

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(1) CARRIERS GENERALLY/1. Who is a carrier.

## **CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)**

### **1. DEFINITION AND CLASSIFICATION OF CARRIERS**

#### **(1) CARRIERS GENERALLY**

##### **1. Who is a carrier.**

Carriers are persons who, either gratuitously or for reward, carry passengers or goods otherwise than for the carriers' own purposes or for purposes connected with the carriers' own trade or business. They may be classified as: (1) common carriers; (2) private carriers; or (3) other classes of carrier with special rights and duties<sup>1</sup>.

Forwarding agents are persons who conduct the business of arranging the transport of goods for others. They are not ordinarily carriers and do not ordinarily undertake that goods will be carried. Their normal function is to act as agents in concluding contracts for the carriage or handling of customers' goods with carriers or other independent contractors<sup>2</sup>.

A stevedore is not a carrier in the ordinary sense of that term<sup>3</sup>.

The rights and liabilities of a common carrier are determined by the common law<sup>4</sup>, subject to qualification by statute<sup>5</sup> or by any special contract<sup>6</sup>. Private carriers ordinarily transact on detailed standard terms and their rights and liabilities are often determined solely by contract<sup>7</sup>. In every case, apart from any statutory exception<sup>8</sup>, it is a question of fact whether or not a person is a common carrier<sup>9</sup>. Since, however, virtually all modern carriage of goods is regulated by contract, carriers who operate purely as common carriers but fail to limit by special contract their common law liabilities<sup>10</sup> are likely to be rare. Moreover, in the case of international carriage the status of a common carrier is something of an anachronism<sup>11</sup> since much of modern English law relating to such carriage (whether by road, rail, sea or air) derives directly or indirectly from international conventions<sup>12</sup>. These conventions form part of English law only so far as they are incorporated into it by domestic legislation<sup>13</sup>.

1 As to common carriers see PARAS 3-55; as to private carriers see PARAS 56-70; and as to carriers with special rights and duties see PARAS 94-120. A belief that there is a fourth class of carriers consisting of those who, though not in fact common carriers, by the exercise of the public employment of carrying must be deemed to have impliedly undertaken the liabilities of common carriers, is founded upon what seems to be an erroneous view of the decision in *Liver Alkali Co v Johnson* (1872) LR 7 Exch 267 (affd (1874) LR 9 Exch 338): see *Nugent v Smith* (1876) 1 CPD 423 at 433, CA; *Watkins v Cottell* [1916] 1 KB 10, DC; *Aslan v Imperial Airways Ltd* (1933) 149 LT 276. If such a class of carriers does exist it would appear to be confined to lightermen and not to extend to carriers by land: *Watkins v Cottell*; *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210.

2 See PARA 92; and **AGENCY** vol 1 (2008) PARA 13. Forwarding agents frequently act as carriers to a limited extent, eg by providing their own collection and delivery services: see PARA 92. They may also act as principals in relation to the consignor of goods, making independent contracts on their own behalf with individual carriers, but not undertaking any carriage of the goods personally (in which capacity the forwarding agent may have personally undertaken that the goods will be carried while undertaking no part of the carriage in person): see PARA 65; and **BAILMENT**.

3 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL.

4 See eg *Great Northern Ry Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA; and PARAS 7-26. A carrier of goods is a bailee: see PARA 59; and **BAILMENT** vol 3(1) (2005 Reissue) PARAS 1-2. If the carrier is a private carrier, he owes the normal common law obligations of a bailee; in particular, to take reasonable care of the goods and to refrain from converting them: *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA. If the carrier is a common carrier, he is an insurer of the safety of the goods: see PARA 16. As to bailee's insurance see **INSURANCE** vol 25 (2003 Reissue) PARA 698 et seq. The common law relationship of bailment can arise independently of contract and generate rights and liabilities distinct from those arising in contract: see eg *Morris v CW Martin & Sons Ltd*; *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA; *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

5 See the Carriers Act 1830: see PARAS 27-37.

6 See PARA 36.

7 See PARAS 57, 58. The legal relationship of bailor and bailee may exist independently of contract: see note 4. As to statutory control of contract terms or notices which purport to exclude or restrict liability for negligence or breach of contract see the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARAS 797-835. As to the identity of the parties to a contract of carriage see PARA 752 et seq.

8 See eg the Transport Act 1962 ss 43(6), 52(2); and PARA 5.

9 See *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210; and PARA 4.

10 See PARAS 7-37.

11 But cf *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428.

12 For a discussion of these conventions see PARAS 121-192 (carriage by air), PARAS 367-401, 634-649 (carriage by sea), and PARAS 650-751 (carriage by road and rail).

13 For an example of direct incorporation see the Carriage by Air Act 1961; and PARA 192 et seq; and for an example of indirect incorporation see the Civil Aviation Act 1982; and **AIR LAW**.

## UPDATE

### 1 Who is a carrier

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 2. Conflict of laws and the Rome Convention.

The question of which law is to govern the obligations of the parties to contracts is to be decided in accordance with the Rome Convention<sup>1</sup>. Under this Convention a contract is governed either by whichever law is expressly and freely chosen by the parties<sup>2</sup> or, absent such choice, by the law of the country with which it is most closely connected<sup>3</sup>, although it is also provided that rules of English law may still be applied, whatever the choice or otherwise of the parties, where they are mandatory irrespective of the law otherwise applicable<sup>4</sup> or where the application of the applicable law is manifestly incompatible with public policy<sup>5</sup>. Provision is made as to the legality or illegality of the contractual obligations under the applicable law and as to the formation, validity and interpretation of the contract itself<sup>6</sup>.

1. See the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980; Cmd 8489), set out in the Contracts (Applicable law) Act 1990 Sch 1. As to the detailed operation, application and scope of the Convention see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 349-350.

2. See Rome Convention art 3; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 351.

3. See Rome Convention art 4; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 352.

4. See Rome Convention art 7; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 357.

5. See Rome Convention art 16; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 358.

6. See Rome Convention arts 8-11; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 359-365.

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## **(2) COMMON CARRIERS**

### **(i) Common Carriers Generally**

#### **3. Characteristics of a common carrier.**

A common carrier is one who exercises the public profession of carrying the goods of all persons wishing to use his services or of carrying passengers whoever they may be. His rights and liabilities are determined by the common law for reasons of public policy<sup>1</sup>, although they may be varied by contract<sup>2</sup>, and stem from his status as a common carrier rather than from contract, express or implied<sup>3</sup>. His position is analogous to that of an innkeeper at common law<sup>4</sup>.

Although their duties and liabilities are different<sup>5</sup>, there appears to be no substantial distinction between the factors which identify a common carrier of goods and those which identify a common carrier of persons<sup>6</sup>.

The test as to whether a carrier of goods is a common carrier is an objective one which does not depend on whether the carrier personally intends to hold himself out as being prepared to carry irrespective of circumstances<sup>7</sup>. To constitute himself a common carrier of goods, a carrier must hold himself out, either expressly or by a course of conduct, as willing to carry for reward, so long as he has room, goods of all persons indifferently who send him goods to be carried<sup>8</sup> at a reasonable price<sup>9</sup>. He must hold himself out as ready to carry for hire as a business and not as a casual occupation for a particular occasion<sup>10</sup>. A carrier's advertising literature may be material in establishing his willingness to carry goods for all those who may call upon his services<sup>11</sup>. The same criteria apply for a common carrier of passengers<sup>12</sup>, namely the carrier must hold himself out as ready to carry all persons indifferently who wish to be carried at the proper fare<sup>13</sup>. If a carrier reserves to himself the right to reject persons or goods whom he is asked to carry according to his usual course of business<sup>14</sup>, or if he carries only certain passengers or goods for certain customers<sup>15</sup>, he is not a common carrier<sup>16</sup>.

A carrier may be a common carrier even though one of the places between which he carries is out of the jurisdiction<sup>17</sup> or overseas<sup>18</sup>. He may also be a common carrier even though he does not profess to carry between fixed termini at all, but is prepared to carry from or to any terminus<sup>19</sup>. If a carrier professes to carry only particular kinds of goods he is (at most) a common carrier only of such goods; and if he professes to carry only from one place to another place, he is not a common carrier to intermediate places or to any other place<sup>20</sup>.

It seems that the status of a common carrier, who is under an obligation to carry unless he can show reasonable excuse, and (if a carrier of goods) is an insurer of the safety of the goods carried<sup>21</sup>, has become something of an anachronism<sup>22</sup>.

1 He is charged with the safety of goods entrusted to him in all events but acts of God or the Queen's enemies: see *Coggs v Bernard* (1703) 2 Ld Raym 909. The law presumes against him 'to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled': see *Forward v Pittard* (1785) 1 Term Rep 27 at 33 per Lord Mansfield.

2 As to statutory control on contract terms or notices which purport to exclude or restrict liability for negligence and breach of contract see the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARAS 797-835.

3 Thus it appears that a person may owe the responsibilities of a common carrier towards a particular consignor or consignee notwithstanding the fact that he does not have a contract with that consignor or consignee: *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25 (sub-carrier).

4 See *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *Clarke v West Ham Corpn* [1909] 2 KB 858, CA; *National Bank of Greece SA v Pinios Shipping Co No 1, The Maira* [1990] 1 AC 637, [1989] 1 All ER 213, CA (revsd without reference to this point [1990] 1 AC 637, [1990] 1 All ER 78, HL). As to inns and innkeepers see generally **LICENSING AND GAMBLING** vol 67 (2008) PARA 183 et seq.

5 As to the distinction at common law between common carriers of goods and of passengers, and for the power of a common carrier or other carrier of passengers to limit his liability, see *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC.

6 *Clarke v West Ham Corpn* [1909] 2 KB 858, CA.

7 *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428.

8 *Nugent v Smith* (1875) 1 CPD 19 (revsd without affecting this point (1876) 1 CPD 423, CA). See also *Benett v Peninsular and Oriental Steam-Boat Co* (1848) 6 CB 775 at 787 per Wilde CJ, defining a common carrier as 'one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place'.

9 *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210.

10 See *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210.

11 *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428.

12 See the text and notes 8-11.

13 *Clarke v West Ham Corpn* [1909] 2 KB 858, CA.

14 *Ingate v Christie* (1850) 3 Car & Kir 61; *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210; *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428. A carrier's decision to discontinue dealing with certain unsatisfactory customers was held not to deprive him of the status of a common carrier towards customers generally: *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd*.

15 See *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210 at 212.

16 *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210 (goods); *Rosenthal v LCC* (1924) 131 LT 563 (goods); *Aslan v Imperial Airways Ltd* (1933) 149 LT 276 (goods). See also *Cowper and Cowper v JG Goldner Pty Ltd* (1986) 40 SASR 457, S Aust SC (where a carrier of horses reserved the right to refuse services to individual consignors, and was held not to be a common carrier); *Securitas (NZ) Ltd v Cadbury Schweppes Hudson Ltd* [1988] 1 NZLR 340, NZ CA (where there were individualised contracts; and the carrier was held not to be a common carrier).

17 *Crouch v London and North Western Rly Co* (1854) 14 CB 255.

18 *Benett v Peninsular and Oriental Steam-Boat Co* (1848) 6 CB 775 at 787; *Pianciani v London and South Western Rly Co* (1856) 18 CB 226.

19 *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338.

20 *Johnson v Midland Rly Co* (1849) 4 Exch 367. It appears that a person may be a common carrier notwithstanding that he carries from place to place within a particular town: in contrast see *Brind v Dale* (1837) 8 C & P 207, criticised by Kahn-Freund *The Law of Carriage by Inland Transport* (4th Edn, 1965) p 205. A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods, or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places: *Johnson v Midland Rly Co*. Cf *Cowper and Cowper v JG Goldner Pty Ltd* (1986) 40 SASR 457, S Aust SC (where a carrier of horses was held not to be a common carrier). In principle, some of a carrier's vehicles may be operated by him as a common carrier and others as a private carrier: *Date & Cocke v GW Sheldon & Co (London) Ltd* (1921) 7 Ll L Rep 53. At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry: *Dickson v Great Northern Rly Co* (1886) 18 QBD 176, CA. See also *Oxlade v North Eastern Rly Co* (1857) 1 CBNS 454; *India General Navigation and Rly Co v Dekhari Tea Co* (1923) 93 LJPC 108.

21 See PARA 16.

22 See PARA 1. However, the law relating to common carriers, though rarely invoked nowadays, is not obsolete: *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428.

As regards the carriage of passengers, the distinction between common carriers and private carriers has dwindled in importance, since a common carrier of passengers is not an insurer of their safety: see PARA 38.

As regards the carriage of goods, the distinction between the professional and the casual carrier has been weakened by Parliament. The abolition of the necessity for obtaining a carrier's licence (see the Transport Act 1968 Sch 18 Pt IV (all repealed)) means that the carriage of goods by motor vehicles for hire or reward is subject to no restriction (save the necessity for operators to hold operators' licences (see the Goods Vehicles (Licensing of Operators) Act 1995 s 2; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1329 et seq) and for special authorisations for the use of large goods vehicles (see Sch 5; and **ROAD TRAFFIC** vol 40(2) (Reissue) PARAS 1377-1379)) and enables traders to carry 'return loads' in vehicles used to deliver goods in the course of their business.

## UPDATE

### 3 Characteristics of a common carrier

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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#### 4. Examples of common carriers.

Whether or not a person is a common carrier is in every case a question of fact<sup>1</sup>. The question is not determined by the carrier's private intention<sup>2</sup>, nor by his description of his own business, although it may be inferred from the character of that business that he is a common carrier<sup>3</sup>.

Persons such as warehousemen, wharfingers and stevedores, who undertake the carriage of goods purely for purposes ancillary to their real businesses, are not common carriers<sup>4</sup>. Forwarding agents do not ordinarily undertake responsibility for the carriage of goods and cannot normally be characterised as common (or private) carriers<sup>5</sup>. Where a forwarding agent

carries goods as a function additional to his general operations, however, he may carry as a common carrier or as a private carrier according to circumstances<sup>6</sup>. Where a carrier is never in possession of the goods carried, because they remain in the possession of the consignor or his employees or agents, he is not liable for their safety as a common carrier, although he will be liable for loss or damage resulting from his own negligence or that of his own employees or agent<sup>7</sup>. Furniture removers are not, as a general rule, common carriers, for they usually make a special contract with each customer<sup>8</sup>.

From the nature of their occupations, hoymen, lightermen, masters of general ships and common bargemen have been held to be common carriers<sup>9</sup>. A shipowner who offers out his ship for the carriage of the goods of any shipper is a common carrier<sup>10</sup>.

Provided they have accommodation, persons who provide regular road passenger services and hold themselves out as willing to carry any passenger, not being an objectionable person, who offers himself in a fit condition to be carried and is willing to pay the proper fare, are common carriers of their passengers with the duty of carrying according to their public profession<sup>11</sup>, unless otherwise provided by statute<sup>12</sup> or by the terms of any notice given to members of the public<sup>13</sup>. Accordingly it is submitted that public passenger transport authorities are common carriers of passengers by road<sup>14</sup>. On the other hand it would seem that the principal providers of transport services for the carriage of goods within the United Kingdom are not common carriers of goods<sup>15</sup>.

It would appear that a person who is not a common carrier may undertake the liabilities of one for a particular journey<sup>16</sup>.

1 *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210; *Brind v Dale* (1837) 8 C & P 207; *Tamvaco & Co v Timothy and Green* (1882) Cab & El 1; *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25; *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428.

2 *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428.

3 *Upston v Slark* (1827) 2 C & P 598; *Chattock & Co v Bellamy & Co* (1895) 64 LJQB 250.

4 *Consolidated Tea and Lands Co v Oliver's Wharf* [1910] 2 KB 395 (warehouseman), commenting on and disapproving *Maving v Todd* (1815) 1 Stark 72; *Armour & Co Ltd v Tarbard Ltd* (1920) 37 TLR 208 (warehousemen); *Lynch Bros Ltd v Edwards and Fase* (1921) 90 LJBK 506 (contractor); *Chattock & Co v Bellamy & Co* (1895) 64 LJQB 250 (wharfinger); *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL (stevedores).

5 See PARA 92.

6 See PARAS 92-93. Even where a forwarding agent acts as a carrier it will be highly exceptional for him to have the status of a common carrier.

7 *East India Co v Pullen* (1726) 2 Stra 690; *Walker v Jackson* (1842) 10 M & W 161; *Willoughby v Horridge* (1852) 12 CB 742. As to whether a forwarding agent is, in general, a carrier see PARA 1 text and note 2 and PARA 92.

8 *Electric Supply Stores v Gaywood* (1909) 100 LT 855; *Scaife v Farrant* (1875) LR 10 Exch 358; *Turner v Civil Service Supply Association Ltd* [1926] 1 KB 50; *Fagan v Green and Edwards Ltd* [1926] 1 KB 102. The two last-mentioned decisions were overruled on a different point by *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA.

9 *Coggs v Bernard* (1703) 2 Ld Raym 909; *Morse v Slue* (1672) 1 Vent 190, 238; *Nugent v Smith* (1876) 1 CPD 423, CA (masters of general ships) (but cf dicta of Scrutton LJ in *Great Northern Ry Co v LEP Transport and Depository Ltd* [1922] 2 KB 742 at 762, CA); *Dale v Hall* (1750) 1 Wils 281 (hoymen); *Rich v Kneeland* (1613) Cro Jac 330 (bargemen). The view that *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338 decided that lightermen were not in fact common carriers but from the exercise of their public employment were subject to the liability of common carriers as insurers of the safety of goods carried by them is now thought to be wrong or, at best, to be limited to lightermen: see *Nugent v Smith*; *Watkins v Cottell* [1916] 1 KB 10, DC; *Belfast Ropework Co Ltd v*

*Bushell* [1918] 1 KB 210; *Aslan v Imperial Airways Ltd* (1933) 149 LT 276; and PARA 1 text and note 1. For the tests as to whether a person is a common carrier of goods or passengers see PARA 3.

10 He is liable at common law for all accidents that may happen to the goods except when occasioned by act of God or the Queen's enemies, the inherent vice of the goods carried, or general average sacrifice (ie he is under a strict liability in relation to the carriage of goods): see *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC. This liability is more stringent than the liability owed in relation to the carriage of passengers: see *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *Macrow v Great Western Rly Co* (1871) LR 6 QB 612; and PARA 38. It is uncertain whether a shipowner who is not a common carrier of goods has the same liability or owes only the obligations of a bailee for the exercise of reasonable care. In practice there will usually be contractual provisions exempting the shipowner from strict liability. These provisions would be set out in a bill of lading or other document. See also the effect of the Hague-Visby Rules (as scheduled to the Carriage of Goods by Sea Act 1971) (see PARAS 367-401) and the Carriage of Goods by Sea Act 1992 (see PARAS 337-342) on the liability of a carrier by sea.

11 *Bretherton v Wood* (1821) 3 Brod & Bing 54, Ex Ch; *Clarke v West Ham Corpn* [1909] 2 KB 858, CA, where it was held, contrary to the belief previously held by some authorities, that a person could be a common carrier of passengers and that common carriers were not confined to carriers of goods. The principle stated in the text applies with peculiar force to persons who, on the faith of a profession of readiness to serve the public, have obtained parliamentary powers, eg for the construction of tramways: see *Clarke v West Ham Corpn* at 878 per Farwell LJ.

12 See eg the Transport Act 1962 ss 43(6), 52(2); and PARA 5.

13 *Baker v Ellison* [1914] 2 KB 762, DC.

14 As to the position of public passenger transport authorities in relation to the carriage of passengers and goods see further PARAS 5, 56. The liability of carriers of passengers at common law is limited to the use of due care, skill and foresight to carry the passengers safely: see PARA 38.

15 See PARA 5.

16 It is open to a court to find as a matter of fact that such a person is a common carrier: see *Tamvaco & Co v Timothy and Green* (1882) Cab & El 1; *Brind v Dale* (1837) 8 C & P 207; and the text and note 1.

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## 5. Providers of transport services who are not common carriers.

Carriers of goods by road usually reserve to themselves liberty to reject goods tendered to them for carriage, and are therefore not usually common carriers<sup>1</sup>. No person is to be regarded as a common carrier by railway<sup>2</sup>. The British Waterways Board<sup>3</sup>, any independent railway undertaking<sup>4</sup> or independent inland waterway undertaking<sup>5</sup>, Transport for London<sup>6</sup>, and any wholly-owned subsidiaries of any of those bodies, are not to be regarded as common carriers by rail or inland waterway<sup>7</sup>. Those responsible for operating the Channel Tunnel are not to be regarded as common carriers<sup>8</sup>.

1 See *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210; *Brind v Dale* (1837) 8 C & P 207; cf *Hunt & Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617, [1962] 1 All ER 111, CA. However, some of the vocabulary and concepts developed in connection with common carriers have been carried over into modern contracts and some of the cases cited in PARAS 3-4 may be helpful in interpretation: see Kahn-Freund *The Law of Inland Transport* (4th Edn, 1965) p 201.

2 See the Railways Act 1993 s 123; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 434.

3 As to the British Waterways Board see **WATER AND WATERWAYS** vol 101 (2009) PARA 725 et seq.

4 For this purpose 'independent railway undertaking' means a railway undertaking not forming part of the undertaking of any of the Boards, being an undertaking the carrying on of which is authorised by, or by an order made under, an Act of Parliament: Transport Act 1962 s 52(4). 'The Boards' are the Boards established by s 1(1) (as to which see **WATER AND WATERWAYS** vol 101 (2009) PARA 714) and Transport for London (see the Transport for London (Consequential Provisions) Order 2003, SI 2003/1615, Sch 1 para 2(2)(a)). 'Undertaking' means an undertaking carried on in Great Britain: Transport Act 1962 s 52(4). By virtue of the Transport Act 1962 s 52(4), 'railway' does not include:

- 1 (1) a light railway laid wholly or mainly along a public carriageway and used wholly or mainly for the carriage of passengers;
- 2 (2) a railway which, under the statutory provisions relating thereto, is to be treated as forming part of a tramway;
- 3 (3) a railway laid wholly or mainly over a beach or wholly along a pier; or
- 4 (4) a railway of the nature of a lift providing communication between the top and bottom of a cliff.

5 By virtue of the Transport Act 1962 s 52(4), 'independent inland waterway undertaking' means an undertaking not forming part of the undertaking of any of the Boards, being an undertaking engaged in conserving, maintaining, improving or working a canal or other inland navigation or the navigation of a tidal water but does not include:

- 5 (1) an undertaking none of the charges of which has been the subject of a Provisional Order made, and confirmed by Parliament, in pursuance of the Railway and Canal Traffic Act 1888 ss 24, 36 (repealed); or
- 6 (2) an undertaking forming part of a harbour undertaking if the inland waterway is situated wholly within the limits of the harbour; or
- 7 (3) an undertaking all or any of the charges of which are, under the statutory provisions relating to that undertaking, subject to revision by the Secretary of State,

and by virtue of the Transport Act 1962 s 92(1), 'harbour' means any harbour, whether natural or artificial, and any port, haven, estuary, tidal or other river or inland waterway navigated by sea-going ships, and any dock, including any pier, jetty or other place at which ships can ship or unship goods or passengers and 'inland waterway' includes every such waterway whether natural or artificial. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

6 As to Transport for London and its subsidiaries see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 269 et seq.

7 See the Transport Act 1962 s 43(6) (amended by the Railways Act 2005 Sch 12 para 2(c)); the Transport Act 1962 s 52(2); the Transport Act 1968 s 51(4); and the Greater London Authority Act 1999 Sch 11 para 31(1). See also **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1) (Reissue) PARAS 125, 418.

8 See the Channel Tunnel Act 1987 s 19(2).

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## 6. Hackney carriages.

Within the metropolitan police district<sup>1</sup> and the City of London<sup>2</sup>, drivers of hackney carriages<sup>3</sup> are obliged to carry a reasonable quantity of passengers' luggage<sup>4</sup>, and are therefore regarded as common carriers of that luggage<sup>5</sup>. Outside that area, although there may well be a statutory obligation to carry passengers<sup>6</sup>, there is no express obligation to carry their luggage, and in a particular case it may be doubtful whether the proprietor is a common carrier or a private carrier<sup>7</sup>.

- 1 As to the metropolitan police district see **POLICE** vol 36(1) (2007 Reissue) PARA 137.
- 2 As to the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 31.
- 3 For these purposes, the term 'hackney carriage' or 'cab' means any carriage for the conveyance of passengers which plies for hire and is neither a stage carriage nor a tramcar: see the Metropolitan Public Carriage Act 1869 s 4 (amended by the Transport and Works Act 1992 s 62(1)); the London Cab Act 1896 s 3; and the London Cab and Stage Carriage Act 1907 s 6(1), (2) (s 6(1) amended by the Greater London Authority Act 1999 Sch 20 para 6(5)(b); London Cab and Stage Carriage Act 1907 s 6(2) amended by the Statute Law Revision Act 1907 and the Statute Law (Repeals) Act 1976). A hackney carriage is not a 'public service vehicle' within the meaning of the Public Passenger Vehicles Act 1981 s 1 (see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1136), the provisions of the Hackney Carriage Acts having been repealed, so far as they related to public service vehicles, by the Road Traffic Act 1930 Sch 5 (repealed). Thus a hackney carriage is generally a motor taxi-cab carrying fewer than eight passengers, or, rarely, a horse-drawn vehicle carrying passengers for payment. As to public service vehicles see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1136 et seq; and as to hackney carriages see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1434 et seq.
- 4 See the London Hackney Carriage Act 1853 s 10; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1489.
- 5 As to common carriers see PARAS 4, 7 et seq.
- 6 See the Town Police Clauses Act 1847 ss 52, 53; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1445.
- 7 As to private carriers see PARAS 56-57, 58 et seq; and as to the liability of a 'coachman' for the luggage he carries see also *Lovett v Hobbs* (1680) 2 Show 127.

## UPDATE

### 6 Hackney carriages

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## (ii) Common Carriers of Goods

### A. DUTIES AND LIABILITIES AT COMMON LAW

#### 7. Common carrier's duty to carry.

A common carrier exercises a public employment, and in the absence of lawful ground for refusal<sup>1</sup>, he is bound to accept goods which are offered to him for carriage according to his profession<sup>2</sup>. If, therefore, a common carrier wrongfully refuses to carry goods so offered to him, he is liable to the owner of the goods for damage suffered in consequence of the refusal<sup>3</sup>. Although a carrier may be bound by statute to carry, it does not follow that his obligation is to carry as a common carrier unless the statute so provides; indeed, a carrier who is under a statutory obligation to carry may cease to act as a common carrier<sup>4</sup>.

A common carrier's obligation is, however, to carry only according to his profession<sup>5</sup>.

If a common carrier demands an unreasonable charge or seeks to impose unreasonable conditions, this amounts to a wrongful refusal to carry<sup>6</sup>.

1 For grounds for refusal see PARA 8. As to common carriers generally see PARAS 3-6.

2 See note 5; and *Clarke v West Ham Corpn* [1909] 2 KB 858, CA; *Jackson v Rogers* (1683) 2 Show 327; *Boson v Sandford* (1690) 1 Show 101; *Lane v Cotton* (1701) 12 Mod Rep 472, cited with approval in *Johnson v Midland Rly Co* (1849) 4 Exch 367; *Macklin v Waterhouse* (1828) 5 Bing 212. Cf the liability of an innkeeper to receive guests into his inn: see **LICENSING AND GAMBLING** vol 67 (2008) PARA 186.

3 *Jackson v Rogers* (1683) 2 Show 327; *Crouch v London and North Western Rly Co* (1854) 14 CB 255. A claim for damages lies against a common carrier for refusing to carry a passenger's luggage: see *Munster v South Eastern Rly Co* (1858) 4 CBNS 676. The damages recoverable where there has been no actual damage suffered are nominal (*Flaherty v Midland Great Western Rly Co* (1914) 48 ILT 216), and an owner cannot recover the actual damage he suffers if it is due to some defect in the goods (*Waller v Midland Great Western Rly Co of Ireland* (1879) 4 LR Ir 376). At one time a common carrier was liable to indictment for wrongful refusal to carry goods (see *Pozzi v Shipton* (1838) 1 Per & Dav 4; *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210), but there does not appear to be any reported case of a trial of such an indictment, and it is submitted that this liability is now obsolete.

4 *Smith & Sons v London and North Western Rly Co* (1918) 88 LJB 742; *Sutcliffe v Great Western Rly Co* [1910] 1 KB 478, CA.

5 *Johnson v Midland Rly Co* (1849) 4 Exch 367; *Carr v Lancashire and Yorkshire Rly Co* (1852) 7 Exch 707; *Oxlade v North Eastern Rly Co* (1864) 15 CBNS 680; and see PARA 3 note 20.

6 *Garton v Bristol and Exeter Rly Co* (1861) 1 B & S 112; *Allday v Great Western Rly Co* (1864) 5 B & S 903. See also *Crouch v Great Northern Rly Co* (1856) 11 Exch 742; *Parker v Great Western Rly Co* (1856) 6 E & B 77; *Piddington v South Eastern Rly Co* (1858) 5 CBNS 111; *Baxendale v London and South Western Rly Co* (1866) LR 1 Exch 137. There is nothing unreasonable, however, in charging a greater sum for a number of parcels carried at one time addressed to different persons than for a similar number addressed to the same person, although the former are all to be delivered to the claimant at the end of the journey: *Baxendale v Eastern Counties Rly Co* (1858) 4 CBNS 63. Cf *Peek v North Staffordshire Rly Co* (1863) 10 HL Cas 473.

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## 8. Grounds for common carrier's refusal to carry.

It is a lawful excuse for refusing to carry that the common carrier does not hold himself out to carry the particular kind of goods offered, or that his operations do not extend to the proposed destination<sup>1</sup>.

A common carrier may refuse to accept goods for carriage unless and until he is paid the full and proper price for carriage<sup>2</sup>. He may also refuse on the ground that he has no room in his vehicle, or no convenience for carrying the goods in safety<sup>3</sup>, or where goods are brought to him a long time before he is ready to start on his journey, for the goods must be tendered at a reasonable time<sup>4</sup>. He may also refuse to accept goods tendered to him for carriage without such protection of packing as is necessary to enable him to carry them with a reasonable prospect of protection from loss or damage in transit<sup>5</sup>.

If the country through which the carrier's vehicle has to pass is in so disturbed a state that the goods cannot be carried safely, he may lawfully refuse to accept them<sup>6</sup>.

1 *Macklin v Waterhouse* (1828) 5 Bing 212; *Johnson v Midland Rly Co* (1849) 4 Exch 367; and see PARA 3 note 20.

2 *Wyld v Pickford* (1841) 8 M & W 443.

3 *Jackson v Rogers* (1683) 2 Show 327; *Batson v Donovan* (1820) 4 B & Ald 21; *Riley v Horne* (1828) 5 Bing 217; *Spillers and Bakers Ltd v Great Western Rly Co* [1911] 1 KB 386, CA.

4 *Lane v Cotton* (1701) 1 Ld Raym 646; *Garton v Bristol and Exeter Rly Co* (1861) as reported in 30 LJQB 273.

5 *Munster v South Eastern Rly Co* (1858) 4 CBNS 676; *Sutcliffe v Great Western Rly Co* [1910] 1 KB 478, CA; *London and North Western Rly Co v Richard Hudson & Sons Ltd* [1920] AC 324, HL. For the carriers' liability for damage to goods sustained owing to their being improperly packed see PARA 19.

6 *Edwards v Sherratt* (1801) 1 East 604.

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## 9. Common carrier's rights to payment.

When goods are offered to him, a common carrier is entitled to demand and to be paid the full price of carriage<sup>1</sup>. If he accepts the goods without making such a demand, he cannot sue for the freight until the carriage is completed<sup>2</sup>. He is not, however, entitled to refuse to carry on the ground that there has been no strict legal tender of the price of carriage but merely an offer to pay by a person who is in fact ready and willing to do so<sup>3</sup>. Nor is the common carrier entitled to charge what he pleases; the price demanded must be a reasonable one<sup>4</sup>.

Nevertheless, there is no obligation at common law upon a carrier to charge all customers equally, and provided that the higher charge is reasonable, one customer may be preferred to another<sup>5</sup>.

If a reasonable sum for the carriage of the goods is offered, and is refused by the carrier, and the owner of the goods accordingly pays a higher sum under protest, the excess of that sum above what is reasonable may be recovered in a claim for money had and received<sup>6</sup>.

1 *Wyld v Pickford* (1841) 8 M & W 443. As to the carrier's lien on goods for his charges see PARA 761 et seq.

2 *Barnes v Marshall* (1852) 18 QB 785; and see PARA 13.

3 *Pickford v Grand Junction Rly Co* (1841) 8 M & W 372.

4 *Harris v Packwood* (1810) 3 Taunt 264; *Crouch v Great Northern Rly Co* (1856) 11 Exch 742.

5 *Branley v South Eastern Rly Co* (1862) 12 CBNS 63; *Great Western Rly Co v Sutton* (1869) LR 4 HL 226.

6 *Baxendale v London and South Western Rly Co* (1866) LR 1 Exch 137; *Great Western Rly Co v Sutton* (1869) LR 4 HL 226. See **CONTRACT** vol 9(1) (Reissue) PARA 1137 et seq.

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## 10. Commencement of common carrier's liability.

The duties and liability of a carrier do not begin until he has accepted the goods for carriage. He may accept them either personally, or by his duly authorised agent or employee<sup>1</sup>, or he may

impliedly accept them, as where he permits goods to be placed by another in the usual place for carriage<sup>2</sup>. If, by the usual course of his business, the carrier recognises a certain place as a receiving office, he is responsible as carrier for the goods from the time they are delivered there<sup>3</sup>. If he allows a person to receive goods for him in order to be carried by him, he is responsible for the goods from the time they are delivered to that person, even though that person is not paid for receiving them<sup>4</sup>.

If a carrier's employee, who is not authorised to receive goods for carriage by his employer, does in fact receive them, the carrier is not bound by his employee's unauthorised act<sup>5</sup> unless he has so acted as to hold out the employee as authorised to receive them<sup>6</sup>.

Where, by means of a false representation, a lorry driver induces a carrier to employ him as a sub-contractor and give him a collection note which enables him to obtain goods from the carrier's customer for carriage, the goods are entrusted to the carrier, who is liable for their loss when the driver disappears with them<sup>7</sup>. However, where a person falsely represents himself to be the carrier's employee and thereby obtains possession of goods from an intending consignor and purloins them, the fact that the carrier claims possession of the goods for the purposes of the prosecution of that person is not sufficient to amount to a ratification of the contract of carriage, and the carrier is not thereby made liable for the loss<sup>8</sup>.

1 *Lovett v Hobbs* (1680) 2 Show 127; *Cobban v Downe* (1803) 5 Esp 41; *Boehm v Combe* (1813) 2 M & S 172; *Buckman v Levi* (1813) 3 Camp 414; *Leigh v Smith* (1825) 1 C & P 638.

2 *Jenkyns v Southampton etc Steam Packet Co* [1919] 2 KB 135, CA.

3 *Colepepper v Good* (1832) 5 C & P 380. Cf *Westminster Bank Ltd v Imperial Airways Ltd* [1936] 2 All ER 890.

4 *Burrell v North* (1847) 2 Car & Kir 680.

5 *Slim v Great Northern Rly Co* (1854) 14 CB 647.

6 *Soanes v London and South Western Rly Co* (1919) 88 LJB 524, CA. See further **AGENCY** vol 1 (2008) PARA 40.

7 *John Rigby (Haulage) Ltd v Reliance Marine Insurance Co Ltd* [1956] 2 QB 468, [1956] 3 All ER 1, CA; and see PARAS 61, 65.

8 *Harrisons and Crossfield Ltd v London and North Western Rly Co* [1917] 2 KB 755, 86 LJB 524.

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## **11. Duration of common carrier's liability.**

Once a common carrier has accepted goods for carriage, it becomes his duty not only to carry them safely, but also to deliver them safely at the place to which they are directed<sup>1</sup>, and he must bear the expense of delivery at the proper destination even when he is compelled to carry over a different and longer route by circumstances over which he has no control<sup>2</sup>.

The carrier's liabilities must usually extend beyond as well as precede the actual period of transit: first, there is usually an interval between the receipt of the goods and their departure; next, there is the time which in most cases must necessarily intervene between the arrival of the goods at the place of destination and the delivery to the consignee<sup>3</sup>. His absolute liability ends only where there has been delivery, actual or constructive<sup>4</sup>, or where the time for delivery

has passed and the goods remain uncollected through no fault of his<sup>5</sup>. Where goods are to be collected from a common carrier's premises by a consignor or consignee, the carrier's responsibility for them as a common carrier survives until the time, if any, appointed for their collection or (where no such time has been agreed) for a reasonable time after the arrival of the goods at the carrier's premises<sup>6</sup>. Where a common carrier is not bound to deliver at the consignee's house, his liability as carrier ceases when he has brought the goods to the station or depot of destination and has given the consignee notice of arrival, and the consignee has had a reasonable time<sup>7</sup> in which to remove the goods<sup>8</sup>. What constitutes a reasonable time depends on the circumstances of the particular case; but the consignee cannot, for his own convenience, or by his own laches, prolong the liability of the common carrier as such<sup>9</sup>.

1 *Duff v Budd* (1822) 3 Brod & Bing 177; cf *Chapman v Great Western Rly Co* (1880) 5 QBD 278.

2 *Mongaldai Tea Co Ltd v Ellerman Lines Ltd* [1920] WN 152.

3 *Chapman v Great Western Rly Co* (1880) 5 QBD 278.

4 *Shepherd v Bristol and Exeter Rly Co* (1868) LR 3 Exch 189.

5 As to a carrier's entitlement to dispose of uncollected goods see the Torts (Interference with Goods) Act 1977 ss 12, 13, Sch 1; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 80.

6 *Chapman v Great Western Rly Co* (1880) 5 QBD 278; and see *McKinnon v Acadian Lines Ltd* (1978) 81 DLR (3d) 480, NS SC.

7 *Shepherd v Bristol and Exeter Rly Co* (1868) LR 3 Exch 189; *Patscheider v Great Western Rly Co* (1878) 3 ExD 153; *Bourne v Gatcliffe* (1841) 3 Man & G 643, Ex Ch.

8 *Mitchell v Lancashire and Yorkshire Rly Co* (1875) LR 10 QB 256; *Bradshaw v Irish North Western Rly Co* (1873) IR 7 CL 252.

9 *Chapman v Great Western Rly Co* (1880) 5 QBD 278. After expiry of the agreed time for collection (or after expiry of a reasonable time where no specific time of collection is agreed) the common carrier may owe the ordinary responsibilities of a bailee for reward: see PARA 59. There may, however, be circumstances in which a consignor's or consignee's failure to collect the goods relieves the carrier of any duty of care, particularly where collection of the goods can be construed as a positive obligation on the part of the consignor or consignee: *Pedrick v Morning Star Motors Ltd* (4 February 1979, unreported), CA (seller); *Ridyard v Roberts* (16 May 1980, unreported), CA (agister). See also *Jerry Juhan Developments SA v Avon Tyres Ltd* (1999) Times, 25 January (revsd 23 February 2000, unreported, CA).

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## 12. Delivery by common carrier.

Whether at the termination of the journey the goods are to be delivered<sup>1</sup> to the consignee at his house, or at the carrier's station or office or at a named port, depends on agreement and on the usual course of business<sup>2</sup>. If the goods are delivered at the house to which they are addressed, the carrier has done all he contracted to do; and the mere fact that he delivers to some person other than the consignee at the house is not a breach of duty on his part<sup>3</sup>. However, the carrier delivers at any other place, to any person other than the consignee, at his peril<sup>4</sup>. Where the goods are addressed to a place beyond the sphere of the carrier's business, so that from a certain point he must forward them by another carrier, he is responsible for the goods for the whole journey, unless he limits his liability by agreement<sup>5</sup>.

Where delivery is to be effected at the carrier's station or office, it is ordinarily the duty of a carrier by land to give notice to the consignee of the arrival of the goods<sup>6</sup>. Whether this duty

arises, however, must depend on the circumstances; often notice of arrival is not required, or the giving of such notice may be impossible<sup>7</sup>.

1 As to the duty to deliver within a reasonable time see PARA 13.

2 *Golden v Manning* (1773) 2 Wm Bl 916; *Storr v Crowley* (1825) M'Cle & Yo 129; *Essex Counties Farmers' Co-operative Association Ltd v Newhouse & Co Ltd* (1916) 86 LJKB 172.

3 *McKean v McIvor* (1870) LR 6 Exch 36; and see *Galbraith and Grant Ltd v Block* [1922] 2 KB 155; *British Traders and Shippers Ltd v Ubique Transport and Motor Engineering Co (London) Ltd and Port of London Authority* [1952] 2 Lloyd's Rep 236. See also PARA 14 note 1.

4 *Stephenson v Hart* (1828) 4 Bing 476; *Hoare v Great Western Rly Co* (1877) 37 LT 186.

5 *Hyde v Trent and Mersey Navigation Co* (1793) 5 Term Rep 389; *Muschcamp v Lancaster and Preston Junction Rly Co* (1841) 8 M & W 421; *Mach v London and South Western Rly Co* (1848) 2 Exch 415; *Shepherd v Bristol and Exeter Rly Co* (1868) LR 3 Exch 189; *Reader v South Eastern and Chatham Rly Co and London and North Western Rly Co* (1921) 38 TLR 14. Contrast the case of a forwarding agent, whose responsibility is only to use care and skill in making contracts with carriers: *Jones v European and General Express Co* (1920) 90 LJKB 159; *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA; *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd and World Transport Agencies* [1974] 1 Lloyd's Rep 443; and see PARA 92. Cf *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, CA; *Moto Vespa SA v MAT (Brittania Express) Ltd, Moto Vespa SA v Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175 (both decisions under the Carriage of Goods by Road Act 1965, as to which see PARA 650 et seq).

6 *Bourne v Gatcliffe* (1841) 3 Man & G 643, Ex Ch; *Neston Colliery Co v London and North Western Rly Co* (1883) 4 Ry & Can Tr Cas 257. It is otherwise in the case of carriage by sea: see PARA 527. See also, in connection with carriage by air, PARA 159.

7 *Chapman v Great Western Rly Co* (1880) 5 QBD 278.

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### 13. Common carrier's duty to deliver within a reasonable time.

In the absence of any express contract as to the time of delivery of goods, a carrier is bound only to deliver within a reasonable time<sup>1</sup>. Statute provides that where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time<sup>2</sup>; what is a reasonable time is in that case a question of fact<sup>3</sup>. In the context of a common carrier's obligations, a reasonable time means the time within which, by due diligence, delivery can be effected; accordingly, the carrier is not liable for those consequences of delay which are not due to any breach of duty on his part<sup>4</sup>. The common carrier is bound to carry the goods by the ordinary route by which he professes to carry, and is therefore liable for damages for delay caused by unnecessary deviation from that route<sup>5</sup>. A contract to carry goods by a train which ordinarily arrives at a certain hour is not a contract to deliver the goods at that hour<sup>6</sup>. If delay in the delivery of goods has arisen from the fact that the carrier has not dealt with them in the ordinary way of his business, this fact, if unexplained, affords evidence of unreasonable delay<sup>7</sup>.

The duty of the carrier is to carry without delay with reference to all the circumstances. Where an event causing delay arises from circumstances outside the carrier's control, the carrier,

although bound to act reasonably<sup>8</sup> is not bound to make extraordinary efforts, or to incur extraordinary expense, to avoid the consequences of such delay<sup>9</sup>.

1 *Raphael v Pickford* (1843) 5 Man & G 551; *Taylor v Great Northern Rly Co* (1866) LR 1 CP 385; *Hales v London and North Western Rly Co* (1863) 4 B & S 66. This is 'a term engrafted by legal implication upon a promise or duty to deliver generally': *Raphael v Pickford* at 558 per Tindal CJ. As to the measure of damages for delay see PARAS 775-779. As to the mode of delivery see PARA 12.

2 See the Supply of Goods and Services Act 1982 s 14(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 98. See also **BAILMENT** vol 3(1) (2005 Reissue) PARA 68.

3 See the Supply of Goods and Services Act 1982 s 14(2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 98. See also **BAILMENT** vol 3(1) (2005 Reissue) PARA 68.

4 *Taylor v Great Northern Rly Co* (1866) LR 1 CP 385; *Hawes & Son v South Eastern Rly Co* (1884) 54 LJQB 174; *Nicholls v North Eastern Rly Co* (1888) 59 LT 137. In computing what is a reasonable time for delivery, the fact that there is a strike should normally be taken into account: *Sims & Co v Midland Rly Co* [1913] 1 KB 103. However, a carrier may be unable to rely in his defence upon a strike or other industrial action which occurs within his own labour force, at least where this could have been prevented or resolved by him: cf *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, CA; *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323, CA (cases of force majeure clauses); *General Engineering Services Ltd v Kingston and St Andrew Corp* [1988] 3 All ER 867, [1989] 1 WLR 69, PC (vicarious liability for industrial action).

5 *Hales v London and North Western Rly Co* (1863) 4 B & S 66; *Mallet v Great Eastern Rly Co* [1899] 1 QB 309. See also PARAS 64, 79-83.

6 *Lord v Midland Rly Co* (1867) LR 2 CP 339.

7 *Wren v Eastern Counties Rly* (1859) 1 LT 5; *Page v Great Northern Rly Co of Ireland* (1868) IR 2 CL 228.

8 Cf *Coldman v Hill* [1919] 1 KB 443, CA; *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA.

9 *Briddon v Great Northern Rly Co* (1858) 28 LJEx 51.

## UPDATE

### 13 Common carrier's duty to deliver within a reasonable time

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 14. Misdelivery and conversion.

A common carrier is bound to deliver the goods to the right person, and is liable for misfeasance if he delivers them to anyone else<sup>1</sup>. If, however, following a misdelivery, the owner sues the actual receiver of the goods for the price, he waives the tort by recognising the carrier's action as valid and he cannot then sue the carrier for misdelivery<sup>2</sup>. As long as he deals with the goods merely as a carrier in the ordinary course of his business, the common carrier is under no liability for conversion of the goods, for he is bound to carry goods delivered to him for carriage; but if a demand for the goods is made by one who has a right to demand them,

and the carrier refuses to deliver them to him on the ground that they belong to a third party, a claim may be made against the carrier<sup>3</sup>.

If the carrier delivers goods in the ordinary course, without notice that the consignee is not entitled to them, he is under no liability<sup>4</sup>; and if he delivers the goods on demand, out of the ordinary course, to one who is entitled to possession of them, he is under no liability<sup>5</sup>. If the goods are demanded, the carrier may give a qualified refusal so as to have a reasonable opportunity of acquainting himself with the facts of the case<sup>6</sup>. If, however, he absolutely refuses to comply with the demand, then the right of property may be tried in a claim against him; but he is entitled to interplead<sup>7</sup>. If he interpleads, claiming no interest in the goods other than for his costs and charges, an order may be made that his costs and charges be paid on his dealing with the goods as the court directs<sup>8</sup>.

1 *Stephenson v Hart* (1828) 4 Bing 476; *Devereux v Barclay* (1819) 2 B & Ald 702; *Duff v Budd* (1822) 3 Brod & Bing 177. See also PARA 1. A misdelivery constitutes conversion, liability for which is strict: see **TORT** vol 45(2) (Reissue) PARA 548. Where his liability as common carrier has come to an end and he has become a mere involuntary bailee (see PARAS 11-12, 22), the common carrier will be liable for delivery to an unauthorised person only if the misdelivery was accompanied by a lack of reasonable care on his part: *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51. As to the circumstances in which misdelivery amounts to misconduct see PARA 84.

2 *Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, CA. Cf *Sanquer v London and South Western Rly Co* (1855) 16 CB 163.

3 *Greenway v Fisher* (1824) 1 C & P 190. See *Fowler v Hollins* (1872) LR 7 QB 616 (on appeal sub nom *Hollins v Fowler* (1875) LR 7 HL 757); *Caunce v Spanton* (1844) 7 Man & G 903. As to conversion generally see **TORT** vol 45(2) (Reissue) PARA 548 et seq.

4 *McKean v McLvor* (1870) LR 6 Exch 36.

5 *Sheridan v New Quay Co* (1858) 4 CBNS 618.

6 *Lee v Bayes and Robinson* (1856) 18 CB 599; cf *Clayton v Le Roy* [1911] 2 KB 1031, CA; and see **TORT** vol 45(2) (Reissue) PARA 556 et seq.

7 *Wilson v Anderton* (1830) 1 B & Ad 450.

8 *De Rothschild Frères v Morrison Kekewich & Co* (1890) 24 QBD 750, CA.

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### **15. Common carrier's duty in emergency.**

If, in order to preserve the goods in an emergency, the carrier will be put to expense not contemplated by the parties when he undertook the carriage, he must incur that expense but can recover it, so far as it is reasonable, from the owner<sup>1</sup>. Where the goods carried get into such a condition that it is impossible for them to be safely carried to their destination and the carrier can show both that a real necessity exists for the sale of the goods and that it is practically impossible to obtain instructions from the owner of the goods, it is the carrier's duty to sell the goods forthwith, and he will not be liable in conversion for having sold them or in contract for having failed to deliver them<sup>2</sup>.

1 *Great Northern Rly Co v Swaffield* (1874) LR 9 Exch 132; *Notara v Henderson* (1872) LR 7 QB 225, Ex Ch. Both these decisions were applied in *China Pacific SA v Food Corpn of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL, a case of gratuitous bailment: see **BAILMENT**. Cf *Coldman v Hill* [1919] 1 KB 443, CA.

2 *Springer v Great Western Rly Co* [1921] 1 KB 257, CA; *Sims & Co v Midland Rly Co* [1913] 1 KB 103, where Scrutton LJ said that the doctrine as to sale by necessity applied equally to carriers by land as to carriers by sea if the necessary conditions existed. See further *Ridyard v Roberts* (16 May 1980, unreported), CA (agister of uncollected horses entitled to sell on grounds of agency of necessity). As to the authority of the master of a ship to deal with the ship's cargo in cases of accident and emergency see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 438 et seq. As to a carrier's right to dispose of uncollected goods see the Torts (Interference with Goods) Act 1977 ss 12, 13, Sch 1; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 80.

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## 16. Common carrier's liability as insurer.

Subject to certain statutory limitations<sup>1</sup>, a common carrier is absolutely responsible for the safety of goods entrusted to him for carriage save where loss or damage results from:

- 1 (1) an act of God<sup>2</sup>;
- 2 (2) an act of the Queen's enemies<sup>3</sup>;
- 3 (3) the fault of the consignor<sup>4</sup>; or
- 4 (4) inherent vice in the goods themselves<sup>5</sup>.

The common carrier is therefore an insurer of the safety of the goods against every extraneous risk save act of God or the Queen's enemies<sup>6</sup>. He is liable even when overwhelmed and robbed of the goods by irresistible force<sup>7</sup>.

The common carrier's absolute responsibility for goods entrusted to him is a responsibility imposed by law; his failure to deliver the goods safely is therefore a breach of duty independent of any contract of carriage<sup>8</sup>. Where there has been a breach of duty on the carrier's part, such as an unjustifiable deviation<sup>9</sup>, he may be liable for loss or damage even though such loss or damage results from an act of God or of the Queen's enemies<sup>10</sup>. Where, however, there is a contract, liability may arise either at common law or under the contract<sup>11</sup>, and, subject to statutory control<sup>12</sup>, the contract may limit the carrier's responsibility<sup>13</sup>.

1 Ie under the Carriers Act 1830: see PARA 27 et seq.

2 *Morse v Slue* (1672) 1 Vent 190, 238; *Coggs v Bernard* (1703) 2 Ld Raym 909; *Briddon v Great Northern Rly Co* (1858) 28 LJEx 51; *Lloyd v Guibert* (1865) LR 1 QB 115, Ex Ch; *Nugent v Smith* (1876) 1 CPD 423, CA. Loss or damage arises through act of God where it is caused directly and exclusively by such a direct, violent, sudden and irresistible act of nature as the carrier could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect: *Nugent v Smith* (1875) 1 CPD 19 at 34 per Brett J. Because the absolute duty is cast upon the common carrier by law, the act of God will afford him an excuse for its non-performance: *River Wear Comrs v Adamson* (1877) 2 App Cas 743, HL. See further **TORT** vol 45(2) (Reissue) PARA 416.

3 *Morse v Slue* (1672) 1 Vent 190, 238; *Coggs v Bernard* (1703) 2 Ld Raym 909. 'Queen's enemies' would apparently include rebels (*Secretary of State for War v Midland Great Western Rly Co of Ireland* [1923] 2 IR 102), and may, in particular circumstances, include enemies of a foreign government (*Russell v Niemann* (1864) 17 CBNS 163) but do not include ordinary robbers or hijackers (cf *Richmond Metal Co Ltd v J Coales & Son Ltd* [1970] 1 Lloyd's Rep 423; and see further *Barclay v Cuculla y Gana* (1784) 3 Doug KB 389). In common with other bailees, carriers are in general exempted from liability for loss of or damage to goods in their possession

caused by war: see the Liability for War Damage (Miscellaneous Provisions) Act 1939 s 1; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 92.

4 See PARA 18.

5 See PARA 21.

6 *Dale v Hall* (1750) 1 Wils 281; *Trent and Mersey Navigation v Wood* (1785) 3 Esp 127; *Covington v Willan* (1819) Gow 115; *Brooke v Pickwick* (1827) 4 Bing 218; *Riley v Horne* (1828) 5 Bing 217; *Brind v Dale* (1837) 8 C & P 207.

7 *Coggs v Bernard* (1703) 2 Ld Raym 909; *Forward v Pittard* (1785) 1 Term Rep 27.

8 *Forward v Pittard* (1785) 1 Term Rep 27; *Bretherton v Wood* (1821) 3 Brod & Bing 54, Ex Ch; *Riley v Horne* (1828) 5 Bing 217; *Pozzi v Shipton* (1838) 8 Ad & El 963; *London and North Western Ry Co v Richard Hudson & Sons Ltd* [1920] AC 324, HL; *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25 (obligations of common carrier held to be owed by sub-carrier to original bailor, but the point was not considered in any detail). Cf *National Bank of Greece SA v Pinios Shipping Co No 1, The Maira* [1990] 1 AC 637, [1989] 1 All ER 213, CA (revsd without reference to this point [1990] 1 AC 637, [1990] 1 All ER 78, HL).

9 See PARAS 79-82.

10 See PARA 17.

11 *London and North Western Ry Co v Richard Hudson & Sons Ltd* [1920] AC 324, HL; and see PARA 765.

12 See the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

13 *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC.

## UPDATE

### 16 Common carrier's liability as insurer

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 17. Common carrier's liability where loss or damage through excepted perils.

A common carrier must use all reasonable care, skill and diligence to avoid the consequences of excepted perils<sup>1</sup>. If loss or damage occurs which is attributable to a breach of this duty, he is liable<sup>2</sup>. A common carrier is also liable for loss or injury caused wholly by the fault of other persons over whom he has no control<sup>3</sup>.

The general obligation of a common carrier of goods to carry the goods safely whatever happens renders it unnecessary to import into the contract for carriage a special warranty of the roadworthiness of the vehicle or the seaworthiness of the vessel, for if the goods are carried safely the condition of the vehicle or vessel is immaterial, and, if they are lost or damaged, it is unnecessary to inquire how the loss or damage occurred<sup>4</sup>. Where, however, a common carrier of goods is seeking relief from liability by reason of one of the excepted perils, the condition of the vehicle or vessel is material in determining the question of negligence<sup>5</sup>;

and if the carrier fails to provide a sufficient and proper conveyance and loss or damage results he will be liable<sup>6</sup>.

A common carrier is liable for negligence as an ordinary bailee. He is therefore liable for loss or damage occasioned by his negligence, even though an act of God or act of the Queen's enemies conduces to the loss<sup>7</sup>. He is not relieved of liability where the damage would not have happened but for the intervention of some other person<sup>8</sup>.

To avoid the consequences of an act of God, the carrier must use all reasonable means to protect the goods. He is not, however, bound to make extraordinary efforts. The act of God is no excuse unless it is the immediate cause of the damage<sup>9</sup>.

1 le those described in PARA 16.

2 *Gill v Manchester Sheffield and Lincolnshire Rly Co* (1873) LR 8 QB 186. See also *Notara v Henderson* (1872) LR 7 QB 225, Ex Ch. As to the duty of the carrier in emergency see PARA 15.

3 *Trent and Mersey Navigation v Wood* (1785) 3 Esp 127 (carrier's barge running against obstruction wrongfully left in the water by a stranger); *Thorogood v Marsh* (1819) Gow 105; *Covington v Willan* (1819) Gow 115 (accidental fire); *Dale v Hall* (1750) 1 Wils 281; *Laveroni v Drury* (1852) 8 Exch 166 (rats); *Coggs v Bernard* (1703) 2 Ld Raym 909; *Barclay v Cuculla y Gana* (1784) 3 Doug KB 389; *Forward v Pittard* (1785) 1 Term Rep 27 (theft, even by superior force).

4 *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch, explaining *Lyon v Mells* (1804) 5 East 428 (seaworthiness of ship). The private carrier of goods (see PARAS 56-57) does not warrant the roadworthiness of his vehicle and is normally answerable only for a failure to exercise reasonable care of goods entrusted to him: see PARA 59.

5 *Amies v Stevens* (1718) 1 Stra 127 (act of God); *Blower v Great Western Rly Co* (1872) LR 7 CP 655 (inherent vice).

6 *Blower v Great Western Rly Co* (1872) LR 7 CP 655; *London and North Western Rly Co v Richard Hudson & Sons Ltd* [1920] AC 324, HL; and see *M'Manus v Lancashire and Yorkshire Rly Co* (1859) 4 H & N 327; *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196, [1949] 1 All ER 1, HL.

7 *Amies v Stevens* (1718) 1 Stra 127; *Siordet v Hall* (1828) 4 Bing 607; *Forward v Pittard* (1785) 1 Term Rep 27; *Blower v Great Western Rly Co* (1872) LR 7 CP 655; and see PARA 16. It appears that the onus of disproving negligence in these circumstances rests with the carrier. As to the ordinary bailee's onus of proof see PARA 62.

8 *Oakley v Portsmouth and Ryde Steam Packet Co* (1856) 11 Exch 618.

9 *Briddon v Great Northern Rly Co* (1858) 28 LJEx 51.

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## 18. Consignor's act or omission.

A common carrier is not liable for any loss or injury caused by the act or omission of the consignor himself, or by the act of a third party brought about by the consignor<sup>1</sup>, unless the carrier has been guilty of negligence<sup>2</sup>, in which case he will be liable for such damage as results from his negligent act or omission<sup>3</sup>. But where the loss is caused by the act or omission of the consignor in endeavouring to carry out part of the carrier's duty under a private arrangement with him, the carrier will be liable to the owner of the goods<sup>4</sup>.

A consignor impliedly warrants that the goods sent are not dangerous<sup>5</sup> or likely to cause delay<sup>6</sup>, unless the carrier is aware, or could by examination have become aware, of the nature of the

goods<sup>7</sup>. The consignor is liable for damage resulting from the breach of this implied warranty to the carrier or to other persons whose goods are being carried<sup>8</sup>.

It is the duty of the consignor to address the goods with an address sufficient to enable the carrier to find the intended place of delivery readily; and the carrier is not responsible for loss or delay due to an imperfect address<sup>9</sup>.

If the owner agrees with the carrier that he himself will protect the goods, or if in fact the goods never come into the carrier's custody, the carrier is excused from liability<sup>10</sup>. However, the fact that the owner accompanies the goods does not of itself present any excuse<sup>11</sup>.

1 *Butterworth v Brownlow* (1865) 19 CBNS 409.

2 *Talley v Great Western Rly Co* (1870) LR 6 CP 44; *Barbour v South Eastern Rly Co* (1876) 34 LT 67; *Bradley v Waterhouse* (1828) 3 C & P 318.

3 *Higginbotham v Great Northern Rly Co* (1861) 2 F & F 796.

4 *London and North Western Rly Co v Richard Hudson & Sons Ltd* [1920] AC 324, HL.

5 *Brass v Maitland* (1856) 6 E & B 470. As to the carriage of dangerous goods see further PARAS 101, 105.

6 See *Mitchell Cotts & Co v Steel Bros & Co Ltd* [1916] 2 KB 610, where charterers of a ship knew that government permission was required for the discharge of the cargo, but the shipowners did not, and delay was caused by failure to obtain permission (considered in *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1994] 2 Lloyd's Rep 171, QB (affd [1998] AC 605, [1998] 1 All ER 495, HL)).

7 *Acatos v Burns* (1878) 3 ExD 282, CA; *Transoceanica Societa Italiana di Navigazione v HS Shipton & Sons* [1923] 1 KB 31.

8 *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA. See further PARA 105.

9 *Caledonian Rly Co v W Hunter & Co* (1858) 20 Dunl 1097, Ct of Sess; *Wilson & Co v Scott* (1797) Hume 302; *Campbell v Caledonian Rly Co* (1852) 14 Dunl 806, Ct of Sess; *Pointin v Porrier* (1885) 49 JP 199.

10 *East India Co v Pullen* (1726) 2 Stra 690; *Brind v Dale* (1837) 8 C & P 207. See PARA 4 text and note 7.

11 *Robinson v Dunmore* (1801) 2 Bos & P 416.

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## 19. Improper packing.

Although a common carrier is an insurer, it is a condition precedent to his liability that if the goods are liable to be damaged unless carefully and properly packed, they should be so packed<sup>1</sup>, and he may refuse to carry goods which are improperly packed<sup>2</sup>. The carrier is not to be liable for damage to goods due to improper packing<sup>3</sup>, even when he accepts them for carriage when obviously improperly packed<sup>4</sup>. The acceptance of goods improperly packed does not absolve the carrier from his duty to take reasonable care of them in that state<sup>5</sup>, and where goods are damaged in transit, and part of the damage can be ascribed to improper packing, the carrier is not liable for that part<sup>6</sup>; nor is the carrier liable where, although there has been delay on his part, the damage is due not to delay but to improper packing<sup>7</sup>.

If a packing defect from which damage is likely to occur is discovered by the carrier on the journey, he should use reasonable means to arrest loss or deterioration from it<sup>8</sup>, and, if the defect be discovered in time to prevent the forwarding of the goods, they should not be

forwarded in that condition<sup>9</sup>. Carriers who give clean bills of lading notwithstanding the bad condition of the goods carried are estopped against a buyer of the goods who acts in reliance on the bills<sup>10</sup>.

1 *Hart v Baxendale* (1867) 16 LT 390; *Smith v Buskell*, *Buskell v Smith and Great Western Rly Co* [1919] 2 KB 362, CA.

2 *Sutcliffe v Great Western Rly Co* [1910] 1 KB 478, CA.

3 *Cox v London and North Western Rly Co* (1862) 3 F & F 77; *Barbour v South Eastern Rly Co* (1876) 34 LT 67; *Baldwin v London, Chatham and Dover Rly Co* (1882) 9 QBD 582.

4 *Gould v South Eastern and Chatham Rly Co* [1920] 2 KB 186, explaining the decision in *Stuart v Crawley* (1818) 2 Stark 323, on which the contrary opinion of Lord Atkinson in *London and North Western Rly Co v Richard Hudson & Sons Ltd* [1920] AC 324 at 340, HL, was based. Cf *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, CA.

5 *Gould v South Eastern and Chatham Rly Co* [1920] 2 KB 186, explaining *Stuart v Crawley* (1818) 2 Stark 323. Cf *Richardson v North Eastern Rly Co* (1872) LR 7 CP 75.

6 *Higginbotham v Great Northern Rly Co* (1861) 2 F & F 796.

7 *Baldwin v London, Chatham and Dover Rly Co* (1882) 9 QBD 582.

8 *Beck v Evans* (1812) 16 East 244; *Notara v Henderson* (1872) LR 7 QB 225.

9 *Cox v London and North Western Rly Co* (1862) 3 F & F 77.

10 *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341, applying *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416. See also the Hague-Visby Rules art III r 4 (Scheduled to the Carriage of Goods by Sea Act 1971); the Carriage of Goods by Sea Act 1992 s 4 (representations in bills of lading); and PARAS 317, 367, 380.

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## 20. Declarations concerning goods.

In general, if a carrier asks no questions as to the contents of a parcel, no information need be given and the carrier is liable for the full value if the parcel is lost<sup>1</sup>. If, however, the carrier asks questions, and the consignor answers falsely to the prejudice of the carrier, the consignor is guilty of fraud, and the carrier is not bound by the contract or liable for loss<sup>2</sup>. If the consignor declares that the goods are of a certain value, or if he acts in such a way as to represent them to be of a certain value, in order to secure a lower rate of carriage, he cannot allege subsequently that the goods were in fact of higher value<sup>3</sup>.

1 The position may be otherwise in an extreme case where the nature and identity of the goods delivered to the carrier falls so far outside his reasonable expectation that he cannot be taken to have consented to possession of them.

2 *Long v District Messenger and Theatre Ticket Co Ltd* (1916) 32 TLR 596; *Gibbon v Paynton* (1769) 4 Burr 2298; *Walker v Jackson* (1842) 10 M & W 161; *Titchburne v White* (1719) 1 Stra 145. In certain cases, in order to recover the full value the consignor must first declare it: see the Carriers Act 1830 s 1; and PARA 28.

3 *Tyly v Morrice* (1699) Carth 485; *Riley v Horne* (1828) 5 Bing 217; *Bradley v Waterhouse* (1828) 3 C & P 318; *M'Cance v London and North Western Rly Co* (1864) 3 H & C 343. As to the carriage of goods by sea where the Hague-Visby Rules (Scheduled to the Carriage of Goods by Sea Act 1971) apply see PARA 394.

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## 21. Inherent vice.

A common carrier is not responsible for harm which occurs to the goods from anything inherent in their own nature, over which he has no control and against which he cannot guard<sup>1</sup>. Thus, although bound to make all reasonable provision against the ordinary and natural unruliness of animals carried, he is not liable if injury occurs through what may be called 'inherent vice' or 'proper vice' in the animal, or restiveness on the part of the animal of an extraordinary kind<sup>2</sup>.

Where there is an inherent defect in the thing carried, which is developed by the act of being carried in the ordinary way, without any negligence on the carrier's part, the carrier is not responsible<sup>3</sup>. Where perishable goods of a soft nature, like fruit, are damaged entirely by their own weight and the shaking which is a necessary incident of the act of carriage, without any negligence on the carrier's part, the carrier is not liable<sup>4</sup>. However, the carrier is liable where the injury could have been avoided by reasonable care on his part: thus fruit and similar goods, which necessarily require refrigeration, ventilation or other reasonable treatment while in transit, should be refrigerated, ventilated or otherwise reasonably treated<sup>5</sup>. Further, the carrier will not escape liability unless he has supplied a vehicle which is sound and reasonably fit for the carriage of the goods<sup>6</sup>.

1 *Blower v Great Western Rly Co* (1872) LR 7 CP 655 at 663, where the following statement of the law set out in Story on Bailment (9th Edn, 1878) 492a was stated by Willes J to be accurate: 'Although the rule is thus laid down in general terms at the common law that the carrier is responsible for all losses not occasioned by the act of God, or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality, in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect or wrong or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases'. See also *Nugent v Smith* (1876) 1 CPD 423, CA; *Brass v Maitland* (1856) 6 E & B 470; *Hutchinson v Guion* (1858) 5 CBNS 149; *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94, CA. Cf *Bull v Robinson* (1854) 10 Exch 342.

2 *Kendall v London and South Western Rly Co* (1872) LR 7 Exch 373. Cf *Gill v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 QB 186.

3 *Lister v Lancashire and Yorkshire Rly Co* [1903] 1 KB 878; *Hudson v Baxendale* (1857) 2 H & N 575.

4 *Kendall v London and South Western Rly Co* (1872) LR 7 Exch 373.

5 *Davidson v Gwynne* (1810) 12 East 381.

6 *Blower v Great Western Rly Co* (1872) LR 7 CP 655.

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## 22. Non-acceptance by consignee.

The liability of a common carrier as an insurer of the safety of goods<sup>1</sup> ceases if the consignee is not to be found at the address given by the consignor<sup>2</sup>, or if the goods are tendered to the consignee and refused<sup>3</sup>. Thereafter the carrier becomes an involuntary bailee, although he continues to owe a duty of reasonable care in effecting a delivery of the goods to a claimant<sup>4</sup> and may owe a more general duty of reasonable care for the safekeeping of the goods. Where the goods are refused by the consignee, the carrier need not give notice of the refusal to the consignor, but should do what is reasonable in the circumstances<sup>5</sup>. Where the goods are refused because the consignee is not prepared to pay the carriage demanded, the goods should not be returned at once to the place of departure, but should be kept at the place of destination for a reasonable time<sup>6</sup>.

1 See PARA 16.

2 *Stephenson v Hart* (1828) 4 Bing 476.

3 *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51; *Hudson v Baxendale* (1857) 2 H & N 575; *Great Western Rly Co v Crouch* (1858) 3 H & N 183, Ex Ch; *Storr v Crowley* (1825) M'Cle & Yo 129.

4 *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51. See PARA 11.

5 *Hudson v Baxendale* (1857) 2 H & N 575. As to a carrier's entitlement to dispose of uncollected goods see the Torts (Interference with Goods) Act 1977 ss 12, 13, Sch 1; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 80.

6 *Great Western Rly Co v Crouch* (1858) 3 H & N 183.

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## 23. Common carrier's liability as warehouseman.

Where a common carrier remains in possession of goods after his responsibility as an insurer has ceased<sup>1</sup>, his liability for loss of or damage to the goods becomes that of a warehouseman<sup>2</sup>. His liability is then to take reasonable and proper care of the goods and to adopt reasonable means of protecting them from such risks as fire and theft<sup>3</sup>. The fact of loss or damage is prima facie evidence of negligence, and so the burden of proving that he took all reasonable precautions, or that the loss or damage did not result from any failure by him to do so, rests upon the carrier<sup>4</sup>.

A carrier who, in pursuance of his general duty of reasonable care, incurs reasonable expenses in protecting the goods against unexpected hazards can recover those expenses from the owner<sup>5</sup>. A carrier who exercises his lien upon the goods for unpaid carriage is not thereafter entitled to charge for warehousing<sup>6</sup>. The position may be otherwise, however, where the carrier's continued warehousing of the goods is not exclusively for his own benefit or is primarily for the benefit of the consignee or other bailor<sup>7</sup>.

1 Eg where arrived goods are awaiting collection by the consignee at the carrier's premises and the agreed time for their collection (or a reasonable time, where no specific time has been agreed) has passed: see PARA 11. As to the common carrier's strict liability see PARA 16.

2 *Re Webb* (1818) 8 Taunt 443; *Bourne v Gatcliffe* (1841) 3 Man & G 643, Ex Ch; *Cairns v Robins* (1841) 8 M & W 258; *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51; *Great Western Rly Co v Crouch* (1858) 3 H & N 183, Ex Ch; *Chapman v Great Western Rly Co* (1880) 5 QBD 278. However, if the consignee's delay in collecting the goods is protracted, the carrier's responsibility for the goods may diminish to a point where no duty of care is owed: see PARA 11 text and note 9.

3 *Mitchell v Lancashire and Yorkshire Rly Co* (1875) LR 10 QB 256; *Giles v Taff Vale Rly Co* (1853) 2 E & B 822, Ex Ch; *Garside v Trent and Mersey Navigation Proprietors* (1792) 4 Term Rep 581; *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534, [1936] 3 All ER 696, CA; *British Traders and Shippers Ltd v Ubique Transport and Motor Engineering Co (London) Ltd and Port of London Authority* [1952] 2 Lloyd's Rep 236.

4 *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73 at 87-88, CA, per Buckley LJ, citing *Morison, Pollexfen and Blair v Walton* (10 May 1909, unreported), cited [1915] 1 KB at 90, HL; *Coldman v Hill* [1919] 1 KB 443, CA; *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534, [1936] 3 All ER 696, CA; *WLR Traders (London) Ltd v British and Northern Shipping Agency Ltd and I Leftley Ltd* [1955] 1 Lloyd's Rep 554; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC.

5 *Great Northern Rly Co v Swaffield* (1874) LR 9 Exch 132, applied in *China Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; *London and North Western Rly Co v Crooke & Co* (1904) 20 TLR 506.

6 *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338; and see *Delantera Armadora SA v Bristol Channel Shiprepairers Ltd and Swansea Dry Dock Co, The Katingaki* [1976] 2 Lloyd's Rep 372; *China Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; *Rashtriya Chemicals and Fertilizers Ltd v Huddart Parker Industries Ltd, The Boral Gas* [1988] 1 Lloyd's Rep 342. However this does not apply where the contract is exclusively for storage in the first place and the charges are therefore no more than the contractual cost of storage: *Vacha v Gillett* (1934) 50 Ll L Rep 67. As to the carrier's lien see PARA 761.

7 *China Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL. Cf *Morris v Beaconsfield Motors Ltd* [2001] EWCA Civ 1322, [2001] All ER (D) 335 (Jul).

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## 24. Special contracts.

The liability of a common carrier for loss, injury or delay in respect of the goods carried may be varied by contract<sup>1</sup>. If the contract is such as to obliterate or destroy his character of a common carrier, he must be regarded for the purposes of that particular contract as a private carrier, but if the contract does not so obliterate or destroy that character, and merely limits his liabilities in some respects, in all other respects he remains under a common carrier's liability<sup>2</sup>.

1 For a full discussion of the terms of contracts of carriage, exemption clauses and the application to cases of deviation and other breaches of contract see PARA 71 et seq. As to statutory controls on contract terms or notices which purport to exclude or restrict liability for negligence or breach of contract see the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

2 *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA; *M'Manus v Lancashire and Yorkshire Rly Co* (1859) 4 H & N 327; *Scaife v Farrant* (1875) LR 10 Exch 358; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Sutton & Co v Ciceri & Co* (1890) 15 App Cas 144, HL; *Price & Co v Union Lighterage Co* [1904] 1 KB 412, CA; *Beal v South Devon Rly Co* (1864) 3 H & C 337, Ex Ch; *Phillips v Clark* (1857) 2 CBNS 156; cf *India General Navigation and Rly Co v Dekhari Tea Co* (1923) 93 LJPC 108.

## UPDATE

### 24 Special contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## **25. Effect of public notice.**

The common law liability of a common carrier<sup>1</sup> cannot be limited or varied by any public notice given by him<sup>2</sup>, but a contract varying his liability may be based upon a public notice<sup>3</sup>.

1 See PARA 16 et seq.

2 See the Carriers Act 1830 ss 4, 6; and PARA 36.

3 *Drayson v Horne* (1875) 32 LT 691; *Joshua Buckton & Co Ltd v London and North Western Rly Co* (1916) 87 LJB 234. See also PARA 36.

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## **26. Special directions to carrier.**

Where any directions as to the mode of dealing with the goods are given to the carrier at the time of the delivery of the goods to him, and he assents to the directions, he is bound to obey them, and is liable for any loss that occurs through disregarding them<sup>1</sup>.

1 *Streeter v Horlock* (1822) 1 Bing 34. In an American case, a carrier was held liable for the consequences of disregarding a direction to carry a parcel 'this side up'; but it was said he could have refused to carry the parcel with this direction: *Hastings v Pepper* 11 Pickering 41 (1831).

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## **B. THE CARRIERS ACT 1830**

### **27. Purpose of the Carriers Act 1830.**

The Carriers Act 1830 was passed with the primary object of protecting common carriers from the great risk which they ran under the common law in carrying parcels containing articles of great value in a small compass. With regard to such property, the carrier attempted to protect himself by posting up notices limiting his liability; but there was great difficulty in fixing consignors with knowledge of notices of this kind<sup>1</sup>.

1 Carriers Act 1830, title and preamble. The words in the preamble 'articles of great value in small compass' do not limit the meaning of the words used in s 1 (see PARA 29) to articles of small size: *Owen v Burnett* (1834) 4 Tyr 133.

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## 28. Limitation of carrier's liability.

The Carriers Act 1830 provides that no common carrier by land<sup>1</sup> is liable for the loss<sup>2</sup> of or injury to any article or articles or property of specified descriptions<sup>3</sup> contained in any parcel or package<sup>4</sup> delivered to the carrier to be carried for hire or to accompany the person of a passenger in a public conveyance, where the value of such property contained in the parcel or package exceeds £10<sup>5</sup> unless, at the time of its delivery at the carrier's office, warehouse, or receiving house<sup>6</sup> or to his employee<sup>7</sup>, the value and nature of the property has been declared by the person delivering it, and, subject to certain conditions as to display of a notice and giving of a receipt<sup>8</sup>, an increased charge, above the ordinary carriage, has been paid or agreed to be paid<sup>9</sup>.

No special form of declaration is prescribed or required. It is sufficient declaration of the value and nature of the property if words are used by the consignor which supply the carrier with the information necessary to enable him to calculate the extra charge that he is entitled to make for the carriage<sup>10</sup>. The words must be used by the consignor with the intention of making a declaration for the purposes of the Carriers Act 1830<sup>11</sup>, and must be such as to intimate that the consignor intends to hold the carrier responsible for a higher sum<sup>12</sup>; and if the declaration is made by an employee, it must be one which he has been authorised to make<sup>13</sup>.

If the consignor fails to make the declaration, the carrier is entitled to the protection of the Act, even though he may not have posted at the place of delivery the statutory notice<sup>14</sup> which would have entitled him to make an increased charge<sup>15</sup>.

1 Carriers Act 1830 s 1 (amended by the Statute Law Revision (No 2) Act 1888 and by the Statute Law (Repeals) Act 2004). Where any carrier, acting as a common carrier, carries partly by sea and partly by land, the contract is divisible as to liability, and the Act applies to the land part of the journey only: *Le Conteur v London and South Western Rly Co* (1865) LR 1 QB 54. The onus of showing that the statute applies lies upon the person endeavouring to rely upon it, and if he fails to show that the loss occurred during transit on land he is not protected: *London and North Western Rly Co v JP Ashton & Co* [1920] AC 84, HL. See also *Pianciani v London and South Western Rly Co* (1856) 18 CB 226; *Baxendale v Great Eastern Rly Co* (1869) LR 4 QB 244, Ex Ch.

2 'Loss' means loss by the carrier, and does not include delay in delivery unless this results from the carrier's temporary loss of the goods: see PARA 33.

3 See PARA 29.

4 The phrase 'parcel or package' has been held to include an open wagon containing pictures and other goods: *Whaite v Lancashire and Yorkshire Rly Co* (1874) LR 9 Exch 67. A parcel, exceeding the value of £10, although composed of several small parcels (some of which were damaged), is within the Act: *Hartley v Great Northern Rly Co* (1849) 14 LTOS 134.

5 The value of the goods is the invoice price to the consignee, not the price paid by the consignor: *Blankensee v London and North Western Rly Co* (1881) 45 LT 761.

6 These words include every office, warehouse or receiving house used or appointed by a carrier for the purpose of receiving parcels to be carried: see the Carriers Act 1830 s 5 (amended by the Statute Law Revision (No 2) Act 1888). Where a coach regularly stopped at an inn to pick up parcels, it was held that the inn was a

'receiving house': *Syms v Chaplin* (1836) 5 Ad & El 634. An inn appointed by the carrier for the purpose of receiving parcels is an 'office, warehouse, or receiving house'; and where goods are received at any house recognised by a railway undertaking, that house is to be considered as part of the system for the purposes of the Act: *Stephens v London and South Western Rly Co* (1886) 18 QBD 121, CA; and see *Burrell v North* (1847) 2 Car & Kir 680.

7 Where the carrier accepts goods at the house of the consignor, the carrier is entitled to the protection of the Carriers Act 1830 where no declaration is made: *Hart v Baxendale* (1852) 6 Exch 769.

8 This notice and receipt are required by the Carriers Act 1830 ss 2, 3: see PARA 30.

9 Carriers Act 1830 s 1 (as amended: see note 1).

10 *Bradbury v Sutton* (1872) 19 WR 800; on appeal 21 WR 128 (overruling on this point *Boys v Pink* (1838) 8 C & P 361).

11 *Hirschel and Meyer v Great Eastern Rly Co* (1906) 12 Com Cas 11 (declaration made for customs purposes). Information derived by the carrier from sources other than such a declaration would probably be insufficient to justify him in making an additional charge: *Robinson v London and South Western Rly Co* (1865) 19 CBNS 51. A statement that the consignor wished the goods to be 'insured' will not suffice without a declaration of their value if this exceeds £10: *Doey v London and North Western Rly Co* [1919] 1 KB 623. For the effect of declarations of value where the Carriers Act 1830 does not apply see PARA 20.

12 *Robinson v London and South Western Rly Co* (1865) 19 CBNS 51.

13 *Fox v London, Midland and Scottish Rly Co* [1926] IR 106.

14 As required by the Carriers Act 1830 s 2: see PARA 30.

15 *Hart v Baxendale* (1852) 6 Exch 769, followed in *Collis v Midland Great Western Rly Co* (1868) 19 LT 150, and recognised as authority for the proposition in *Rosenthal v LCC* (1924) 131 LT 563; cf *Ashton & Co v London and North Western Rly Co* [1918] 2 KB 488, CA (affd without reference to the dictum sub nom *London and North Western Rly Co v JP Ashton & Co* [1920] AC 84, HL). It is otherwise if no notice is posted at the carrier's office, warehouse or receiving house: *Rosenthal v LCC*.

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## 29. Articles to which the Carriers Act 1830 applies.

The Carriers Act 1830 applies<sup>1</sup> to gold, silver and cupro-nickel<sup>2</sup> coin of the realm, to gold and silver coin of any foreign country, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks or timepieces of any description<sup>3</sup>, trinkets<sup>4</sup>, bills<sup>5</sup>, bank notes, orders, notes or securities for the payment of money, stamps, maps<sup>6</sup>, writings, title deeds, paintings<sup>7</sup>, engravings<sup>8</sup>, pictures<sup>9</sup>, gold or silver plate or plated articles, glass<sup>10</sup>, china, silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials<sup>11</sup>, furs<sup>12</sup> or lace other than machine-made lace<sup>13</sup>.

Anything which is merely accessory to a thing within the Act, and which is with the principal thing in any package, is itself within the Act<sup>14</sup>. Where a case contains only things within the Act, the case as well as its contents are within the Act<sup>15</sup>; but where a case contains things not within the Act and also things which are within the Act, the carrier is not protected in respect either of the case or of such of its contents as are not within the Act<sup>16</sup>.

1 See the Carriers Act 1830 s 1 (amended by the Statute Law Revision (No 2) Act 1888 and the Statute Law (Repeals) Act 2004). Whether any particular thing comes within the list of things described in this provision is a question of fact, not of law: *Brunt v Midland Rly Co* (1864) 2 H & C 889; *Woodward v London and North Western Rly Co* (1878) 3 ExD 121; *Levi, Jones & Co Ltd v Cheshire Lines Committee* (1901) 17 TLR 443. The Carriers Act

1830 applies to the things named where they are carried by a railway as the personal luggage of a passenger without extra charge: *Casswell v Cheshire Lines Committee* [1907] 2 KB 499.

2 Coinage Act 1971 ss 12(3), 13(3)(a); Cupro-nickel Coins (Carriers' Liability) Regulations 1951, SI 1951/1032. The Carriers Act 1830 s 1 also extends to certain coins of a denomination of not less than 5p specified in a proclamation made by virtue of the Coinage Act 1971 s 3(1)(cc): see s 12(2), Sch 2 (s 12(2) amended by the Currency Act 1983 s 1(7)); and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 798, 1282.

3 This includes a ship's chronometer: *Le Conteur v London and South Western Rly Co* (1865) LR 1 QB 54.

4 Trinkets are things which are primarily ornamental, though they may also be useful, eg bracelets, shirt pins, rings and brooches (which do not come within the meaning of jewellery), tortoiseshell purses and ornamental smelling bottles; but plain German silver pocket matchboxes are not trinkets: *Bernstein v Baxendale* (1859) 6 CBNS 251. An eyeglass with a gold chain attached is not a trinket: *Davey v Mason* (1841) Car & M 45 (overruled in *Bernstein v Baxendale*, but not upon this point). See also *Levi, Jones & Co Ltd v Cheshire Lines Committee* (1901) 17 TLR 443 (opera glasses and photographic apparatus held not to be trinkets).

5 A parcel containing a bill of exchange bearing the acceptor's signature and sent to the drawer to be signed is not a 'bill' and is of no value: *Stoessiger v South Eastern Rly Co* (1854) 3 E & B 549. See further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1448.

6 This includes the case in which a set of maps is contained: *Wyld v Pickford* (1841) 8 M & W 443. See the text and notes 15-16.

7 'Paintings' means works of art; hand-painted carpet designs are not paintings: *Woodward v London and North Western Rly Co* (1878) 3 ExD 121.

8 This includes prints and coloured prints: *Boys v Pink* (1838) 8 C & P 361.

9 The frame of a picture is also included as being merely an accessory of the picture (see the text and note 14): *Henderson v London and North Western Rly Co* (1870) LR 5 Exch 90.

10 A looking-glass mirror of large size is included (*Owen v Burnett* (1834) 4 Tyr 133), and also smelling bottles (*Bernstein v Baxendale* (1859) 6 CBNS 251); but not opera glasses or photographic equipment (*Levi, Jones & Co Ltd v Cheshire Lines Committee* (1901) 17 TLR 443).

11 Silk dresses are within the provision: *Flowers v South Eastern Rly Co* (1867) 16 LT 329. The decision in *Davey v Mason* (1841) Car & M 45 to the opposite effect was overruled in *Wood v Metropolitan Rly Co* (1867) cited in 16 LT 330. Silk hose and tights are included (*Bernstein v Baxendale* (1859) 6 CBNS 251). Elastic silk webbing is 'silk wrought up with other articles': *Brunt v Midland Rly Co* (1864) 2 H & C 889.

12 This does not include articles made of felt composed of rabbits' fur and sheep's wool: *Mayhew v Nelson* (1833) 6 C & P 58.

13 Machine-made lace made wholly of silk is included: *Taylor v Midland Rly Co* (1877) 41 JP 504.

14 *Henderson v London and North Western Rly Co* (1870) LR 5 Exch 90.

15 *Wyld v Pickford* (1841) 8 M & W 443.

16 *Treadwin v Great Eastern Rly Co* (1868) LR 3 CP 308; *Flowers v South Eastern Rly Co* (1867) 16 LT 329.

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### 30. Notices of and receipts for increased charges.

When a parcel or package containing any of the specified articles<sup>1</sup> has been delivered to the carrier, and the value and nature of the contents have been duly declared<sup>2</sup>, the carrier is entitled to demand the increased charge provided he affixes in a conspicuous part of his office,

warehouse or receiving house<sup>3</sup> a legible notice stating the increased rate of charge above the ordinary rate of carriage<sup>4</sup>. The carrier may demand the additional charge only where the notice has been given<sup>5</sup>, and is liable to refund an additional charge when no notice is displayed<sup>6</sup>. The notice need not recite all the provisions of the Carriers Act 1830<sup>7</sup>.

Where the consignor has made the required declaration and paid, or agreed to pay, the increased rate of charge, the carrier is bound, if required, to give the consignor a signed receipt for the package, acknowledging it to have been insured; if such a receipt is not given when required the carrier loses all protection from the Act and becomes liable as at common law, and the amount of the increased charge may be recovered from him<sup>8</sup>.

1 See PARA 29.

2 As to such declarations see PARA 28.

3 See PARA 28 note 6.

4 Carriers Act 1830 s 2 (amended by the Statute Law Revision (No 2) Act 1888).

5 *Hart v Baxendale* (1852) 6 Exch 769.

6 See the Carriers Act 1830 s 3 (amended by the Statute Law Revision (No 2) Act 1888 and the Statute Law (Repeals) Act 2004).

7 *Drayson v Horne* (1875) 32 LT 691.

8 Carriers Act 1830 s 3 (as amended: see note 6).

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### **31. Carrier's liability where value declared.**

When a consignor has made a declaration under the Carriers Act 1830<sup>1</sup> of the value and nature of the contents of a parcel or package, the carrier receives the goods under his full common law liability as an insurer<sup>2</sup> not only in cases where he demands, and is paid, the additional charge, but also in cases where he fails to demand it<sup>3</sup>.

1 As to such declarations see PARA 28.

2 See PARA 16.

3 The consignor is not bound to tender the additional charge. The carrier must demand it if he requires it, and where a sufficient declaration is made, the common law liability attaches to the carrier, even though no such demand is made: *Behrens v Great Northern Rly Co* (1861) 3 LT 863.

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### **32. Carrier's liability for loss or injury.**

The fact that loss or injury is caused by negligence does not deprive a carrier of the protection of the Carriers Act 1830<sup>1</sup>, but if he wilfully does an act inconsistent with his contract, or converts the goods to his own use, he is liable<sup>2</sup>.

1 *Hinton v Dibbin* (1842) 2 QB 646; *Great Western Rly Co v Rimell* (1856) 18 CB 575.

2 The protection of the Carriers Act 1830 extends to cases where the goods have been carried beyond their destination, or lost or injured upon a journey which the consignor never contemplated, or delivered to the wrong person, provided these matters arise from negligence. The carrier remains liable for all acts of wilful misfeasance, such as converting the goods to his own use or knowingly delivering them to the wrong person: *Morritt v North Eastern Rly Co* (1876) 1 QBD 302, CA; *Millen v Brasch* (1882) 10 QBD 142, CA. Cf *Wyld v Pickford* (1841) 8 M & W 443. As to the effects of a deviation or other serious breach of contract on a carrier's exclusion clauses see PARA 83 et seq; and **CONTRACT** vol 9(1) (Reissue) PARAS 811-812. Cf also PARA 64 (deviation creating insurer's liability in private carrier).

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### 33. Carrier's liability for delay.

The Carriers Act 1830 is no protection against liability for damage resulting from delay, unless the delay is caused by loss; and if the goods are temporarily lost, and recovered by the carrier, he should deliver them within a reasonable time of so recovering them, or he will be liable for delay<sup>1</sup>.

1 *Hearn v London and South Western Rly Co* (1855) 10 Exch 793. See also *Pianciani v London and South Western Rly Co* (1856) 18 CB 226.

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### 34. Amounts recoverable from carrier.

Where the value and contents of a parcel containing things within the Carriers Act 1830<sup>1</sup> have been duly declared<sup>2</sup>, and the increased charge paid, and loss or damage occurs, the owner is entitled to recover from the carrier the amount of the increased charge in addition to damages for the loss or damage<sup>3</sup>.

The carrier is not bound by the declaration as to the value of the things declared, but is entitled to put the owner to strict proof of the real value, although the owner cannot recover more than the value he has declared<sup>4</sup>.

1 As to the articles to which the Carriers Act 1830 applies see PARA 29.

2 As to such declarations see PARA 28.

3 Carriers Act 1830 s 7 (amended by the Statute Law Revision (No 2) Act 1888).

4 Carriers Act 1830 s 9 (amended by the Statute Law Revision (No 2) Act 1888). See *M'Cance v London and North Western Rly Co* (1864) 3 H & C 343; and PARA 20.

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### 35. Theft or forgery by carrier's employee.

The Carriers Act 1830 is no protection to a carrier against liability for loss of, or injury to, any goods arising from the theft<sup>1</sup> or forgery<sup>2</sup> of any employee of his; nor is it any protection to any such employee against personal liability for loss or injury due to his own negligence or misconduct<sup>3</sup>. Where a claimant relies upon the theft or forgery of an employee in answer to a defence claiming the protection of the Act, it is quite immaterial that the employee's act was not facilitated by any negligence on the part of the carrier<sup>4</sup>.

The employee of the proprietor of a receiving house, recognised by the carrier, is an employee of the carrier so as to make the carrier responsible for his theft or forgery<sup>5</sup>, as is the employee of an agent employed by the carrier to perform part of the carrier's contract<sup>6</sup>. Where possession of goods is obtained from the carrier by a person who falsely represents himself to be his agent's employee, and who, having obtained possession of the goods in that character, misappropriates them by theft or forgery, the carrier is not estopped from denying that the offender is his employee<sup>7</sup>. He does not ratify the contract of carriage and become liable for the loss of the goods by claiming possession of the goods for the purpose of prosecution<sup>8</sup>.

Where the claimant pleads theft or forgery by an employee of the carrier, it is not necessary to give evidence sufficient to bring the crime home to one particular employee<sup>9</sup>. On the other hand, it is not sufficient to show that it is more probable that the goods were stolen by an employee of the carrier than by any person not an employee, nor does such evidence establish a prima facie case against the carrier<sup>10</sup>.

If a prima facie case is made out by proving theft or forgery against some unidentified employee of the carrier, which the carrier is unable or fails to answer, the claimant is entitled to succeed<sup>11</sup>. A prima facie case is not established merely by proving that goods have been lost<sup>12</sup>, or that when last seen the goods were in the possession of an employee of the carrier<sup>13</sup>. A prima facie case is made out if the stolen goods are proved to have been dealt with by an employee of the carrier whose possession of them is not explained; and the fact that witnesses are not called who, if called, might explain such possession is a fact which may be taken into account<sup>14</sup>.

1 The offence of theft is defined as the dishonest appropriation of property belonging to another with the intention of depriving him of it permanently: see the Theft Act 1968 ss 1-6; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 282-290.

2 The offence of forgery at common law was abolished by the Forgery and Counterfeiting Act 1981 s 13. Forgery is now an offence under the Forgery and Counterfeiting Act 1981, and is defined as the making of a false instrument with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice: see s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 347.

3 Carriers Act 1830 s 8 (amended by the Statute Law Revision (No 2) Act 1888; the Criminal Law Act 1967 Sch 2 para 4; and the Theft Act 1968 Sch 3 Pt III). The Carriers Act 1830 s 8 cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their employees, but such liability can be excluded by special contract: see *Shaw v Great Western Rly Co* [1894] 1 QB 373.

4 *Great Western Rly Co v Rimell* (1856) 18 CB 575; *Metcalf v London, Brighton and South Coast Rly Co* (1858) 4 CBNS 307.

5 *Stephens v London and South Western Rly Co* (1886) 18 QBD 121, CA.

6 *Machu v London and South Western Rly Co* (1848) 2 Exch 415; *Doolan v Midland Rly Co* (1877) 2 App Cas 792, HL.

7 *Way v Great Eastern Rly Co* (1876) 1 QBD 692.

8 *Harrisons and Crossfield Ltd v London and North Western Rly Co* [1917] 2 KB 755, 86 LJBK 1461.

9 *Vaughton v London and North Western Rly Co* (1874) LR 9 Exch 93.

10 *M'Queen v Great Western Rly Co* (1875) LR 10 QB 569; *Turner v Great Western Rly Co* (1876) 34 LT 22; *Campbells v North British Rly Co* (1875) 2 R 433, Ct of Sess. Cf *HC Smith Ltd v Midland Rly Co* (1918) 88 LJBK 868, CA; and PARA 62.

11 *M'Queen v Great Western Rly Co* (1875) LR 10 QB 569; *Boyce v Chapman* (1835) 2 Bing NC 222; *Vaughton v London and North Western Rly Co* (1874) LR 9 Exch 93.

12 *Great Western Rly Co v Rimell* (1856) 18 CB 575; *Metcalfe v London, Brighton and South Coast Rly Co* (1858) 4 CBNS 307.

13 *Gogarty v Great Southern and Western Rly Co* (1874) IR 9 CL 233; *Jupe v Great Western Rly Co* (1852) 19 LTOS 93.

14 *Boyce v Chapman* (1835) 2 Bing NC 222; *Vaughton v London and North Western Rly Co* (1874) LR 9 Exch 93; *HC Smith Ltd v Midland Rly Co* (1918) 88 LJBK 868, CA. See also *Kirkstall Brewery Co v Furnesss Rly Co* (1874) LR 9 QB 468.

## UPDATE

### 35-36 Theft or forgery by carrier's employee, Effect of special contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 36. Effect of special contract.

The common law liability of a common carrier in respect of any goods whatever cannot be limited by public notice given by the carrier<sup>1</sup>, but nothing in the Carriers Act 1830 affects any special contract between the carrier and the consignor for the carriage of goods<sup>2</sup>, and such a special contract may be based upon a public notice<sup>3</sup>.

Where a special contract is made between the carrier and the consignor for the carriage of goods, the carrier is still entitled to the protection of the Act except in so far as the terms of the contract are inconsistent with the provisions of the Act<sup>4</sup>, and unless the contract is such that he must be regarded for the purposes of that contract as having entered into it as a private carrier, in which case the Act will not apply to him<sup>5</sup>. The carrier may protect himself by contract against liability even for the criminal act of his employee<sup>6</sup>.

1 Carriers Act 1830 s 4 (amended by the Statute Law Revision (No 2) Act 1888). See PARA 25.

2 Carriers Act 1830 s 6 (amended by the Statute Law Revision (No 2) Act 1888). Where a paper containing the conditions upon which the carrier is prepared to carry goods offered for carriage is delivered to the consignor and received by him without objection, a special contract has been made by the parties, and the

paper is not a public notice within the Carriers Act 1830 s 4, and is binding upon the consignor when signed by him (*Great Northern Rly Co v Morville* (1852) 7 Ry & Can Cas 830); or if only handed to him without signature (*Carr v Lancashire and Yorkshire Rly Co* (1852) 7 Exch 707; *York, Newcastle and Berwick Rly Co v Crisp* (1854) 14 CB 527); or if served upon the consignor before any contract is proposed (*Walker v York and North Midland Rly Co* (1853) 2 E & B 750). However, where a carrier relies upon conditions contained in a paper or ticket handed to a consignor, he must prove that he used reasonable means to bring the conditions to the consignor's knowledge so as to raise a presumption that he accepted them: see *Henderson v Stevenson* (1875) LR 2 Sc & Div 470, HL; and PARA 74. As to statutory control on contract terms or notices purporting to exclude or restrict liability for negligence and breach of contract see the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

3 *Drayson v Horne* (1875) 32 LT 691; *Joshua Buckton & Co Ltd v London and North Western Rly Co* (1916) 87 LJB 234.

4 *Baxendale v Great Eastern Rly* (1869) LR 4 QB 244, Ex Ch; *Hirschel and Meyer v Great Eastern Rly Co* (1906) 96 LT 147.

5 *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA; and see PARA 24.

6 *Shaw v Great Western Rly Co* [1894] 1 QB 373; *Butt v Great Western Rly Co* (1851) 11 CB 140; *John Carter (Fine Worsted) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA; and see *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *Metrotex Pty Ltd v Freight Investments Pty Ltd* [1969] VR 9, Vict SC (cases of private carriers). However, a provision to this effect may be rendered ineffective by the statutory control on contractual terms and notices purporting to restrict liability for negligence and breach of contract contained in the Unfair Contract Terms Act 1977: see further **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

## UPDATE

### 35-36 Theft or forgery by carrier's employee, Effect of special contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 37. Insurance by carrier with third party.

If the carrier insures goods to which the Carriers Act 1830 applies<sup>1</sup>, but which have not been declared<sup>2</sup>, as goods 'in trust as carrier', he is entitled to their full value notwithstanding that the consignor has no claim upon him<sup>3</sup>.

1 See PARA 29.

2 As to the declaration see PARA 28.

3 *London and North Western Rly Co v Glyn* (1859) 1 E & E 652. Cf *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL. See PARA 69.

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### (iii) Common Carriers of Passengers and Luggage

#### A. DUTY TO CARRY

##### 38. Basic liability.

The distinction between common carriers and private carriers of passengers is of much less significance than that between common carriers and private carriers of goods<sup>1</sup>. A common carrier of passengers, like a common carrier of goods, is bound to carry according to his profession<sup>2</sup>, and so is bound to carry any person not in an unfit condition for whom he has accommodation upon tender of the proper fare, without the imposition of any unreasonable condition<sup>3</sup>.

Whereas a common carrier of goods, as their bailee, insures the safety of the goods which he carries<sup>4</sup>, a common carrier of passengers, not being a bailee, does not insure the safety of his passengers, but is bound to exercise due care to carry them safely<sup>5</sup>. It does not appear that a higher standard of care is demanded of him than of a private carrier of passengers for reward<sup>6</sup>.

Provisions relating to the international carriage of passengers are dealt with elsewhere in this work<sup>7</sup>.

1 For the considerations which determine whether a carrier is a common carrier or a private carrier see PARAS 3-5, 56. As to carriers of goods see PARA 7 et seq.

2 *Clarke v West Ham Corp* [1909] 2 KB 858, CA; *Bretherton v Wood* (1821) 3 Brod & Bing 54, Ex Ch; *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC.

3 *Garton v Bristol and Exeter Rly Co* (1861) 1 B & S 112.

4 See PARA 16.

5 *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *East Indian Rly Co v Kalidas Mukerjee* [1901] AC 396, PC; *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC; *O'Connor v British Transport Commission* [1958] 1 All ER 558, [1958] 1 WLR 346, CA.

6 See PARA 39.

7 As to international carriage of passengers by road and rail see PARAS 650-751. As to international carriage of passengers by air see PARAS 136-172. As to the carriage of passengers by sea see PARAS 626-649.

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#### B. GENERAL DUTY OF CARE TO PASSENGERS

##### 39. Standard of care.

Carriers of passengers, whether common carriers or private carriers<sup>1</sup>, are not insurers of the safety of the persons whom they carry<sup>2</sup>, neither do they warrant the soundness or sufficiency of their vehicles, though they are answerable for defects which careful and reasonable examination of their vehicles would have revealed<sup>3</sup>. Their undertaking is to take all due care<sup>4</sup>, and to carry safely as far as reasonable care and forethought can attain that end<sup>5</sup>.

They are responsible for any negligence on the part of their employees which is within the scope of their employment<sup>6</sup>, but not generally for the acts of their independent contractors<sup>7</sup> or of strangers<sup>8</sup>. Carriers are, however, responsible to passengers to whom they are in a contractual relation for the negligence, not only of their employees, but of all persons to whom they delegate any task connected with the carrying of the passenger<sup>9</sup>. The basis of such liability is an implied term in the contract of carriage that the carrier undertakes that due care will be used in carrying the passenger throughout the journey. It does not extend to the negligence of independent contractors in the performance of tasks having nothing to do with such carriage<sup>10</sup>. The registered proprietor of a hackney carriage<sup>11</sup>, such as a taxi, bears a statutory liability<sup>12</sup> for the driver's negligence; and this is so although the relationship between the proprietor and driver is that of bailor and bailee<sup>13</sup>.

The obligation upon carriers of persons is to use all due, proper and reasonable care, and the care required is of a very high degree<sup>14</sup>, although the obligation does not appear to be greater than the general duty at common law to take reasonable care in the circumstances to avoid acts or omissions which can reasonably be foreseen as likely to injure the person or property of another<sup>15</sup>. Since the likelihood of injury resulting from any act or omission depends upon the physical presence of the passenger in or on the carrier's vehicle or premises, and not upon the terms upon which he is carried, there is no difference between the standard of care required in gratuitous carriage or carriage for reward<sup>16</sup>. Where, however, the passenger is a trespasser<sup>17</sup> and his presence cannot be foreseen, the carrier's only duty is to avoid the intentional or reckless infliction of harm<sup>18</sup>. There is no authority on the question of the carrier's liability to a foreseeable trespasser, at least as far as the activity of carrying rather than the condition of the vehicle<sup>19</sup> is concerned.

1 See *Clarke v West Ham Corpn* [1909] 2 KB 858, CA; *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch.

2 *O'Connor v British Transport Commission* [1958] 1 All ER 558, [1958] 1 WLR 346, CA.

3 See PARA 41.

4 'Due care' means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order: *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *O'Connor v British Transport Commission* [1958] 1 All ER 558, [1958] 1 WLR 346, CA. See also the text and notes 14-18.

5 *Christie v Griggs* (1809) 2 Camp 79; *Harris v Costar* (1825) 1 C & P 636; *Crofts v Waterhouse* (1825) 3 Bing 319; *Aston v Heaven* (1797) 2 Esp 533; *Pym v Great Northern Rly Co* (1861) 2 F & F 619; *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *Gee v Metropolitan Rly Co* (1873) LR 8 QB 161, Ex Ch; *East Indian Rly Co v Kalidas Mukerjee* [1901] AC 396, PC; *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL. The passage in the text was approved in *O'Connor v British Transport Commission* [1958] 1 All ER 558, [1958] 1 WLR 346, CA (railway undertakers entitled to assume that a very young child would be accompanied and cared for by an adult).

6 *Dudley v Smith* (1808) 1 Camp 167; *White v Boulton* (1791) Peake 113; *Ansell v Waterhouse* (1817) 6 M & S 385.

7 *Wright v Midland Rly Co* (1873) LR 8 Exch 137.

8 *Thomas v Rhymney Rly Co* (1871) LR 6 QB 266.

9 *Great Western Rly Co v Blake* (1862) 7 H & N 987; *Thomas v Rhymney Rly Co* (1871) LR 6 QB 266; *Self v London, Brighton and South Coast Rly Co* (1880) 42 LT 173, CA.

10 *Daniel v Metropolitan Rly Co* (1871) LR 5 HL 45. There is no authority on the liability of the carrier for such acts to a passenger who, while not being a trespasser, is not in a contractual relationship with the carrier, but it is submitted that in this respect the positions of the contractual and non-contractual passenger differ. As to the carrier's duty of care to his passengers generally see PARA 44.

11 As to the meaning of 'hackney carriage' see PARA 6 note 3.

12 See the London Hackney Carriages Act 1843 s 28 (in the metropolitan police district and the City of London); the Town Police Clauses Act 1847 s 63 (outside that area); and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1446, 1491.

13 *Keen v Henry* [1894] 1 QB 292, CA; *Bygraves v Dicker* [1923] 2 KB 585.

14 *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL. See also *Madden v Quirke* [1989] 1 WLR 702 (duty owed by driver regarding the manner of driving as well as the manner of carriage).

15 *Western Scottish Motor Traction Co Ltd v Fernie* [1943] 2 All ER 742, HL, distinguished in *Wragg v Grout and London Transport Board* (1966) 116 LJo 752, CA.

16 *Harris v Perry & Co* [1903] 2 KB 219, CA; *Collett v London and North Western Rly Co* (1851) 16 QB 984; *Lygo v Newbold* (1854) 9 Exch 302, Ex Ct; *Great Northern Rly Co v Harrison* (1854) 10 Exch 376; *Miller v Liverpool Co-operative Society Ltd* [1940] 4 All ER 367; *Lewys v Burnett and Dunbar* [1945] 2 All ER 555. See also *Austin v Great Western Rly Co* (1867) LR 2 QB 442.

17 A person is not a trespasser merely because he has bought a second-class ticket but is found in a first-class compartment: *Vosper v Great Western Rly Co* [1928] 1 KB 340.

18 *Grand Trunk Rly Co of Canada v Barnett* [1911] AC 361, PC; *Videan v British Transport Commission* [1963] 2 QB 650, [1963] 2 All ER 860, CA; *Railways Comr v Quinlan* [1964] AC 1054, [1964] 1 All ER 897, PC.

19 See PARA 41.

## UPDATE

### 39 Standard of care

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 40. Danger beyond carrier's control.

Carriers are bound, so far as the high degree of care imposed upon them<sup>1</sup> can accomplish it, to see that everything under their own control is complete and in proper order; but they are not liable for the acts of persons over whom they have no control<sup>2</sup>. However, if there is any reasonable ground for apprehending danger from any external cause, carriers of passengers are bound to take steps to guard against it<sup>3</sup>; and it may be neglect if they do not warn passengers against dangers of the road, of which they know, but which are not necessarily obvious to the passengers<sup>4</sup>.

<sup>1</sup> See PARA 39.

<sup>2</sup> *Daniel v Metropolitan Rly Co* (1871) LR 5 HL 45; *Wright v Midland Rly Co* (1873) LR 8 Exch 137. See also *East Indian Rly Co v Kalidas Mukerjee* [1901] AC 396, PC; *Latch v Rumner Rly Co* (1858) 27 LJEx 155.

<sup>3</sup> *Daniel v Metropolitan Rly Co* (1871) LR 5 HL 45; *Wyborn v Great Northern Rly Co* (1858) 1 F & F 162; *Radley v London Passenger Transport Board* [1942] 1 All ER 433; *Hale v Hants and Dorset Motor Services Ltd* [1947] 2 All ER 628, CA. Cf *Simon v London General Omnibus Co Ltd* (1907) 23 TLR 463, DC; *Hase v London General Omnibus Co Ltd* (1907) 23 TLR 616, DC; *Trinder v Great Western Rly Co* (1919) 35 TLR 291.

4 *Dudley v Smith* (1808) 1 Camp 167; *John v Bacon* (1870) LR 5 CP 437; *Lewys v Burnett and Dunbar* [1945] 2 All ER 555.

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#### **41. Carrier's duty as to vehicles.**

Carriers of passengers, at common law, are answerable for the soundness and sufficiency of their vehicles, and are liable for any defect which careful and reasonable examination would reveal<sup>1</sup>. In respect of the obligations imposed on a person by or by virtue of any contract for the carriage of passengers for reward, this liability remains unaffected by the legislation concerning occupiers' liability<sup>2</sup>. It seems that failure to comply with particular regulations governing the construction and use of motor vehicles will not give to an injured person a right to claim damages for breach of statutory duty<sup>3</sup>. Periodical testing and examination is a duty<sup>4</sup>, and the fact that a vehicle breaks down is *prima facie* evidence of negligence<sup>5</sup>. If a risk is one against which a transport undertaking could reasonably take precautions, the fact that they are not customarily taken is no excuse<sup>6</sup>.

If they have taken all reasonable care and used the best precautions in known practical use for securing safety, the carriers are not liable for accidents due to latent defects in their vehicles which such precautions would not discover<sup>7</sup>. Thus there is no warranty that a carrier's vehicle is fit for the purpose of carriage<sup>8</sup>. Where a carrier alleges that damage was caused by a latent defect in his vehicle, there is an onus upon him to show that all proper care and skill were used<sup>9</sup>. Where, however, those latent defects, though undiscoverable when the defective part was new, are such as may be discovered later by proper examination when the part is worn, it is negligent to omit such examination<sup>10</sup>.

When a railway authority receives trucks from other undertakings, to be forwarded on its railway, it is not obliged to make so minute an examination of those trucks as of its own, although a reasonable examination should be made, according to opportunity and circumstances, and the existence of a defect which such examination would not reveal is no evidence of negligence<sup>11</sup>.

The carrier's liability toward those who are not passengers carried for reward depends on whether the passenger is classified as a visitor for the purposes of the legislation concerning occupiers' liability<sup>12</sup>. If the passenger is a visitor, such as a gratuitous passenger, liability will be governed by the legislation which, replacing the rules of the common law, provides that an occupier has a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor is safe in using the premises<sup>13</sup> for the purposes for which he is invited or permitted to be there<sup>14</sup>. There is no duty to warn passengers of well-known hazards, such as those presented by the presence of seat belt anchorages to a passenger getting out of a car<sup>15</sup>, but where the passenger is unfamiliar with the car the carrier may be liable for failing to ensure that equipment which is designed to increase safety, such as seat belts, does not become a danger<sup>16</sup>. It is submitted that the duty owed to passengers under the legislation is probably no different from that owed to passengers carried for reward at common law.

Where the passenger is a trespasser, the carrier's liability in respect of the state of the vehicle is governed by the legislation. In certain cases the carrier is under a duty to take such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer injury on the vehicle by reason of the danger concerned<sup>17</sup>. Such a duty will only arise where: (1) the carrier is aware of the danger or has reasonable grounds to believe that it exists; (2) he

knows or has reasonable grounds to believe that the trespasser is in the vicinity of the danger concerned or that the trespasser may come into the vicinity of the danger; and (3) the risk is one against which, in all the circumstances of the case, he may be reasonably expected to offer the trespasser some protection<sup>18</sup>.

1 This statement was approved in *O'Connor v British Transport Commission* [1958] 1 All ER 558 at 563, [1958] 1 WLR 346 at 351, CA, per Sellers LJ (child fell from guard's van but carrier not liable as door handle was not defective or unsuitable for normal use), applying the dicta of Montague Smith J in *Readhead v Midland Rly Co* (1869) LR 4 QB 379 at 393, Ex Ch, defining 'due care' (see PARA 39 note 4), from which it is clear that what the carrier is answerable for is failure to take proper care to ensure soundness and sufficiency. See also *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL; *Israel v Clark* (1803) 4 Esp 259; *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108 (duty to provide competent pilot and safe aircraft); *Philippson v Imperial Airways Ltd* [1939] AC 332, [1939] 1 All ER 761, HL (duty as to airworthiness of aircraft); and cf *Francis v Cockrell* (1870) LR 5 QB 501; *Christie v Griggs* (1809) 2 Camp 79; *Sharp v Grey* (1833) 9 Bing 457; *Bremner v Williams* (1824) 1 C & P 414; *Mayor v Humphries* (1824) 1 C & P 251; *Curtis v Drinkwater* (1831) 2 B & Ad 169; *Hyman v Nye* (1881) 6 QBD 685; *Andrews v Little* (1887) 3 TLR 544, CA (neglect to provide means of getting out of berth). The carrier will be liable if he provides a carriage horse which he knew or ought to have known was not suitable for the required purpose: *White v Steadman* [1913] 3 KB 340.

2 See the Occupiers' Liability Act 1957 s 5(3); and **NEGLIGENCE** vol 78 (2010) PARA 36. The rules laid down in the Occupiers' Liability Act 1957 apply with equal force to the obligations of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft: see s 1(3)(a); and **NEGLIGENCE** vol 78 (2010) PARA 29.

3 *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL. As to the legislation governing the construction and use of motor vehicles see **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARAS 260 et seq, 583 et seq. Cf *Madden v Quirk* [1989] 1 WLR 702.

4 *Bremner v Williams* (1824) 1 C & P 414; *Jones v Page* (1867) 15 LT 619; *Richie v Western Scottish Motor Traction Co Ltd* 1935 SLT 13.

5 *Christie v Griggs* (1809) 2 Camp 79; *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL.

6 *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL (duty to instruct drivers to report heavy blows to tyres).

7 *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch. See also *Ford v London and South Western Rly Co* (1862) 2 F & F 730; *Stokes v Eastern Counties Rly Co* (1860) 2 F & F 691; *Newberry v Bristol Tramways and Carriage Co Ltd* (1912) 107 LT 801, CA; *Ritchie v Western Scottish Motor Traction Co Ltd* 1935 SLT 13.

8 *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA.

9 *Holton v London and South Western Rly Co* (1885) Cab & El 542.

10 *Manser v Eastern Counties Rly Co* (1860) 3 LT 585.

11 *Richardson v Great Eastern Rly Co* (1876) 1 CPD 342, CA.

12 See the Occupiers' Liability Act 1957 s 1(2); and **NEGLIGENCE** vol 78 (2010) PARA 31.

13 See note 2.

14 See the Occupiers' Liability Act 1957 s 2(2); and **NEGLIGENCE** vol 78 (2010) PARA 32.

15 *Donn v Schacter* [1975] RTR 238.

16 *McCready v Miller* [1979] RTR 186, CA.

17 See the Occupiers' Liability Act 1984 s 1(2), (4); and **NEGLIGENCE** vol 78 (2010) PARA 40.

18 See the Occupiers' Liability Act 1984 s 1(3); and **NEGLIGENCE** vol 78 (2010) PARA 40.

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#### **42. Conduct in emergency.**

The actual degree of care required of a carrier of passengers depends upon the circumstances of each case. Thus if there is a very thick fog a duty is imposed upon railways to take all reasonable precautions to protect persons from the dangers besetting all movement<sup>1</sup>. The driver of a vehicle owes a duty not only to his passengers, but also to pedestrians and other traffic, to drive with reasonable care for their safety; when an accident appears imminent he is justified if he takes action to avoid the immediate and probably greater degree of danger, though at the risk of injuring his passengers, and the standard by which his conduct is judged is that of the action which a driver of ordinary sense and prudence would have taken in the circumstances<sup>2</sup>.

Where a passenger is put in peril by the carrier's negligence, it may be reasonable for him to leap from the vehicle; and in such case the carrier will be liable for injuries the passenger receives by leaping, even though in fact he would not have been injured if he had kept his seat<sup>3</sup>. When there is no real danger, and the passenger jumps out under the influence of unreasonable fright, and is injured, the carrier is not liable<sup>4</sup>.

1 *London, Tilbury and Southend Rly Co v Paterson* (1913) 29 TLR 413, HL; *Wagner v West Ham Corpn* (1920) 37 TLR 86, DC; *Schlarb v London and North Eastern Rly Co* [1936] 1 All ER 71.

2 *Sutherland v Glasgow Corpn* 1951 SC (HL) 1; *O'Hara v Central Scottish Motor Traction Co* 1941 SC 363; *Mars v Glasgow Corpn* 1940 SC 202; *Parkinson v Liverpool Corpn* [1950] 1 All ER 367, CA; *Wooller v London Transport Board* [1976] RTR 206n, CA. Cf *Jackson v Tollett* (1817) 2 Stark 37.

3 *Jones v Boyce* (1816) 1 Stark 493.

4 *Kearney v Great Southern and Western Rly Co* (1886) 18 LR Ir 303.

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#### **43. Passenger introducing dangerous article.**

It is negligence on the part of a carrier to allow a passenger to take with him in the part of the vehicle intended for passengers any article which is likely to injure other passengers<sup>1</sup>; but when such a thing is contained in a parcel, and there is nothing in the appearance of the parcel to excite any reasonable suspicion as to its contents, the carrier is not liable for any injury done<sup>2</sup>.

1 *East Indian Rly Co v Kalidas Mukerjee* [1901] AC 396, PC; *Hanson v London Transport Executive* (1952) Times, 14 May. For the restrictions on the carriage of dangerous goods, explosives etc see PARAS 105-107.

2 *East Indian Rly Co v Kalidas Mukerjee* [1901] AC 396, PC.

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#### **44. Duty not dependent on contract.**

The duty of a carrier of passengers to exercise a high degree of care towards them does not necessarily depend upon contract, but is owed to any person lawfully on his vehicle<sup>1</sup>, although it may be modified or negated, so far as the carrier is able, by the terms of the contract<sup>2</sup> or a suitably displayed notice. A carrier is not by law permitted to exclude or restrict, either by a term in the contract of carriage or by a notice, his liability for death or personal injury resulting from negligence<sup>3</sup>.

The inability of a carrier to exclude or restrict his negligence liability to passengers for personal injury or death applies whether or not the carrier operates the vehicle in the course of his business, and any term of a contract or notice which seeks to exclude or restrict the carrier's negligence liability in respect of losses other than personal injury or death is only effective in so far as it satisfies the statutory requirement of reasonableness<sup>4</sup>. Such a requirement will also need to be met in a case where there is a contractual relationship between the carrier and a passenger and the passenger deals either as consumer or on the carrier's written standard terms of business, and the carrier claims, by reference to any contract term, to be entitled to render a contractual performance substantially different from that which was reasonably expected of him or, in respect of his contractual obligation, to render no performance at all<sup>5</sup>. No statutory provision expressly restricts the ability of a carrier to exclude any duty he may owe to trespassing passengers under the Occupiers' Liability Act 1984, but it seems that the duty probably cannot be excluded<sup>6</sup>.

Any contract for the conveyance of a passenger in a public service vehicle will be void in so far as it purports to negative or restrict the liability of any person for the death of, or personal injury to, a passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of such liability<sup>7</sup>.

The carrier's duty towards any person, passenger, intending passenger or other person lawfully upon his premises is that of any other occupier of premises to persons lawfully there<sup>8</sup>. Thus carriers by rail are liable for negligence to persons, not intending to travel, who come to their stations on business<sup>9</sup>, or merely to accompany friends who are about to travel<sup>10</sup> or returning from a journey<sup>11</sup>. On the other hand, where a person goes to a part of the carrier's premises to which the carrier has no reason to expect him to go, and without any express or implied invitation, or if he wrongfully enters the carrier's premises or vehicle, it seems that the carrier owes him only such duty as is owed to a trespasser<sup>12</sup>.

A claim for damages for personal injuries by negligence is a claim in tort<sup>13</sup>.

A carrier is liable for personal injuries caused by negligence to a person travelling with a free pass<sup>14</sup>, to a Post Office employee travelling with the mails<sup>15</sup>, and to a child carried free of charge<sup>16</sup>.

1 *Collett v London and North Western Rly Co* (1851) 16 QB 984; *Hamilton v Caledonian Rly Co* (1857) 19 Dunl 457, Ct of Sess; *Austin v Great Western Rly Co* (1867) LR 2 QB 442; *Foulkes v Metropolitan District Rly Co* (1880) 5 CPD 157, CA; *Taylor v Manchester, Sheffield and Lincolnshire Rly Co* [1895] 1 QB 134, CA; *Grand Trunk Rly Co of Canada v Robinson* [1915] AC 740, PC; *Fosbrooke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108. Cf *Coyle v Great Northern Rly Co of Ireland* (1887) 20 LR Ir 409.

2 *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC. As to the inclusion of special terms as to liability in contracts see PARA 71 et seq.

- 3 See the Unfair Contract Terms Act 1977 s 2(1); and **CONTRACT** vol 9(1) (Reissue) PARA 822 (noting the extended meaning of 'negligence' for this purpose).
- 4 See the Unfair Contract Terms Act 1977 s 2(2); and **CONTRACT** vol 9(1) (Reissue) PARA 822. As to the reasonableness test see s 11; and **CONTRACT** vol 9(1) (Reissue) PARA 831.
- 5 See the Unfair Contract Terms Act 1977 s 3; and **CONTRACT** vol 9(1) (Reissue) PARA 823.
- 6 The Occupiers' Liability Act 1984 contains no provision equivalent to the Occupiers' Liability Act 1957 s 2(1), which allows an occupier, so far as he is free to do so, to extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise (see **NEGLIGENCE** vol 78 (2010) PARA 38).
- 7 See the Public Passenger Vehicles Act 1981 s 29; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1175. As to the meaning of 'public service vehicle' for these purposes see s 1; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1136.
- 8 See PARA 52.
- 9 *Holmes v North Eastern Rly Co* (1871) LR 6 Exch 123.
- 10 *Thatcher v Great Western Rly Co* (1893) 10 TLR 13, CA; *Watkins v Great Western Rly Co* (1877) 37 LT 193. Any provision in a platform ticket which sought to exclude liability for death or personal injury caused by the negligence of the carrier would be of no effect owing to the Unfair Contract Terms Act 1977 s 2(2) (see the text and note 4), while liability for other losses would, in the case of a carrier operating as a business, be subject to a test of reasonableness under s 3 (see the text and note 5).
- 11 *Stowell v Railway Executive* [1949] 2 KB 519, [1949] 2 All ER 193. As to a carrier's duty as to the safety of his premises see PARAS 48, 52.
- 12 *Berringer v Great Eastern Rly Co* (1879) 4 CPD 163; and see PARA 41.
- 13 See *Kelly v Metropolitan Rly Co* [1895] 1 QB 944, CA; *Taylor v Manchester, Sheffield and Lincolnshire Rly Co* [1895] 1 QB 134, CA; cf *Lyles v Southend-on-Sea Corpn* [1905] 2 KB 1, CA; *Tomlinson v Railway Executive* [1953] 1 All ER 1, CA.
- 14 *Great Northern Rly Co v Harrison* (1854) 10 Exch 376.
- 15 *Collett v London and North Western Rly Co* (1851) 16 QB 984.
- 16 *Austin v Great Western Rly Co* (1867) LR 2 QB 442.

## UPDATE

### 44 Duty not dependent on contract

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### 45. Proof of negligence.

Negligence must be proved by the party who alleges it, but where proof is given that something which was under the control of the defendant or his employees has caused damage, which would not have happened in the ordinary course of things if proper care and skill had been used, the doctrine of *res ipsa loquitur* applies, and there is evidence of negligence<sup>1</sup>. Thus there is evidence of negligence if two trains come into collision<sup>2</sup>, or if a train leaves the rails<sup>3</sup> or drives into the buffers<sup>4</sup>, or if a vehicle overturns<sup>5</sup>, stops suddenly<sup>6</sup>, loses a wheel<sup>7</sup>, mounts the footpath<sup>8</sup>, collides with a permanent structure on the footpath<sup>9</sup> or crosses the central reservation<sup>10</sup>, or if a tyre bursts<sup>11</sup>, or if an aircraft crashes on take-off<sup>12</sup>. In such cases, the happening of the accident is not conclusive, but only *prima facie* proof of negligence, so that if the defendant calls no evidence there will be nothing to rebut the inference of negligence and the claimant will be entitled to judgment<sup>13</sup>. The defendant may rebut the inference of negligence by giving evidence as to what actually did happen and leave the claimant to prove negligence on his part<sup>14</sup>. Even where the explanation for the accident is not known, the defendant carrier may rebut the presumption by showing that the accident is one which may reasonably have arisen from a cause for which he is not responsible<sup>15</sup> or if he satisfies the court that he took all reasonable care<sup>16</sup>. The presumption will have no application where it is shown that the accident was due to the wilful act of a stranger<sup>17</sup>, or to a cause beyond the control of the carrier, and which he could not have been reasonably expected to foresee<sup>18</sup>.

1 *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596, Ex Ch; *Gee v Metropolitan Rly Co* (1873) LR 8 QB 161, Ex Ch; *Kearney v London, Brighton and South Coast Rly Co* (1871) LR 6 QB 759, Ex Ch; *Burns v North British Rly Co* 1914 SC 754 (open door of moving train striking person on platform); *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108; *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, PC. See further **NEGLIGENCE** vol 78 (2010) PARA 64 et seq.

2 *Carpue v London and Brighton Rly Co* (1844) 5 QB 747; *Skinner v London, Brighton and South Coast Rly Co* (1850) 5 Exch 787; *Ayles v South Eastern Rly Co* (1868) LR 3 Exch 146.

3 *Dawson v Manchester, Sheffield and Lincolnshire Rly Co* (1862) 5 LT 682.

4 *Burke v Manchester, Sheffield and Lincolnshire Rly Co* (1870) 22 LT 442.

5 *Halliwell v Venables* (1930) 99 LJB 353, CA.

6 *Sutherland v Glasgow Corp* 1951 SC (HL) 1; *Parkinson v Liverpool Corp* [1950] 1 All ER 367, CA; *Wooler v London Transport Board* [1976] RTR 206n, CA.

7 *Lilly v T Tilling Ltd and LCC* (1912) 57 Sol Jo 59, CA.

8 *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL; *Wing v London General Omnibus Co Ltd* [1909] 2 KB 652, CA.

9 *Isaac Walton & Co Ltd v Vanguard Motor Bus Co Ltd* (1908) 72 JP 505, DC; and see *Simon v London General Omnibus Co Ltd* (1907) 23 TLR 463, DC; *Trinder v Great Western Rly Co* (1919) 35 TLR 291.

10 *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, PC.

11 *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL.

12 *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108.

13 *Henderson v Henry E Jenkins & Sons* [1970] AC 282, [1969] 3 All ER 756, HL; *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, PC.

14 *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, PC.

15 *Hanson v Lancashire and Yorkshire Rly Co* (1872) 20 WR 297.

16 *Woods v Duncan, Duncan v Hambrook, Duncan v Cammell Laird & Co Ltd* [1946] AC 401, HL; and see **NEGLIGENCE** vol 78 (2010) PARA 68.

17 *Latch v Rumner Rly Co* (1858) 27 LJEx 155; *McDowall v Great Western Rly Co* [1903] 2 KB 331, CA.

18 *Hart v Lancashire and Yorkshire Rly Co* (1869) 21 LT 261.

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#### **46. Carriage doors and windows.**

Failure to fasten a carriage door<sup>1</sup> securely before a train starts<sup>2</sup>, or the mere fact that a person on a platform has been struck by an open door of a train entering or leaving a station, may be evidence of negligence<sup>3</sup>; but during the course of a long non-stop journey the doors of a train are not continuously under the sole control of the railway authority, so that the mere fact that a door comes open is not in itself prima facie evidence of negligence on the part of that authority<sup>4</sup>. Where a door flies open, proof that a passenger leaned against it is no proof of contributory negligence on his part<sup>5</sup>, but it may not be reasonable for a passenger voluntarily to incur the risk of shutting a door while the train is in motion; and where he chooses to run such risk there may be evidence of contributory negligence on his part<sup>6</sup>. A passenger may be liable in damages for negligence if he opens a carriage door without due regard to the safety of persons on the platform<sup>7</sup>.

A carrier by rail cannot reasonably be expected to examine windows at every stop, and so the fact that a window falls open is no evidence of negligence<sup>8</sup>.

1 See PARA 52.

2 *Gee v Metropolitan Rly Co* (1873) LR 8 QB 161, Ex Ch; *Inglis v London, Midland and Scottish Rly Co* 1941 SC 551; *Brookes v London Passenger Transport Board* [1947] 1 All ER 506.

3 *Toal v North British Rly Co* [1908] AC 352, HL; *Thatcher v Great Western Rly Co* (1893) 10 TLR 13, CA, per Lord Esher MR; *Burns v North British Rly Co* 1914 SC 754; *Hare v British Transport Commission* [1956] 1 All ER 578, [1956] 1 WLR 250.

4 *Easson v London and North Eastern Rly Co* [1944] KB 421, [1944] 2 All ER 425, CA; *O'Connor v British Transport Commission* [1958] 1 All ER 558, [1958] 1 WLR 346, CA; and see PARA 41.

5 *Gee v Metropolitan Rly Co* (1873) LR 8 QB 161; *Richards v Great Eastern Rly Co* (1873) 28 LT 711. Cf *Warbuton v Midland Rly Co* (1870) 21 LT 835, which does not agree with the decision in *Gee v Metropolitan Rly Co* as to leaning against the door. It is submitted that *Gee v Metropolitan Rly Co* contains a correct statement of the law, and it was cited with approval in *Grant v Sun Shipping Co Ltd* [1948] AC 549, [1948] 2 All ER 238, HL (where it was said that 'The courts have long recognised that in some circumstances an omission to make sure for oneself that others have done what they ought to have done is not negligent': see at 567 and 247 per Lord du Parc).

6 *Adams v Lancashire and Yorkshire Rly Co* (1869) LR 4 CP 739.

7 The duty of care is owed equally to members of the railway staff and members of the public: *Booker v Wenborn* [1962] 1 All ER 431, [1962] 1 WLR 162, CA.

8 *Murray v Metropolitan District Rly Co* (1873) 27 LT 762.

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#### 47. Slamming carriage doors.

The mere fact that a railway employee shuts the door<sup>1</sup> of a carriage with violence, or without warning, is no evidence in itself of negligence, and when a passenger is seated in a train, or is completely within a carriage, and the door is banged and traps his hand or otherwise injures him, the passenger's own negligence is as a rule the cause of his injury, and the railway authority is not liable<sup>2</sup>. If a door is slammed and injures a passenger while he is in the act of leaving<sup>3</sup>, or in the act of entering and before he is completely inside the carriage, there is evidence of negligence<sup>4</sup>, as there is if a train starts so suddenly as to throw a passenger entering a carriage off his feet so that his hand is caught by the sliding door of the carriage set in motion by the starting of the train and he is injured<sup>5</sup>.

1 See also PARA 46.

2 *Metropolitan Rly Co v Jackson* (1877) 3 App Cas 193, HL; *Drury v North Eastern Rly Co* [1901] 2 KB 322; *Benson v Furness Rly Co* (1903) 88 LT 268; *Richardson v Metropolitan Rly Co* (1868) LR 3 CP 374n; *Bullner v London, Chatham and Dover Rly Co* (1885) 1 TLR 534; *Maddox v London, Chatham and Dover Rly Co* (1878) 38 LT 458. But see *Jones v Great Western Rly Co* (1885) 1 TLR 333, in which the court refused to interfere with a verdict for the claimant where he had been some minutes in a carriage when the door had been banged and hurt him; Mathew J said that each of these cases must depend upon its circumstances, and that it is difficult to decide any one upon the decision in another.

3 *Bird v Railway Executive* (1949) 93 Sol Jo 357, CA.

4 *Coleman v South Eastern Rly Co* (1866) 4 H & C 699; *Fordham v London, Brighton and South Coast Rly Co* (1868) LR 3 CP 368; affd (1869) 17 WR 896, Ex Ch.

5 *Metropolitan Rly Co v Delaney* (1921) 90 LJBK 721, HL.

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#### 48. Entering or alighting from trains.

The platform of a station must not only be safe in itself<sup>1</sup>, but it must also be safe with reference to the trains which use it, so that passengers can alight without danger<sup>2</sup>.

As carriers are bound to exercise all due care for the safety of their passengers, when a passenger is injured when entering or alighting from a train, it is a question of fact whether or not there was negligence on the carrier's part<sup>3</sup>, and whether or not there was contributory negligence on the claimant's part<sup>4</sup>. The fact that a train is stopped short of or overshoots a platform is not of itself evidence of negligence<sup>5</sup>. A railway authority, however, is bound to provide proper means of entering and alighting from a train<sup>6</sup>, and if a train stops where there are no such means it becomes a material question whether the authority has invited passengers to alight from the train at that place<sup>7</sup>. Calling out the name of a station is not necessarily an invitation to alight<sup>8</sup>; but where the name of the station is called, and the train has stopped, and a reasonable interval has elapsed without any warning to passengers, there is evidence of such an invitation<sup>9</sup>. If, seeing the danger of alighting where there is no platform, or in spite of warning, a passenger chooses to alight, the railway authority is not liable if he is injured<sup>10</sup>. In many of these cases it is also a material question whether the state of the light imposed a duty to give passengers warning of danger<sup>11</sup>.

There is evidence of negligence when a train runs into stationary buffers<sup>12</sup>, when it moves or jerks while a passenger is in the act of entering or alighting<sup>13</sup>, or when it is stopped in a violent and unusual manner<sup>14</sup>.

A passenger boarding or alighting from a train is under a duty of care to avoid injury to persons, whether members of the public or the railway staff, through opening a carriage door<sup>15</sup>.

1 *Stowell v Railway Executive* [1949] 2 KB 519, [1949] 2 All ER 193; *Protheroe v Railway Executive* [1951] 1 KB 376, [1950] 2 All ER 1093; *Tomlinson v Railway Executive* [1953] 1 All ER 1, CA (snow on platform; no failure to take reasonable care). For the duty of carriers as to the safety of their premises see further PARA 52.

2 *Foulkes v Metropolitan District Rly Co* (1880) 5 CPD 157, CA; *Manning v London and North Western Rly Co* (1907) 23 TLR 222, CA.

3 *Sharpe v Southern Rly Co* [1925] 2 KB 311, CA. See also *Bridges v North London Rly Co* (1874) LR 7 HL 213; *Rose v North Eastern Rly Co* (1876) 2 ExD 248, CA; *Robson v North Eastern Rly Co* (1876) 2 QBD 85, CA; *London, Tilbury and Southend Rly Co v Glasscock* (1903) 19 TLR 305, HL, distinguished and explained in *Sharpe v Southern Rly Co*.

4 *Sharpe v Southern Rly Co* [1925] 2 KB 311, CA; *Foy v London, Brighton and South Coast Rly Co* (1865) 18 CBNS 225.

5 *Anthony v Midland Rly Co* (1908) 100 LT 117; *Bridges v North London Rly Co* (1874) LR 7 HL 213; *Robson v North Eastern Rly Co* (1876) 2 QBD 85, CA; *Weller v London, Brighton and South Coast Rly Co* (1874) LR 9 CP 126.

6 *Foulkes v Metropolitan District Rly Co* (1880) 5 CPD 157, CA.

7 *Bridges v North London Rly Co* (1874) LR 7 HL 213; *Robson v North Eastern Rly Co* (1876) 2 QBD 85, CA; *Cockle v London and South Eastern Rly Co* (1872) LR 7 CP 321, Ex Ch.

8 *Lewis v London, Chatham and Dover Rly Co* (1873) LR 9 QB 66; *Plant v Midland Rly Co* (1870) 21 LT 836; *Bridges v North London Rly Co* (1874) LR 7 HL 213; *London and North-Western Rly Co v Hellawell* (1872) 26 LT 557.

9 *Bridges v North London Rly Co* (1874) LR 7 HL 213; *Robson v North Eastern Rly Co* (1876) 2 QBD 85, CA; *Cockle v London and South Eastern Rly Co* (1872) LR 7 CP 321, Ex Ch; *Whittaker v Manchester, Sheffield and Lincolnshire Rly Co* (1870) 22 LT 545; *Thompson v Belfast, Holywood and Bangor Rly Co* (1871) IR 5 CL 517; *Nicholls v Great Southern and Western Rly Co* (1873) IR 7 CL 40; *Weller v London, Brighton and South Coast Rly Co* (1874) LR 9 CP 126; *Gill v Great Eastern Rly Co* (1872) 26 LT 945, Ex Ch. But see *Siner v Great Western Rly Co* (1869) LR 4 Exch 117, considered in *Robson v North Eastern Rly Co*. It is not enough in these circumstances for a railway employee to have given warning by calling out 'keep your seats', if the warning was not heard: *Rose v North Eastern Rly Co* (1876) 2 ExD 248, CA.

10 *Harrold v Great Western Rly Co* (1866) 14 LT 440; *Lewis v London, Chatham and Dover Rly Co* (1873) LR 9 QB 66; *Plant v Midland Rly Co* (1870) 21 LT 836; *Siner v Great Western Rly Co* (1869) LR 4 Exch 117; *Owen v Great Western Rly Co* (1877) 46 LJQB 486.

11 *Praeger v Bristol and Exeter Rly Co* (1871) 24 LT 105, Ex Ch. See also *Harrold v Great Western Rly Co* (1866) 14 LT 440; *Plant v Midland Rly Co* (1870) 21 LT 836; *Whittaker v Manchester, Sheffield and Lincolnshire Rly Co* (1870) 22 LT 545; *Gill v Great Eastern Rly Co* (1872) 26 LT 945, Ex Ch.

12 *Burke v Manchester, Sheffield and Lincolnshire Rly Co* (1870) 22 LT 442.

13 *Metropolitan Rly Co v Delaney* (1921) 90 LJB 721, HL; *London and North Western Rly Co v Hellawell* (1872) 26 LT 557; *Stockdale v Lancashire and Yorkshire Rly Co* (1863) 8 LT 289. See *Goldberg v Glasgow and South Western Rly Co* 1907 SC 1035.

14 *Angus v London, Tilbury and Southend Rly Co* (1906) 22 TLR 222, CA. Cf *Parkinson v Liverpool Corp* [1950] 1 All ER 367, CA; *Sutherland v Glasgow Corp* 1951 SC (HL) 1.

15 *Booker v Wenborn* [1962] 1 All ER 431, [1962] 1 WLR 162, CA.

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#### **49. Entering or alighting from other vehicles.**

The same principles apply to the carriage of passengers travelling by road as apply to railway transport. Thus the conductor of a passenger vehicle must take reasonable care that the vehicle does not start whilst passengers are still entering or alighting<sup>1</sup>, although he is entitled to assume that passengers will not alight or enter whilst the vehicle is in motion<sup>2</sup>.

A bus undertaking may become liable to passengers for personal injuries caused by the absence of the conductor from the platform<sup>3</sup>, and the starting signal being given in his absence by another passenger<sup>4</sup>, or failing to prevent the bus starting before a passenger, invited to alight, has alighted<sup>5</sup>. However, provided that passengers appear to be able-bodied persons and there is means of securing themselves by the use of handrails, there is no duty on a driver to wait until all the passengers have taken their seats before moving away from a bus stop<sup>6</sup>, and a passenger may be guilty of contributory negligence by standing on the step or platform of the vehicle or by alighting when it is in motion<sup>7</sup>.

1 *Prescott v Lancashire United Transport Co Ltd* [1953] 1 All ER 288, [1953] 1 WLR 232, CA; *Davies v Liverpool Corpn* [1949] 2 All ER 175, CA; *Mottram v South Lancashire Transport Co* [1942] 2 All ER 452, CA. See also *Brien v Bennett* (1839) 8 C & P 724; *Wagner v West Ham Corpn* (1920) 37 TLR 86, DC.

2 *Askew v Bowtell* [1947] 1 All ER 883. For the statutory obligations of drivers and conductors of public service vehicles see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1172-1176.

3 *Hall v London Tramways Co Ltd* (1896) 12 TLR 611, CA; *Watt v Glasgow Corpn* 1919 SC 300; *Gray v Glasgow Corpn* 1966 SC 967; *Mottram v South Lancashire Transport Co* [1942] 2 All ER 452, CA; *Prescott v Lancashire United Transport Co Ltd* [1953] 1 All ER 288, [1953] 1 WLR 232, CA.

4 *Wagner v West Ham Corpn* (1920) 37 TLR 86; *Steele v Belfast Corpn* [1920] 2 IR 125, CA; *Davies v Liverpool Corpn* [1949] 2 All ER 175, CA.

5 *Prescott v Lancashire United Transport Co Ltd* [1953] 1 All ER 288, [1953] 1 WLR 232, CA, following *Mottram v South Lancashire Transport Co* [1942] 2 All ER 452, CA.

6 *Fletcher v United Counties Omnibus Co Ltd* [1998] PIQR P154, CA.

7 *Hall v London Tramways Co Ltd* (1896) 12 TLR 611, CA; *M'Sherry v Glasgow Corpn* 1917 SC 156; *Watt v Glasgow Corpn* 1919 SC 300; *Buchanan v Glasgow Corpn* 1921 SC 658; *Gray v Glasgow Corpn* 1966 SC 967; *Caldwell v Glasgow Corpn* 1936 SC 490; *Cullen v Dublin United Tramways Co (1896) Ltd* [1920] 2 IR 63, CA; *Gibson v London Transport Executive* (1953) Times, 14 January. Cf *Parkinson v Liverpool Corpn* [1950] 1 All ER 367, CA; *Fletcher v United Counties Omnibus Co Ltd* [1998] PIQR P154, CA (stopping in emergency; no negligence by driver); *Wooller v London Transport Board* [1976] RTR 206n, CA.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(2) COMMON CARRIERS/(iii) Common Carriers of Passengers and Luggage/B. GENERAL DUTY OF CARE TO PASSENGERS/50. Overcrowding.

#### **50. Overcrowding.**

It is the duty of a carrier of passengers to provide reasonable accommodation for them<sup>1</sup>. It is a breach of that duty to allow a carriage to be overcrowded, and damages which are the direct result of that overcrowding may be recovered<sup>2</sup>; but it is not a direct result of overcrowding that

a passenger should be robbed or assaulted by other passengers, and in that event a carrier is not liable in damages<sup>3</sup>. Where injury results from packages carried by passengers in a crowded train, the railway authority will be liable for negligence if, on balance, the risk of injury resulting is less than the inconvenience caused to the public by refusing to permit the carrying of the packages<sup>4</sup>.

Where a railway authority has reason to expect a crowd at a station, it should make reasonable arrangements to control the movements of the passengers, so as to prevent them from involuntarily injuring one another<sup>5</sup>; but it is not bound to provide against voluntary disorder, or to protect passengers from assaults by their fellow-passengers<sup>6</sup>.

Where standing passengers are carried on a vehicle the degree of care to be exercised by the driver depends upon the situation of those passengers and the particular facts of the case<sup>7</sup>.

1 *Jones v Great Northern Rly Co* (1918) 34 TLR 467. The number of passengers that may be carried in public service vehicles is statutorily prescribed: see the Public Passenger Vehicles Act 1981 s 26; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1174.

2 *Metropolitan Rly Co v Jackson* (1877) 3 App Cas 193, HL; *Pounder v North Eastern Rly Co* [1892] 1 QB 385. See *Israel v Clark* (1803) 4 Esp 259; *Machen v Lancashire and Yorkshire Rly Co* (1918) 88 LJB 371, CA.

3 *Pounder v North Eastern Rly Co* [1892] 1 QB 385; *Cobb v Great Western Rly Co* [1894] AC 419, HL.

4 *Hanson v London Transport Executive* (1952) Times, 14 May.

5 *Hogan v South Eastern Rly Co* (1873) 28 LT 271. See also *McKinstry v Railway Executive* (1952) 103 Ljo 107.

6 *Cannon v Midland Great Western Rly Co* (1879) 6 LR Ir 199; *Pounder v North Eastern Rly Co* [1892] 1 QB 385.

7 *Western Scottish Motor Traction Co Ltd v Fernie (or Allam)* [1943] 2 All ER 742, HL, distinguished in *Wragg v Grout and London Transport Board* (1966) 116 L Jo 752, CA.

## UPDATE

### 50 Overcrowding

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### 51. Drunken passengers.

It is not negligence for a carrier to admit to his vehicle or premises a person who is obviously drunk; but if he chooses to do so, it is his duty to protect other passengers from annoyance or injury by the drunken person<sup>1</sup>. With regard to the drunken person himself, however, there is no

duty on the carrier to care for him after he has reached his destination<sup>2</sup>. There is a statutory prohibition against drunkenness on aircraft<sup>3</sup>.

1 *Adderley v Great Northern Rly Co* [1905] 2 IR 378.

2 *M'Cormick v Caledonian Rly Co* (1904) 6 F 362, Ct of Sess.

3 See the Air Navigation Order 2005, SI 2005/1970, art 75; and **AIR LAW** vol 2 (2008) PARA 525.

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## 52. Duty as to premises.

A carrier owes to all visitors<sup>1</sup> to his premises<sup>2</sup> or to any vessel, vehicle or aircraft under his control<sup>3</sup>, whether passengers or not, the 'common duty of care'<sup>4</sup> imposed by statute upon all occupiers<sup>5</sup> save in so far as he is free to<sup>6</sup>, and does, extend, restrict, modify or exclude it by agreement or otherwise<sup>7</sup>. A carrier will only owe a duty to persons other than his visitors, including trespassers, where: (1) he is aware of a danger or has reasonable grounds to believe that one exists; (2) he knows or has reasonable grounds to believe that the person is in the vicinity of the danger concerned or that he may come into the vicinity of the danger; and (3) the risk is one against which, in all the circumstances of the case, the carrier may be reasonably expected to offer the person some protection<sup>8</sup>. The duty then owed is a duty to take such care as is reasonable in all the circumstances of the case to see that the person does not suffer injury on the premises by reason of the danger concerned<sup>9</sup>.

1 The persons who at common law would have been invitees or licensees: see the Occupiers' Liability Act 1957 s 1(2); and **NEGLIGENCE** vol 78 (2010) PARA 31.

2 See the Occupiers' Liability Act 1957 s 1(2); and **NEGLIGENCE** vol 78 (2010) PARA 31.

3 See the Occupiers' Liability Act 1957 s 1(3)(a); and **NEGLIGENCE** vol 78 (2010) PARA 29.

4 The 'common duty of care' is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises, vessel, vehicle, or aircraft for the purposes for which he is invited or permitted by the carrier to be there: see the Occupiers' Liability Act 1957 s 2(2); and **NEGLIGENCE** vol 78 (2010) PARA 32.

5 See the Occupiers' Liability Act 1957 s 1(1)-(3); and **NEGLIGENCE** vol 78 (2010) PARA 29 et seq.

6 A carrier is not able to exclude or restrict his liability for death or personal injuries arising under the Occupiers' Liability Act 1957: see the Unfair Contract Terms Act 1977 s 2(1); and **CONTRACT** vol 9(1) (Reissue) PARA 822. His liability in respect of other loss or damage arising under the Occupiers' Liability Act 1957 can only be excluded or restricted in so far as the term or notice excluding or restricting liability is reasonable: see the Unfair Contract Terms Act 1977 s 2(2); and **CONTRACT** vol 9(1) (Reissue) PARA 822. See also PARA 44.

7 See the Occupiers' Liability Act 1957 s 2(1); and **NEGLIGENCE** vol 78 (2010) PARA 38.

8 See the Occupiers' Liability Act 1984 s 1(3); and **NEGLIGENCE** vol 78 (2010) PARA 40.

9 See the Occupiers' Liability Act 1984 s 1(4); and **NEGLIGENCE** vol 78 (2010) PARA 40.

## UPDATE

### 52 Duty as to premises

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(2) COMMON CARRIERS/(iii) Common Carriers of Passengers and Luggage/C. PASSENGERS' LUGGAGE/53. What is passengers' luggage.

### **C. PASSENGERS' LUGGAGE**

#### **53. What is passengers' luggage.**

Goods do not come within the description of ordinary personal luggage unless they are for the passenger's personal use and are of a kind usually taken by a passenger while away from home<sup>1</sup>. Personal articles in the exclusive possession of the passenger, such as a watch, are not luggage<sup>2</sup>.

1 *Britten v Great Northern Rly Co* [1899] 1 QB 243. See also *Macrow v Great Western Rly Co* (1871) LR 6 QB 612. The following have been held not to be personal luggage: household goods (*Macrow v Great Western Rly Co*); a child's rocking-horse (*Hudston v Midland Rly Co* (1869) LR 4 QB 366); a bicycle (*Britten v Great Northern Rly Co*); a bathchair (*Cusack v London and North Western Rly Co* (1891) 7 TLR 452); an artist's sketches (*Myrton v Midland Rly Co* (1859) 4 H & N 615); documents required in litigation (*Phelps v London and North Western Rly Co* (1865) 19 CBNS 321); theatrical clothing and properties (*Gilbey v Great Northern Rly Co* (1920) 36 TLR 562); a cello (*Great Western Rly Co v Evans* (1921) 38 TLR 166); a typewriter (*Hastie v Great Eastern Rly Co* (1911) 46 LJo 507; but quare whether the decision would be the same today). An officer's revolver, ear defenders, flash lamp and binoculars were held to be personal luggage in *Jenkyns v Southampton etc Steam Packet Co* [1919] 2 KB 135, CA.

2 *Smitton v Orient Steam Navigation Co Ltd* (1907) 96 LT 848.

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#### **54. Duty to carry.**

From the earliest times, common carriers have held themselves out as willing to carry a reasonable amount of ordinary personal luggage<sup>1</sup> without any charge additional to that paid for the carriage of the passenger<sup>2</sup>. Common carriers were therefore obliged to accept such luggage if they had room<sup>3</sup>. The amount of such luggage to be carried free of charge is commonly fixed by notice from the carrier or by express contract<sup>4</sup>. The object of fixing the amount of luggage which may be carried by land free of charge is to secure to the traveller the conveyance of a reasonable amount of luggage and to protect the carrier in case of disputes on amounts, as well as entitling him to proper remuneration for excess luggage<sup>5</sup>. In addition to fixing the amount of luggage which may be carried free of charge, the kind of luggage which may be so carried is in practice limited to ordinary or personal luggage<sup>6</sup>.

In the absence of contract a private carrier is under no liability to accept any passengers' luggage for carriage; but such carriers invariably do so and an obligation to do so will readily be

implied from the circumstances, such as the course of business and the provision of facilities for luggage<sup>7</sup>.

1 See PARA 53.

2 *Macrow v Great Western Rly Co* (1871) LR 6 QB 612; *Caswell v Cheshire Lines Committee* [1907] 2 KB 499. In *Brooke v Pickwick* (1827) 4 Bing 218 at 322, Best CJ regarded the liability of a coachman towards passengers' luggage as that of an insurer. In *Middleton v Fowler* (1698) 1 Salk 282 (stage-coach) and *Upshare v Aidee* (1697) 1 Com 25, Holt CJ held that where no charge was made for the carriage of luggage, the carrier's liability was that of a gratuitous bailee and not that of a common carrier; but Mellish LJ in *Cohen v South Eastern Rly Co* (1877) 2 ExD 253 at 258, CA, considered that these decisions were to be explained by the circumstances of the time.

3 See PARA 7.

4 *Macrow v Great Western Rly Co* (1871) LR 6 QB 612.

5 *Macrow v Great Western Rly Co* (1871) LR 6 QB 612.

6 For decisions on what is included in personal or ordinary luggage see PARA 53.

7 Cf *Rosenthal v LCC* (1924) 131 LT 563.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(2) COMMON CARRIERS/(iii) Common Carriers of Passengers and Luggage/C. PASSENGERS' LUGGAGE/55. Carrier's liability.

## 55. Carrier's liability.

Whether a carrier accepts passengers' luggage as a common carrier or a private carrier depends upon whether he holds himself out as a common carrier of the luggage, and the absence of facilities for the carriage of luggage will afford evidence that he is not a common carrier of it<sup>1</sup>. Whether he carries as a common or a private carrier, he must provide reasonable facilities for the accommodation of luggage which he undertakes to carry<sup>2</sup>.

Unless the passenger himself takes personal charge of his luggage, the liability of a common carrier in respect of articles carried as passengers' luggage is that of a carrier of goods as distinguished from that of a carrier of passengers<sup>3</sup>, that is to say, as an insurer of their safety. A common carrier is liable for the safe custody of hand luggage retained by the passenger, unless he proves that the passenger took the luggage under his sole charge and that its loss was caused wholly or partly by the passenger's negligence<sup>4</sup>.

The carrier becomes liable for the safe custody of passengers' luggage as soon as his employee or agent receives it for transit<sup>5</sup>; but the carrier's employees have no implied authority to receive luggage except within a reasonable time before the journey is due to begin<sup>6</sup>. A carrier's liability as common carrier continues until he hands the luggage over to the passenger<sup>7</sup>, who must be allowed a reasonable time in which to collect it on the termination of the journey<sup>8</sup>, after which time the carrier is liable as a warehouseman only<sup>9</sup>.

Any term of the contract of carriage by which the carrier purports to modify, limit or negative his liability for loss of or damage to passenger's luggage may be subject to a statutory test of reasonableness<sup>10</sup>.

A passenger whose luggage is damaged owing to the misfeasance of the carrier's employees may sue in tort independently of contract or breach of duty as common carrier<sup>11</sup>.

1 *Rosenthal v LCC* (1924) 131 LT 563; and see PARA 3.

- 2 *Upperton v Union-Castle Mail Steamship Co Ltd* (1902) 19 TLR 123; *affd* (1903) 89 LT 289, CA.
- 3 *Macrow v Great Western Rly Co* (1871) LR 6 QB 612; *Casswell v Cheshire Lines Committee* [1907] 2 KB 499.
- 4 *Vosper v Great Western Rly Co* [1928] 1 KB 340; *Richards v London, Brighton and South Coast Rly Co* (1849) 7 CB 839; *Le Conteur v London and South Western Rly Co* (1865) LR 1 QB 54; *Talley v Great Western Rly Co* (1870) LR 6 CP 44. See also *Great Western Rly Co v Bunch* (1888) 13 App Cas 31, HL.
- 5 *Great Western Rly Co v Bunch* (1888) 13 App Cas 31, HL; *Jenkyns v Southampton etc Steam Packet Co* [1919] 2 KB 135, CA.
- 6 *Great Western Rly Co v Bunch* (1888) 13 App Cas 31, HL; *Steers v Midland Rly Co* (1920) 36 TLR 703.
- 7 *Butcher v London and South Western Rly Co* (1855) 16 CB 13; *Agrell v London and North Western Rly Co* (1876) 34 LT 134n; *Parker v London, Midland and Scottish Rly Co* 1930 SC 822.
- 8 *Richards v London, Brighton and South Coast Rly Co* (1849) 7 CB 839; *Patscheider v Great Western Rly Co* (1878) 3 ExD 153.
- 9 *Hodkinson v London and North Western Rly Co* (1884) 14 QBD 228; *Firth v North Eastern Rly Co* (1888) 36 WR 467.
- 10 See PARA 80.
- 11 *Meux v Great Eastern Rly Co* [1895] 2 QB 387, CA; *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA (the burden of proving that the goods were lost without fault rests upon the carrier). As to whether a claim against a carrier arises in contract, tort or bailment see PARA 765.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(3) PRIVATE CARRIERS/(i) Private Carriers Generally/56. Characteristics of private carriers.

### **(3) PRIVATE CARRIERS**

#### **(i) Private Carriers Generally**

##### **56. Characteristics of private carriers.**

A private carrier is a person who, in the course of business or occasionally, undertakes the carriage of passengers or of other people's goods, but who does not hold himself out as exercising the public employment of a common carrier. A carrier who, while inviting all and sundry to employ him, reserves to himself the right to accept or reject their offers of goods for carriage, irrespective of whether his vehicles are full or empty, and who is guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements, is a private carrier<sup>1</sup>.

It is most unlikely that a carrier of goods by land or inland waterway<sup>2</sup> would today be held to be a common carrier<sup>3</sup>; such carriers must therefore be regarded as private carriers, save in exceptional circumstances. Persons carrying on the business of carrying passengers will more readily be held to be common carriers<sup>4</sup>, and it is submitted that carriers who operate passenger services under the authority of the registration of local services may well be treated as common carriers<sup>5</sup>.

The British Waterways Board<sup>6</sup>, any independent railway undertaking<sup>7</sup> or independent inland waterway undertaking<sup>8</sup>, Transport for London<sup>9</sup>, and any wholly-owned subsidiaries of any of those bodies, is not to be regarded as a common carrier by rail or inland waterway<sup>10</sup>, and is a private carrier in respect of these activities.

- 1 *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210; and see *Nugent v Smith* (1875) 1 CPD 19 (revsd (1876) 1 CPD 423, CA).
- 2 As to the position of carriers by air, by sea, and by road and rail see PARAS 121-204, 205-649, 650-751 respectively.
- 3 See PARA 5.
- 4 See PARA 4.
- 5 Cf *Clarke v West Ham Corp*n [1909] 2 KB 858, CA, where it was said to be arguable that obtaining a road service licence involves the taking on of a public trust to carry in accordance with the terms of the licence. Road service licences were abolished by the Transport Act 1985 s 1. As to local service licences see the Transport Act 1985 ss 1, 6-9, 34-46; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1178-1181, 1246.
- 6 As to the British Waterways Board see **WATER AND WATERWAYS** vol 101 (2009) PARA 725 et seq.
- 7 As to the meaning of 'independent railway undertaking' and 'undertaking' see PARA 5 note 4.
- 8 As to the meaning of 'independent inland waterway undertaking' see PARA 5 note 5.
- 9 As to Transport for London and its subsidiaries see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 269 et seq.
- 10 See the Transport Act 1962 s 43(6) (amended by the Railways Act 2005 Sch 12 para 2(c)); the Transport Act 1962 s 52(2); the Transport Act 1968 s 51(4); and the Greater London Authority Act 1999 Sch 11 para 31(1). See also **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1) (Reissue) PARAS 125, 418.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(3) PRIVATE CARRIERS/(i) Private Carriers Generally/57. Obligations of private carrier.

## 57. Obligations of private carrier.

A private carrier of goods is a bailee<sup>1</sup>. As such, his obligation at common law is to take reasonable care of the goods and to refrain from converting them<sup>2</sup>. The obligation of a private carrier of passengers is also to exercise reasonable care<sup>3</sup>. In the absence of any stricter contractual undertaking, a private carrier is liable only where damage, loss or delay results either from negligence<sup>4</sup> or from intentional acts inconsistent with the rights of the consignor or other bailor<sup>5</sup> in the goods<sup>6</sup>, on the part of the carrier or those for whom he is responsible<sup>7</sup>. However, the fact of loss, damage or non-delivery is prima facie evidence of negligence on the part of the carrier or his employees or delegates, and the onus of proving that the misadventure occurred without negligence on his part is on the private carrier as bailee<sup>8</sup>.

Many private carriers are willing to carry subject only to conditions of carriage which exclude or limit their liability for loss, damage or delay<sup>9</sup>. Whether such conditions have been incorporated as terms of a particular contract of carriage is a question to be determined in the light of the facts and circumstances of each case<sup>10</sup>.

1 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 841, [1976] 3 All ER 129, HL. As to the identity of the carrier's bailor see PARA 756.

2 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA (bailment for reward); *East West Corp'n v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. However, similar principles apply to gratuitous bailments: see *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA (where it was held that to put a particular bailment into a particular compartment, such as gratuitous bailment or bailment for reward, might be misleading since the test

was whether a sufficient degree of care had been exercised in all the circumstances of the particular case). See also *AVX Ltd v EGM Solders Ltd* (1982) Times, 7 July.

3 In respect of passengers, the obligation of a private carrier is similar to that of a common carrier: see PARA 38.

4 *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA; *Richardson v North Eastern Rly Co* (1872) LR 7 CP 75.

5 As to the identity of the bailor under a contract of carriage see PARA 756.

6 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; and see *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA. As to the insurer's liability which may attach to a private carrier following a deviation see PARA 64.

7 As to a private carrier's liability for loss of goods stolen by, or through the complicity of, his employee see *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Moukattaf v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396; *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA; *Transmotors Ltd v Robertson, Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224; *Richmond Metal Co Ltd v J Coales & Son Ltd* [1970] 1 Lloyd's Rep 423; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570; cf *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535. See further PARA 61.

8 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Reeve v Palmer* (1858) 5 CBNS 84; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Coldman v Hill* [1919] 1 KB 443, CA; *Owners of SS Ruapehu v R and H Green and Silley Weir Ltd* [1927] AC 523, HL (affg 21 Ll L Rep 119, CA); *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432; *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534, [1936] 3 All ER 696, CA; *WLR Traders (London) Ltd v British and Northern Shipping Agency Ltd and I Leftley Ltd* [1955] 1 Lloyd's Rep 554; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Hunt & Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617, [1962] 1 All ER 111, CA; *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA; *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

9 For statutory control on contract terms or notices which purport to exclude or restrict liability for negligence and breach of contract see the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARAS 797-835.

10 See PARA 71 et seq.

## UPDATE

### 57-60 Obligations of private carrier ... Duty of care: gratuitous carriage

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## (ii) Private Carriers of Goods

### 58. Duty to carry.

A private carrier<sup>1</sup> (unlike a common carrier<sup>2</sup>) owes no obligation to carry goods merely by virtue of the fact that they have been tendered to him for carriage<sup>3</sup>. His obligation to carry arises only from a contract to carry the particular goods<sup>4</sup> or perhaps from his acceptance of the possession of goods under a gratuitous bailment by way of carriage<sup>5</sup>. In cases where a contract to carry is established, the precise nature of the duty to carry will be determined by the terms of that contract<sup>6</sup>. The contract will generally stipulate the time and place of delivery, any special facilities to be employed by the carrier and any special restrictions on his treatment of the goods. Such obligations will (in common with contractual undertakings generally) often be strict and the carrier's liability for failure to comply will be independent of any exercise of reasonable care on his part<sup>7</sup>. Where a contract of carriage is silent on these matters, appropriate terms may be implied<sup>8</sup>.

1 As to who are private carriers see PARA 56.

2 As to who are common carriers see PARA 3.

3 Nevertheless, it is unlawful for him to discriminate against a person on the ground of sex, colour, race or ethnic or national origin, religion or belief, or sexual orientation, or against a disabled person, in connection with the provision of facilities for transport or travel if he is concerned with the provision of those facilities to the public or a section of the public: see the Sex Discrimination Act 1975 s 29; the Race Relations Act 1976 s 20; the Disability Discrimination Act 1995 s 20; the Equality Act 2006 s 46; the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, reg 4; and **DISCRIMINATION** vol 13 (Reissue) PARAS 382, 461, 582, 693, 753.

4 Much contemporary carriage of goods by road is undertaken under standard conditions of carriage: as to the statutory control of contractual terms and notices purporting to exclude or restrict liability for negligence or breach of contract see the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

5 *Oriental Bank Corpn v R* (1867) 6 NSWSCR 122. This proposition is doubtful because the gratuitous carrier's promise to carry may be unenforceable (even where he has taken possession) for want of consideration: see generally **CONTRACT** vol 9(1) (Reissue) PARA 727 et seq. The question may depend on whether the rule governing special promises superimposed on gratuitous bailment is that governing contractual promises generally (in which event consideration is necessary) or an independent rule peculiar to bailments (in which event consideration may not be required). Cf *O'Sullivan v Williams* [1992] 3 All ER 385, CA; *Parastatidis v Kotaridis* [1978] VR 449. As to the enforcement of gratuitous promises generally see *General Accident Fire and Life Assurance Corpn Ltd v Tanter, The Zephyr* [1985] 2 Lloyd's Rep 529, CA; *Bloomfield v Albany Roofing Services Ltd* (31 July 1987, unreported), CA.

6 See PARA 71 et seq.

7 *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL; *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA. But cf, as to time of delivery, PARA 63.

8 See eg the Supply of Goods and Services Act 1982 s 13 (performance of service with reasonable care and skill), s 14 (performance of service within a reasonable time); and PARAS 59, 63.

## UPDATE

### 57-60 Obligations of private carrier ... Duty of care: gratuitous carriage

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

### 58 Duty to carry

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(3) PRIVATE CARRIERS/ (ii) Private Carriers of Goods/59. Duty of care: carriage for reward.

### 59. Duty of care: carriage for reward.

A private carrier who undertakes the carriage of goods for reward becomes a bailee of them and has the ordinary responsibility of a bailee for goods entrusted to him<sup>1</sup>. The private carrier's obligation is to take reasonable care of the goods while they are in his possession<sup>2</sup> and to refrain from converting them<sup>3</sup> or from damaging them by any other intentional act. By statute, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill<sup>4</sup>. The appropriate measure of care in a given case will depend on all the circumstances, including the nature, value, attractiveness, portability and disposability of the goods, the agreed or known conditions in which they are to be carried, any special demands, assurances or undertakings made by either party and the normal practice of a reasonably competent carrier in the situation in question<sup>5</sup>. Where the nature of the carrier's business or profession, or the tenor of his statements about it, is such as to suggest exceptional facilities or precautions, the carrier is answerable for any failure to possess or to utilise such measures; it is no answer for the carrier to say that he used his best endeavours to safeguard the goods with the resources or skills at his disposal if those resources or skills are inadequate for the task undertaken by him<sup>6</sup>. Where a carrier has a discretion to delegate performance of the whole or any part of the contract of carriage, he must take reasonable care in selecting the substitute carrier to ensure that the delegate is honest and competent and that his facilities are reasonably suitable for the task in question<sup>7</sup>. The carrier's obligation of reasonable care may require him to warn the consignor or other bailor of any adverse claim or impending legal proceedings affecting the goods, or even to defend the interests of the bailor or other consignor personally, where this would be reasonable in the circumstances<sup>8</sup>. In the absence of express contractual provision, a private carrier does not ordinarily owe an obligation to insure the goods or to warn the consignor that they are uninsured<sup>9</sup>. There is no strict implied warranty on the carrier's part that the vehicle in which the goods are conveyed will be roadworthy<sup>10</sup>.

1 See *Hunt & Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617, [1962] 1 All ER 111, CA; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215; *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108; *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. Generally the private carrier's obligation as a bailee commences only when he receives possession of the goods. He may, however, be answerable for loss occasioned by his failure to take possession at the agreed time or by his failure to warn the consignor of his inability to take possession: cf *Quiggin v Duff* (1836) 1 M & W 174; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 (duty to warn of inability to deliver). Further, the contract itself may define the point at which the carrier's responsibility is to commence: see eg *Associated Dairies Ltd v Securicor (Mobile) Ltd* (1985) Times, 27 June, CA. As to cases of quasi-bailment where the carrier lawfully delegates the entire performance of the contract of carriage and never receives possession personally see PARA 65. In the absence of a contractual provision to the contrary (such as a contractual power of lien), it is likely that the relationship between a consignor and a carrier is one of bailment at will whereunder the consignor (though out of possession) has the immediate right to possession of the goods and can therefore sue a third party for conversion or negligence; but courts will be reluctant to infer a bailment at will without proof of the specific terms of the particular contract: *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA.

2 See note 5. For a decision where certain consignments in the possession of an original carrier were held to have passed from that original carrier's actual custody and control into that of a succeeding carrier within the meaning of the relevant contract, while another consignment was held to have remained in the original carrier's

custody and control see *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79. In certain circumstances, the private carrier's responsibility as a bailee may extend beyond the period of his personal possession, as where he lawfully sub-contracts performance of part of the carriage to a third party in circumstances which render the sub-contractor a sub-bailee. In such a case, the principal carrier remains answerable as a bailee for the defaults of the sub-contractor: see PARA 65. A carrier from whose possession goods are stolen (or otherwise disappear) without fault on his part may owe an obligation to take reasonable steps to recover the goods or to inform the owner or the authorities: *Coldman v Hill* [1919] 1 KB 443, CA; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033.

3 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701.

4 See the Supply of Goods and Services Act 1982 s 13; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 97. For an application of this provision to carriers see *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197. As to exclusion of implied terms see the Unfair Contract Terms Act 1977; the Supply of Goods and Services Act 1982 s 16; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 100 et seq.

5 Decisions in which carriers were held liable for failure to satisfy the standard of reasonable care include *Pye Ltd v BG Transport Service Ltd* [1966] 2 Lloyd's Rep 300 (failure to immobilise lorry); *AF Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352 (leaving cab unlocked); *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535 (sub-bailment by carrier; lorry parked in inadequately secured compound); *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215 (inadequate hasps to padlocks); *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570 (insufficient control over incoming and outgoing goods); *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197 (haulage contractor failing to check adequacy of sub-contractor's premises and storage system); *Securitas (NZ) Ltd v Cadbury Schweppes Hudson Ltd* [1988] 1 NZLR 340, NZ CA (inadequate number of guards for carriage of bullion). See also *John Carter (Fine Worsted's) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA; *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25; *Gallaher Ltd v British Road Services Ltd and Containerway and Roadferry Ltd* [1974] 2 Lloyd's Rep 440; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA (where a warehouseman storing whisky for carrier had no standing watchman or beam alarm and entry was possible through a skylight; the carrier was held liable). For cases where carriers were held not to have been negligent see *Presvale Trading Co Ltd v Sutch & Searle Ltd* [1967] 1 Lloyd's Rep 131; *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd and Stenbridge* [1972] 1 Lloyd's Rep 410 (carrier of cameras not negligent for failing to fit lorry with immobilisers); *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428 (carriers not negligent in failing to fit inside locks to cab doors or to adopt greater variation of routes, but held to be strictly liable as common carriers in any event: see PARAS 3-4, 16); *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79 (carriers of parcels of bank-notes not negligent in unloading at loading agents' warehouse when roller-shutter doors open and fire door unsecured, or in permitting all parcels to be exposed simultaneously); *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220, Aust HC (semble, a case of quasi-bailment since the primary contractor did not take possession: see PARA 65). A claim lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (ie it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished by the Torts (Interference with Goods) Act 1977 s 2(1)): see s 2(2); and **TORT** vol 45(2) (Reissue) PARAS 543, 548.

6 *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535 (right to expect a 'Rolls-Royce service').

7 *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197. An authorised delivery to a sub-contractor whom the primary carrier has chosen without reasonable care may also (at least where resulting in the theft of the goods) constitute conversion: *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940. The primary carrier may also be liable to his consignor or other bailor where he contracts with the sub-carrier on unsuitable terms: cf *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79, where an allegation to that effect was not substantiated.

8 *Ranson v Platt* [1911] 2 KB 291, CA; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033.

9 *Mason v Morrow's Moving and Storage Ltd; Fraser v Morrow's Moving and Storage Ltd* [1978] 4 WWR 534, BC CA; *Koromvokis v Gregsons Auctioneers Pty Ltd* (20 November 1986, unreported), CA; and see PARA 92 (forwarding agents). Cf *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25 (carrier owed duty to insure on sub-contracting); *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA (bailee's obligation to insure valuable jewellery when entrusting it to untried carrier justified as means of alerting carrier to peculiar value of goods). Express obligations to insure were discovered in *A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep 428 and in

*Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March. Cf *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; and see PARA 93 (forwarding agent has no general duty to insure).

10 *John Carter (Fine Worsted) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA, where the view was expressed that an analogy cannot be drawn from cases relating to carriage by sea (such as *Steel v State Line Steamship Co* (1877) 3 App Cas 72, HL; *Tattersall v National Steamship Co Ltd* (1884) 12 QBD 297, DC; *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 AC 250, HL), and that such cases cannot be applied to carriage by land. As to the implied warranty of seaworthiness see PARA 464 et seq.

## UPDATE

### 57-60 Obligations of private carrier ... Duty of care: gratuitous carriage

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(3) PRIVATE CARRIERS/ (ii) Private Carriers of Goods/60. Duty of care: gratuitous carriage.

### 60. Duty of care: gratuitous carriage.

A gratuitous carrier owes (as a bailee) a duty to take such care of the goods as is reasonable in all the circumstances<sup>1</sup>. He must show towards the goods that degree of care which a reasonable and prudent owner would take of his own goods in comparable circumstances<sup>2</sup>. In practical terms, the care required of a gratuitous carrier may be less exacting than that required of a carrier for reward<sup>3</sup>. If, however, the nature of the gratuitous carrier's operations is such as to imply the possession of a certain proficiency and expertise, and he either lacks that proficiency and expertise or fails to utilise it, the gratuitous carrier will be in breach of his duty of reasonable care and skill<sup>4</sup>. There is no statutory implied term as to reasonable care and skill in a bailment by way of gratuitous carriage<sup>5</sup>.

1 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA; *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535 (gratuitous sub-bailment by carrier). Cf *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May) (bailee has a personal obligation to look after goods).

2 *China Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL.

3 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC.

4 *Wilson v Brett* (1843) 11 M & W 113; *Beal v South Devon Rly Co* (1864) 3 H & C 337, Ex Ch.

5 The Supply of Goods and Services Act 1982 s 13 (see PARA 59; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 97) applies only where there is a contract for the supply of a service in the course of a business.

## UPDATE

### 57-60 Obligations of private carrier ... Duty of care: gratuitous carriage

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(3) PRIVATE CARRIERS/ (ii) Private Carriers of Goods/61. Deliberate misconduct by employees or delegates.

## 61. Deliberate misconduct by employees or delegates.

A private carrier is answerable for any theft of the goods (or any complicity in theft) by an employee acting in the course of his employment<sup>1</sup>. For this purpose, an employee is deemed to act in the course of his employment whenever he steals or participates in the theft of goods which the carrier has entrusted to him<sup>2</sup>. For this liability to attach, the carrier must have delegated to the employee the performance of some part of the carrier's original duty of care towards the goods<sup>3</sup>; it is insufficient if the employee's employment merely afforded him an opportunity to steal the goods or to assist in their theft<sup>4</sup>. Similar principles render the carrier answerable for theft or complicity in theft by an agent or independent contractor to whom he has entrusted the goods<sup>5</sup>.

1 *United Africa Co Ltd v Saka Owoade* [1955] AC 130, [1957] 3 All ER 216, PC; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Transmotors Ltd v Robertson Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224; *Richmond Metal Co Ltd v J Coales & Son Ltd* [1970] 1 Lloyd's Rep 423; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700, per Mance LJ; *Metrotex Pty Ltd v Freight Investments Pty Ltd* [1969] VR 9, Vict SC; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA.

2 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; and see *Rustenburg Platinum Mines Ltd, Johnson Matthey (Pty) Ltd and Matthey Bishop Inc v South African Airways and Pan American World Airways Inc* [1979] 1 Lloyd's Rep 19, CA. As to when an employee is acting in the course of his employment see generally *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 FCR 97.

3 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Rustenburg Platinum Mines Ltd, Johnson Matthey (Pty) Ltd and Matthey Bishop Inc v South African Airways and Pan American World Airways Inc* [1979] 1 Lloyd's Rep 19, CA.

4 *Irving and Irving v Post Office* [1987] IRLR 289, CA; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd* [1967] 2 QB 250, [1966] 3 All ER 593, CA (a decision under the Carriage of Goods by Sea Act 1924); and see *Heasmans v Clarity Cleaning Co Ltd* [1987] ICR 949, CA. The carrier will still be liable, even where the goods were not entrusted to the employee who stole them or participated in their misappropriation, if the carrier was negligent in his selection or supervision of that employee: *Nahhas v Pier House (Cheyne Walk) Management Ltd* (1984) 270 Estates Gazette 328.

5 *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; and see *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197 (primary haulage contractor, who did not take possession of goods, liable to customer for negligent release of goods by sub-contractor); *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA (warehouseman liable to bailor for negligence of security company engaged by warehouseman if such negligence either caused or contributed to theft of the bailor's goods); and see *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May) (bailee has a personal obligation to look after goods); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700 (general duty on bailee not to convert goods and to protect them from theft extends to acts of persons whose services he has engaged to fulfil his duties). Where the carrier's selection of the independent contractor is negligent, the carrier is in any event liable to the consignor for a direct breach of his duty of care as a bailee: *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)*. Where the consignor does not consent to the carrier's sub-contracting the performance of the carriage to a particular sub-contractor, and the goods are stolen by the sub-contractor, the original carrier may also be guilty of conversion and may forfeit the protection of an exclusion clause purporting to relieve him from liability for 'misdelivery': *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(3) PRIVATE CARRIERS/ (ii) Private Carriers of Goods/62. Burden of proof.

## 62. Burden of proof.

In the event of loss, damage or destruction, the carrier must show that he took reasonable care of the goods or that his failure to exercise such care did not cause or contribute to the misadventure<sup>1</sup>. Where goods disappear from the carrier's possession, the carrier must also show that they were not stolen through the act or complicity of any employee or other delegate to whom he entrusted the goods and to whom he delegated the performance of any part of his duty of care<sup>2</sup>.

1 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC (port authority); *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA (bailee of goods for cleaning); *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA (warehouseman); *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108 (multiple carriers); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700 (shipping contract); and see *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA; *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd and Stenbridge* [1972] 1 Lloyd's Rep 410; *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25; *Gallaher Ltd v British Road Services Ltd and Containerway and Roadferry Ltd* [1974] 2 Lloyd's Rep 440; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215; *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570; *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197; *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220, Aust HC. As to the circumstances in which a negligent carrier may be relieved of liability on proof that his lack of reasonable care was causally unconnected with the loss, destruction or damage see *Morison, Pollexfen and Blair v Walton* (10 May 1909, unreported), HL, cited in *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Coldman v Hill* [1919] 1 KB 443, CA. The carrier need not establish the precise manner in which the misadventure occurred provided that he can show that it arose independently of his negligence: see the authorities cited above; and *Thomas National Transport (Melbourne) Ltd v May and Baker (Australia) Pty Ltd* (1966) 115 CLR 353, Aust HC. A gratuitous carrier carries the same burden of proof as a carrier for reward: *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* (storage by port authority); *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA (loss of passenger's luggage from boot of motor coach); *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535 (gratuitous sub-bailment by carrier). As to statements of claim in these matters see *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Marq v Christie Manson & Woods Ltd (t/a Christie's)* [2002] EWHC 2148 (QB), [2002] 4 All ER 1005 (affd [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561).

2 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Transmotors Ltd v Robertson Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224; *Richmond Metal Co Ltd v J Coales & Son Ltd* [1970] 1 Lloyd's Rep 423; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

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## 63. Delay.

The carrier must deliver the goods at the agreed time. In some cases this obligation will be strict, so that a carrier who gives an unqualified promise as to the time of delivery may be liable for late delivery irrespective of reasonable care on his part<sup>1</sup>. In such a case, only those

events which frustrate the contract will relieve the carrier<sup>2</sup>. Often, however, a promise to deliver at a particular time will be construed as requiring the carrier to exercise reasonable effort or care to meet the promised date<sup>3</sup>. In such a case, the carrier will not be liable for delay resulting from events which he could not have foreseen, prevented or mitigated<sup>4</sup>. Where no time of delivery is expressly agreed the carrier must deliver within a reasonable time<sup>5</sup>. Statute provides that where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time<sup>6</sup>. What is a reasonable time is a question of fact<sup>7</sup>. Where a consignor alleges that the carrier has broken a strict obligation to deliver at a particular time or place, the consignor normally carries the burden of proving both promise and breach<sup>8</sup>. The position may be different where the consignor relies on a written contract and the carrier grounds his defence on an oral variation of that contract; in such a case, it may suffice for the consignor to prove the contract and to look to the carrier to prove the variation<sup>9</sup>. The burden of proof in relation to delay or non-delivery may also rest on the carrier where it is inherent in the consignor's allegation that the carrier has broken some part of his common law duty of reasonable care<sup>10</sup>.

1 This proposition derives from the general principle of the law of contract that a promise by the supplier of a service to achieve a particular result in relation to his customer's goods will normally be construed as a promise of strict obligation, to which notions of reasonable endeavour are irrelevant: *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; *GK Serigraphics v Dispro Ltd* [1980] CA Transcript 916.

2 See **CONTRACT** vol 9(1) (Reissue) PARA 888 et seq. An event which would otherwise be frustratory may of course be rendered non-frustratory by the terms of the contract.

3 See the decisions relating to common carriers cited in PARA 13.

4 *Raphael v Pickford* (1843) 5 Man & G 551; *Briddon v Great Northern Rly Co* (1858) 28 LJEx 51; *Taylor v Great Northern Rly Co* (1866) LR 1 CP 385.

5 See eg *Panalpina International Transport Ltd v Densil Underwear Ltd* [1981] 1 Lloyd's Rep 187.

6 See the Supply of Goods and Services Act 1982 s 14(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 98.

7 See the Supply of Goods and Services Act 1982 s 14(2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 98.

8 *Tozer, Kemsley and Millbourn (Australasia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 CLR 384, Aust HC; cf *Griffiths v Lee* (1823) 1 C & P 110; *Gilbart v Dale* (1836) 5 Ad & El 543; *Midland Rly Co v Bromley* (1856) 17 CB 372.

9 *Tozer, Kemsley and Millbourn (Australasia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 CLR 384, Aust HC.

10 As to the burden of proof in relation to want of reasonable care see PARA 62.

## UPDATE

### 63 Delay

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(3) PRIVATE CARRIERS/ (ii) Private Carriers of Goods/64. Deviation.

#### 64. Deviation.

The private carrier must carry the goods by the agreed route<sup>1</sup> or, where none is agreed, by his usual or customary route<sup>2</sup>. A carrier who departs from the required route without lawful excuse<sup>3</sup> commits a deviation and becomes an insurer of the goods<sup>4</sup>. The carrier is thereafter strictly liable for all ensuing loss or damage unless he can show that the loss or damage arose through the fault of the consignor or other bailor or would have occurred irrespective of the deviation<sup>5</sup>. In a bailment by way of carriage which is not, because of the terms of the contract, a bailment at will<sup>6</sup>, a deviation may also forfeit the carrier's right of possession and cause the consignor's right of possession to revive<sup>7</sup>. A deviation may also deprive the carrier of the protection of exculpatory terms in the contract of carriage<sup>8</sup>. A carrier who deviates may be relieved of the normal consequences of a deviation where the consignor or other bailor becomes aware of the deviation after its occurrence and acquiesces in it<sup>9</sup>.

A principle akin to that of deviation applies in other circumstances where a carrier or other bailee performs an act fundamentally at variance with an essential term of the bailment. A carrier may become strictly liable as an insurer of the goods by retaining them beyond the agreed time (or for longer than is reasonable where no specific time is agreed)<sup>10</sup>; by delivering them without authority to a fraudulent claimant<sup>11</sup>; by delegating the task of carriage to a third party without authority and letting the third party into possession<sup>12</sup>; by storing the goods in a place other than that agreed<sup>13</sup>; by sending them by a slower means of transport than that agreed<sup>14</sup>; or even (in extreme cases) by leaving the goods unattended for a substantial period<sup>15</sup>. It appears that the burden of establishing a deviation rests on the consignor or other bailor unless there is inherent in the consignor's or other bailor's claim an allegation that the carrier has broken some aspect of his duty of care<sup>16</sup>. In that event, the burden may shift to the carrier<sup>17</sup>. It further appears that deviation may be committed by a gratuitous carrier notwithstanding the lack of consideration moving from the bailor under a gratuitous bailment<sup>18</sup>.

1 *London and North Western Rly Co v Neilson* [1922] 2 AC 263, HL; *Mallet v Great Eastern Rly Co* [1899] 1 QB 309. As to deviation generally see PARAS 81-83.

2 *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] AC 562, [1939] 3 All ER 444, HL; *Hales v London and North Western Rly Co* (1863) 4 B & S 66; *Myers v London and South Western Rly Co* (1869) LR 5 CP 1; and see *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd and Stembridge* [1972] 1 Lloyd's Rep 410 (road carrier not guilty of deviation where cameras belonging to plaintiff were loaded on to carrier's lorry along with goods belonging to another customer, the latter goods being delivered first). See generally PARAS 81-83.

3 As to the circumstances in which a departure from the agreed or customary route is justified see PARA 82.

4 *Davis v Garrett* (1830) 6 Bing 716; *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; and see also, in connection with carriage by sea, PARA 248.

5 *Davis v Garrett* (1830) 6 Bing 716; *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783, CA.

6 Cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA; *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; and PARA 59 note 1.

7 Cf *Shell International Petroleum Co Ltd v Gibbs, The Salem* [1983] 2 AC 375, [1983] 1 All ER 745, HL.

8 See PARAS 81-83.

9 *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197; *Punch v Savoy's Jewellers Pty Ltd* (1986) 26 DLR (4th) 546, Ont CA.

10 *Shaw & Co v Symmons & Sons* [1917] 1 KB 799 (bailee for work and labour); and see *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779 (gratuitous depositary).

11 *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442; cf *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. A misdelivery constitutes conversion, liability for which is also strict: see **TORT** vol 45(2) (Reissue) PARA 548. See also *Wilson v Powis* (1826) 3 Bing 633; *Jones v Dowle* (1841) 9 M & W 19; *Wilkinson v Verity* (1871) LR 6 CP 206, approved in *John F Goulding Pty Ltd v Victorian Railways Comr* (1932) 48 CLR 157, Aust HC; *Tozer Kemsley and Millbourn (Australasia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 CLR 384, Aust HC; *Jackson v Cochrane* [1989] 2 Qd R 23, Qld SC; *Joule Ltd v Poole* (1924) 24 SRNSW 387, District CA. Cf *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940 (unauthorised delivery of load of copper wire by carrier to negligently selected sub-contractor; wire stolen while in possession of sub-contractor; held, the unauthorised delegation to the sub-contractor constituted conversion and the primary carrier was not protected by a term in the main contract of carriage purporting to exclude liability for 'misdelivery'). By statute, an action in conversion lies for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor: see the Torts (Interference with Goods) Act 1977 s 2(2); and **TORT** vol 45(2) (Reissue) PARA 548.

12 Cf *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940; *Thomas National Transport (Melbourne) Pty Ltd v May and Baker (Australia) Pty Ltd* (1966) 115 CLR 353, Aust HC. As to the circumstances in which a carrier is entitled to delegate performance of the contract of carriage see PARA 65.

13 *Lilley v Doubleday* (1881) 7 QBD 510; *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA (warehousemen); *Thomas National Transport (Melbourne) Pty Ltd v May and Baker (Australia) Pty Ltd* (1966) 115 CLR 115, Aust HC; cf *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd and Stembridge* [1972] 1 Lloyd's Rep 410.

14 *Gunyon v South Eastern and Chatham Rly Co's Managing Committee* [1915] 2 KB 370, DC.

15 *Bontex Knitting Works Ltd v St John's Garage* [1943] 2 All ER 690 (affd [1944] 1 All ER 381n, CA); but cf *L Harris (Harella) Ltd v Continental Express Ltd and Burn Transit Ltd* [1961] 1 Lloyd's Rep 251; *AF Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352; *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd and Stembridge* [1972] 1 Lloyd's Rep 410.

16 See *Tozer Kemsley and Millbourn (Australasia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 CLR 384, Aust HC (misdelivery); and PARA 59. Cf *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA; *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210; *Woolmer v Delmer Price Ltd* [1955] 1 QB 291, [1955] 1 All ER 377; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617, [1962] 1 All ER 111, CA. See also PARA 84.

17 Cf *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA (non-delivery); *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA.

18 *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779 (gratuitous depositary; strict liability for loss by theft following detention of goods beyond agreed date for redelivery).

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## 65. Sub-bailment, substitutional bailment and quasi-bailment.

Where a carrier who has the present right to the possession of goods delivers them to a subsidiary carrier in circumstances where the first carrier retains some possessory right to the goods, the subsidiary carrier becomes a sub-bailee of the original bailor<sup>1</sup>. The first carrier remains responsible for the goods as a bailee while they are in the sub-carrier's possession<sup>2</sup>; he is answerable for the defaults of the sub-carrier<sup>3</sup> and is entitled to recover possession of the

goods in the circumstances stipulated by the sub-bailment. The sub-carrier, in accepting possession of the goods, assumes the obligations of a bailee towards the original bailor<sup>4</sup>. Where the sub-carriage is for reward, the sub-carrier will owe the original bailor the duties of a bailee for reward<sup>5</sup>, and where the sub-carriage is gratuitous the sub-carrier will owe the original bailor the duties of a gratuitous bailee<sup>6</sup>. The sub-carrier also owes the normal duties of a bailee to the first carrier<sup>7</sup>.

Where the contract between an original carrier and a subsidiary carrier results in the relinquishment by the original carrier of any possessory right to the goods, the bailment which arises between the original bailor and the subsidiary carrier is a substitutional bailment<sup>8</sup>. The subsidiary carrier thereupon occupies the position of bailee directly towards the original bailor. The original carrier ceases to occupy the position of bailee towards the original bailor and henceforth owes him no duty of care as his bailee<sup>9</sup>. He is therefore not liable for the defaults of the subsidiary carrier. The original carrier also has no further rights or obligations as a bailor of the substitutional bailee<sup>10</sup>. Any outstanding obligations which the original carrier owes to the original bailor, and any outstanding rights or obligations which he has towards the substitutional bailee, subsist purely in contract. On a proper construction, it is ordinarily likely that in contract, as in bailment, he owes no substantial liability to the original bailor for the defaults of the substitutional bailee and has no substantial right of action against the substitutional bailee in respect of the latter's default<sup>11</sup>. The substitutional bailee owes the duties of a bailee directly to the original bailor irrespective of contract<sup>12</sup>.

Where a carriage contractor lawfully exercises a discretion to delegate the whole of the performance of the contract of carriage to a third party, and the carriage contractor neither receives possession of the goods nor reserves any right of possession against the party to whom the carriage is delegated, the relationship is one of quasi-bailment<sup>13</sup>. The carriage contractor must take reasonable care in selecting the actual carrier and is answerable, in like manner to a conventional bailee, for the actual carrier's failure to take reasonable care of the goods, irrespective of whether the actual carrier's default was accompanied by personal fault on the part of the carriage contractor himself<sup>14</sup>. But the carriage contractor is not strictly a bailee and does not carry the normal bailee's burden of negating default on the part of himself or any delegate<sup>15</sup>. The actual carrier to whom performance of the carriage is delegated owes the duties of a bailee directly to the original bailor, irrespective of contract<sup>16</sup>. It appears, however, that the actual carrier's rights against, and obligations to, the intermediate contractor are purely contractual<sup>17</sup>.

1 *China Pacific SA v Food Corpn of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL (sub-bailment by salvors to depositaries at port); and see *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC; *Wincanton Ltd v P & O Trans European Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb); *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108; *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561. Cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA, where intermediate carriers failed to adduce evidence of any right to resume possession of the goods from the sub-carriers and were held to have no participation in the scheme of bailment relations. The relationship of original bailor and sub-bailee exists independently of any contract between them or of any attornment by the sub-bailee: *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC; *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (19 June 1992, unreported), NSW CA; cf *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395.

2 *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC (storage); *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220, Aust HC; *Thomas National Transport (Melbourne) Ltd v May and Baker (Australia) Pty Ltd* (1966) 115 CLR 353, Aust HC; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA; and see *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA.

3 See the cases cited in note 2; and *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164.

4 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC; *China Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; and see *Leary & Sons Ltd v Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA. As to the identity of the bailor under a contract of carriage see PARA 756. In general it will be immaterial whether the sub-carrier is aware of the exact identity of the original bailor or of his participation in the bailment relationship: *Balsamo v Medici* [1984] 2 All ER 304, [1984] 1 WLR 951.

5 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA (sub-bailment for cleaning).

6 *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535 (gratuitous sub-bailment by carrier; sub-bailee owed duties of gratuitous bailee to original bailor). Note, however, that reasonable care on the part of a sub-bailee does not entail liability for unforeseeable consequential loss: see *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108 (in which it was held (distinguishing *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd*) that where a consignment of tax seals was lost, the damages for which the carrier was liable did not include the duty which the claimant was obliged to pay on the exportation of other goods as a result of the loss). As to the duty of care of gratuitous bailees and bailees for reward see PARAS 59-60.

7 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

8 *China Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL (delivery of cargo by salvor to depositaries); and see *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *Wincanton Ltd v P & O Trans European Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb); *EMI (New Zealand) Ltd v William Holyman & Sons Pty Ltd* [1976] 2 NZLR 566, NZ SC.

9 *China Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; *Roufos v Brewster and Brewster* (1971) 2 SASR 218, SA SC; *EMI (New Zealand) Ltd v William Holyman & Sons Pty Ltd* [1976] 2 NZLR 566, NZ SC; cf *Gallagher Ltd v British Road Services Ltd and Containerway and Roadferry Ltd* [1974] 2 Lloyd's Rep 440; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA. The principal carrier must nevertheless exercise reasonable care in the selection of the subsidiary carrier, unless the original bailor has effectively given him no discretion in that regard: *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197 (quasi-bailment); *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA; *Scott Maritimes Pulp Ltd v BF Goodrich Canada Ltd* (1977) 72 DLR (3d) 680, NS SC. The principal carrier must also conclude the substitutional contract of carriage on suitable terms: cf *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79, where an allegation that the terms were unsuitable was not substantiated.

10 *China Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL.

11 *Cf Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA.

12 Occasionally a direct contract may arise, as where the intermediate party acts as the substitutional bailee's agent: *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570; and see *Scott Maritimes Pulp Ltd v BF Goodrich Canada Ltd* (1977) 72 DLR (3d) 680, NS SC. But a substitutional bailment can exist independently of any contract between the original bailor and the substitutional bailee: *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (19 June 1992, unreported), NSW CA; cf *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

13 See *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC; *Wincanton Ltd v P & O Trans European Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb). Contrast the position of the forwarding agent: see PARAS 92-93.

14 *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197; *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220; *Rick Cobby Haulage Pty Ltd v Simsmetal Pty Ltd* (1986) 43 SASR 533, SA SC; and see *Thomas National Transport (Melbourne) Ltd v May and Baker (Australia) Pty Ltd* (1966) 115 CLR 353, Aust HC; *Gallagher Ltd v British Road Services Ltd and Containerway and Roadferry Ltd* [1974] 2 Lloyd's Rep 440; *Schenker & Co (Aust) Pty Ltd v Malpas Equipment and Services Pty Ltd* [1990] VR 834, Vict CA. It further appears that an intermediate party who delegates the whole performance of the contract without the authority of the owner of the goods and without receiving possession personally is strictly liable to the owner in like manner to a bailee who deviates from the terms of the bailment: *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA. Even where a delegation of the carriage is authorised, the carriage contractor may be answerable to the goods owner where the contract which he concludes with the subsidiary carrier is on unsuitable terms: cf *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79, where an allegation to that effect was not sustained. As to the

circumstances in which a principal bailor may be bound by the terms of a contract between a primary bailee and a subsidiary bailee see PARA 66.

15 *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197; *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220, Aust HC; cf *Rick Cobby Haulage Pty Ltd v Simsmetal Pty Ltd* (1986) 43 SASR 533, SA SC.

16 *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197.

17 Cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA.

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## 66. Sub-bailment on terms.

A consignor or other bailor under a contract of carriage<sup>1</sup> is bound by an exclusion or limitation clause<sup>2</sup> contained in any sub-bailment of the goods by the carrier to a sub-bailee<sup>3</sup>, irrespective of any contract between him and the sub-bailee<sup>4</sup>, if he expressly or impliedly consents to the carrier's conclusion of the sub-bailment on such terms<sup>5</sup>. The bailor will not, however, be bound by an exclusion or limitation clause contained in the sub-bailment, to the imposition of which he has not expressly or impliedly (or perhaps ostensibly) consented<sup>6</sup>. It appears that similar principles govern the liability of a non-contractual bailee to a principal bailor under a substitutional bailment<sup>7</sup> or under a quasi-bailment<sup>8</sup>.

Bailment on terms is not confined to sub-bailment but may operate where a bailment is accompanied by a parallel contract<sup>9</sup>.

1 As to the identity of the bailor under a contract of carriage see PARA 756.

2 The principle does not appear to be confined to terms which purport to exclude or restrict the liability of the sub-bailee: see *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108; and cf *The Forum Craftsman* [1985] 1 Lloyd's Rep 291, CA. See also *Dresser UK Ltd v Falcogate Freight Management Ltd* [1992] QB 502, [1992] 2 All ER 450, CA (exclusive jurisdiction clause).

3 As to the circumstances in which a relationship of sub-bailment arises, and as to the distinction between that relationship and one of substitutional bailment and quasi-bailment, see PARA 65.

4 Such a contract may be present on particular facts, but its existence is not necessarily critical to the enforcement of obligations as between principal bailor and sub-bailee: see *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108.

5 *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, following *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Hispanica de Petroleos SA v Vencedora Oceanic Navegacion SA, The Kapetan Markos NL (No 2)* [1987] 2 Lloyd's Rep 321, CA; and see *Dresser UK Ltd v Falcogate Freight Management Ltd* [1992] QB 502, [1992] 2 All ER 450, CA; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA; *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC; *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108. But the owner against whom this defence is invoked must have bailed the goods to the original bailee before the original bailee bailed them to the defendant; unless the defendant subsequently attorns to the new owner, the defendant cannot invoke the defence against someone who becomes the owner of the goods after the goods have been bailed to the defendant: *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA. The doctrine of sub-bailment on terms is not grounded on an agreement between the principal bailor and the sub-bailee since it arose specifically to cater for situations where principal bailor and sub-bailee are not contractually related and where the principal bailor accordingly has no claim in contract

against the sub-bailee: *KH Enterprise v Pioneer Container, The Pioneer Container*; and see *Dresser UK Ltd v Falcongate Freight Management Ltd*. In *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* at 168, Steyn J left open the question whether a mere ostensible authority in the original bailee to sub-bail the goods on certain exculpatory terms would suffice to enable the sub-bailee to invoke those terms in a claim against him by the sub-bailee. But cf note 6.

6 *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC, disapproving *Johnson Matthey & Co Ltd v Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215. The validity of this principle was left open in *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, but the principle appears to have been approved in *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA. But note the qualification stated in note 5, which would appear to apply equally to the principle here under discussion. See further *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, [1992] 2 All ER 450, CA. A sub-bailee who gives a direct undertaking to the principal bailor as to the manner in which he will deal with the goods cannot, in a case where the direct undertaking becomes binding on the sub-bailee, without any accompanying contract between the principal bailor and himself, claim the protection of exculpatory terms in the sub-bailment contract where these terms conflict with the sub-bailee's direct undertaking: *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (19 June 1992, unreported), NSW CA. This conclusion would, of course, follow a fortiori where the sub-bailee's undertaking became part of a contract between the principal bailor and himself.

7 Cf the position where a bailee attorns to a purchaser or pledgee of the original bailor: see PARA 65.

8 *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC.

9 See *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700 (where bailors were entitled both in contract and bailment, the bailment or a relationship analogous to bailment could operate on the same terms as the contract so that unless statute transferred the bailor's rights in contract to others, the bailors remained entitled to sue the bailees 'in bailment' on the same terms as the original contract).

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## 67. Estoppel and jus tertii.

At common law<sup>1</sup>, a carrier (in common with any other bailee) is estopped from denying his bailor's title; he may not, in response to his bailor's<sup>2</sup> demand for a redelivery of the goods, plead the superior right or title of a third person to the property in those goods<sup>3</sup>. The estoppel ceases to bind the carrier, however, when the bailment on which it is founded is determined by conduct constituting an eviction of the carrier by title paramount<sup>4</sup>. The carrier is thereby discharged from all liability to his bailor, unless there is a special contract or the carrier is in some way to blame for the eviction<sup>5</sup>. It is not enough that the carrier becomes aware of the title of a third person, or that an adverse claim is made on him<sup>6</sup>. Unless he has been actually evicted he can set up the title of a third person only where he does so on behalf of and with the express authority of that third person<sup>7</sup>.

The carrier's estoppel appears to have been abolished by statute, at least in cases where the carrier is sued in tort. The defendant in a claim for wrongful interference with goods<sup>8</sup> is entitled to show<sup>9</sup> that a third person has a better right than the claimant as respects all or any part of the interest claimed by the claimant, or in right of which he sues<sup>10</sup>. The carrier's estoppel may be preserved, however, where the bailor sues him otherwise than in tort or does not plead the statute<sup>11</sup>.

1 The common law rule is substantially abrogated by statute: see the Torts (Interference with Goods) Act 1977 s 8; the text and notes 8-11; and **TORT** vol 45(2) (Reissue) PARA 644. See also *Chartered Trust plc v King* [2001] All ER (D) 310 (Feb), Ch.

2 As to the identity of the bailor under a contract of carriage see PARA 756.

3 *Biddle v Bond* (1865) 6 B & S 225; *Betteley v Reed* (1843) 4 QB 511; *Re Sadler, ex p Davies* (1881) 19 ChD 86, CA; *Leese v Martin* (1873) LR 17 Eq 224; *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; *China Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; *Redler Grain Silos Ltd v BICC Ltd* [1982] 1 Lloyd's Rep 435, CA. See further **ESTOPPEL** vol 16(2) (Reissue) PARA 1044. This rule does not apply to hire purchase: *Karflex Ltd v Poole* [1933] 2 KB 251. As to who is the carrier's bailor see PARA 756.

4 *Biddle v Bond* (1865) 6 B & S 225. See *Chartered Trust plc v King* [2001] All ER (D) 310 (Feb), Ch.

5 *Ross v Edwards & Co* (1895) 73 LT 100, PC.

6 *Betteley v Reed* (1843) 4 QB 511; *Leese v Martin* (1873) LR 17 Eq 224.

7 *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318, CA. See also *Thorne v Tilbury* (1858) 3 H & N 534 at 539 per Bramwell B, and at 540 per Watson B, expressing the opinion that the bailee may show that the bailor's title has expired since the bailment. This opinion is adopted by Lopes LJ in *Rogers, Sons & Co v Lambert & Co* at 328. In *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774 at 841, [1976] 3 All ER 129 at 132, HL, Lord Diplock speaks of the bailee's common law estoppel as estopping him from denying his bailor's title to the goods at the time when possession was delivered to him (ie to the bailee). Cf *Webb v Ireland and A-G* [1988] IR 353, Ir SC (bailee acquiring title from third party; bailment ceased and bailee's estoppel no longer applied). Where a plaintiff failed to recover property from a bailee because she did not establish a gift to herself from a predecessor in title, the bailee was precluded, in proceedings by the personal representative of the predecessor in title, from asserting against them that the property belonged to the former plaintiff: *Re Savoy Estate Ltd, Remnant v Savoy Estate Ltd* [1949] Ch 622, [1949] 2 All ER 286, CA. Interrogatories may not be administered by a bailor to his bailor for the purpose of showing that the bailor has parted with his title in the chattel to a third person, unless the bailee justifies his detention of it by setting up the title of such third person with his consent: *Rogers, Sons & Co v Lambert & Co*. Cf *Webb v Ireland and A-G* (bailee acquiring title personally; held, no longer bound by bailee's estoppel).

8 The trespass to goods, conversion, negligence so far as it results in damage to goods or an interest in goods, and any other tort so far as it results in damage to goods or to an interest in goods: see the Torts (Interference with Goods) Act 1977 s 1; and **TORT** vol 45(2) (Reissue) PARA 545.

9 See CPR 19.5A(2); **CIVIL PROCEDURE**; **TORT** vol 45(2) (Reissue) PARA 644.

10 See the Torts (Interference with Goods) Act 1977 s 8(1), which also states that any rule of law to the contrary (sometimes called *jus tertii*) is abolished; and **TORT** vol 45(2) (Reissue) PARA 644.

11 See **TORT** vol 45(2) (Reissue) PARA 644.

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## 68. Carrier's right to sue third parties.

In accordance with the general principle of law that, as against a stranger to the bailment, possession counts as title<sup>1</sup>, the carrier of goods (in common with any other bailee) may at common law sue a third party wrongdoer for the torts of trespass, conversion or negligence in respect of any loss of or injury to the goods in all cases where an absolute owner of a chattel may do so, and may in each case recover damages as if he were the absolute owner<sup>2</sup>. In proceedings by a carrier against a third party in respect of the loss or destruction of, or damage to, the chattel bailed, the carrier may therefore at common law recover the full value of the chattel in a case of loss or destruction or the full cost of its repair in a case of damage, and in addition any further damage which he personally sustains by reason of his being deprived of the use of the goods while they are being repaired or replaced<sup>3</sup>. The fact that the carrier is not responsible to the consignor or other bailor<sup>4</sup> for the loss or destruction of or damage to the goods caused by the third party wrongdoer does not at common law avoid the bailee's right of

action against that wrongdoer; the common law rule that a wrongdoer cannot plead the *jus tertii* against a possessor unless he claims under the third party right is absolute, and the state of relations between the bailor and the bailee is immaterial<sup>5</sup>.

The common law rule that a wrongdoer cannot plead the title of a third party in defence to a claim by a bailee has been substantially modified by statute<sup>6</sup>. The carrier's common law right to recover full damages from a third party wrongdoer as if the carrier were the owner of the goods is therefore generally displaced, and the third party wrongdoer is entitled to have the consignor's or other bailor's interest brought into account. But the carrier's common law right to recover full damages may still apply where the wrongdoer elects not to plead the *jus tertii*, or there is an exception to the operation of the provision<sup>7</sup>, or perhaps where the carrier sues otherwise than in tort<sup>8</sup>. A carrier who is not merely a bailee at will<sup>9</sup> (as, for example, where he has a lien over the goods in respect of his charges)<sup>10</sup> may sue the consignor or other bailor for the tort of conversion if the consignor or other bailor wrongfully deprives him of the chattel<sup>11</sup>.

1 This principle has been substantially abrogated by statute: see the Torts (Interference with Goods) Act 1977 s 8; PARA 67 text and notes 8-11; and **TORT** vol 45(2) (Reissue) PARA 644.

2 *Burton v Hughes* (1824) 2 Bing 173; *Rooth v Wilson* (1817) 1 B & Ald 59; *Croft v Alison* (1821) 4 B & Ald 590; *Raynor v Childs* (1862) 2 F & F 775; *Sutton v Buck* (1810) 2 Taunt 302; *The Winkfield* [1902] P 42, CA (where the cases are reviewed); *The Okehampton* [1913] P 173, CA; *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL.

3 Instances of such loss under a bailment by way of carriage (as opposed to a bailment by way of hire) will be rare. As to the measure of damages where the chattel is being used otherwise than for profit see *No 7 Steam Sand Pump Dredger (Owners) v Greta Holme (Owners)*, *The Greta Holme* [1897] AC 596, HL; *Mersey Docks and Harbour Board v Marpessa (Owners)* [1907] AC 241, HL. As to consequential losses suffered by a bailee cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA. The carrier or other bailee may be unable to recover in tort from a third party loss imposed by some contract between him and another person (whether the bailor or a fourth party) where that loss exceeds the value of the goods or the cost of their repair, for in that case the loss may be caused by the contract rather than by the third party's wrongdoing: cf *Chubb Cash Ltd v John Crilley & Son (a firm)* [1983] 2 All ER 294, [1983] 1 WLR 599, CA (action by bailor); and see *Millar v Candy* (1981) 58 FLR 145, Aust Fed Ct. In Admiralty cases, the bailee can recover interest from the date of damage: *The Rosalind* (1920) 90 LJP 126.

4 As to the identity of the bailor under a contract of carriage see PARA 756.

5 *The Winkfield* [1902] P 42, CA, overruling *Claridge v South Staffordshire Tramway Co* [1892] 1 QB 422; *Chhabra Corpn Pte Ltd v Jag Shakti (Owners)*, *The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC; *Worthington v Tipperary County Council* [1920] 2 IR 233, CA. See also *O'Sullivan v Williams* [1992] 3 All ER 385, CA (no separate right of action by bailee against wrongdoer where bailor has already recovered against wrongdoer).

6 See PARA 67 text and notes 8-11.

7 See **TORT** vol 45(2) (Reissue) PARA 644.

8 Cf **TORT** vol 45(2) (Reissue) PARA 644; *American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701; *Harold Stephen & Co Ltd v Post Office* [1978] 1 All ER 939, [1977] 1 WLR 1172, CA (considering the Post Office Act 1969 s 29 (repealed)).

9 Cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA; and PARA 59 note 1.

10 See PARA 761.

11 *Roberts v Wyatt* (1810) 2 Taunt 268; cf *Craig v Shedden* (1858) 1 F & F 553; *Sands v Shedden* (1859) 1 F & F 556.

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## 69. Carrier's insurable interest.

Since a private carrier is a bailee of goods which he accepts for carriage, he has an insurable interest in the goods<sup>1</sup>. The private carrier is entitled to insure the goods for their full value so as to cover both his own interest in them and that of any other interested party, provided that it appears from the policy that he intended to do so<sup>2</sup>. On recovery of the value of the goods from the insurer, the private carrier can retain as much of the proceeds as covers his own interest, but must pay the balance to the other parties having an interest in the goods<sup>3</sup>.

1 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; *Ellerman Lines Ltd v Lancaster Maritime Co Ltd, The Lancaster* [1980] 2 Lloyd's Rep 497; and see *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127, [1983] 3 All ER 35; *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17, [2002] 1 All ER (Comm) 198, [2002] 1 WLR 1419; *Feasey v Sun Life Assurance Company of Canada; Steamship Mutual Underwriting Association (Bermuda) Ltd v Feasey* [2003] EWCA Civ 885, [2003] 2 All ER (Comm) 587.

2 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL.

3 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL. The carrier normally holds the surplus proceeds on trust for the bailor: *Hepburn v A Tomlinson (Hauliers) Ltd*. But it is uncertain whether the carrier's obligation is literally one of trust or whether the parties interested in the goods have some other form of equitable property in the insurance proceeds: see *Re E Dibbens & Sons Ltd (in liquidation)* [1990] BCLC 577; and cf *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385, HL (insurer, entitled to subrogation rights, had equitable lien over proceeds of insured's claim against wrongdoer); *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455, Ch (pledgor had equitable interest over surplus proceeds of sale of pledged chattel after pledgee had recouped the debt).

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### (iii) Private Carriers of Passengers and Luggage

#### 70. Duty to carry passengers and their luggage.

The distinction between private carriers and common carriers of passengers is less significant than that between private carriers and common carriers of goods<sup>1</sup>, and accordingly, the common law provisions relating to carriers' liability to passengers and their luggage<sup>2</sup>, including the standard of care owed to passengers by carriers<sup>3</sup>, the liability of the carrier in respect of things beyond his control<sup>4</sup>, the carrier's duty in relation to the state and maintenance of his vehicle<sup>5</sup> and premises<sup>6</sup>, the carrier's liability in respect of the behaviour of other passengers<sup>7</sup>, and the burden and standard of proof where negligence is alleged<sup>8</sup>, are, subject to necessary inferences, similarly applicable in relation to private carriers as in relation to common carriers.

1 For the considerations which determine whether a carrier is a common carrier or a private carrier see PARAS 3-5, 56. As to private carriers of goods see PARA 58 et seq.

2 See PARA 38 (basic liability) and PARAS 53-55 (duty to carry passengers' luggage and liability therefor).

3 See PARA 39. The standard of care owed to passengers by carriers does not necessarily depend on contract (see PARA 44) and may vary in an emergency (see PARA 42).

4 See PARA 40.

5 See PARA 41.

6 See PARA 52.

7 See PARA 43 (damage or injury caused by dangerous articles introduced by passengers), PARA 50 (overcrowding) and PARA 51 (drunken passengers).

8 See PARA 45. Particular provision is made in respect of injuries caused by carriage doors and windows (see PARAS 46, 47) and in the course of entering or alighting from trains and other vehicles (see PARAS 48, 49).

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## **(4) CARRIERS CARRYING UNDER CONTRACTUAL TERMS**

### **(i) Terms of the Contract**

#### **71. Incorporation of terms into contract.**

The parties to a contract for the carriage of passengers or goods may, with certain exceptions<sup>1</sup>, incorporate in it any terms and conditions upon which they may agree. The terms and conditions of any particular contract of carriage are to be ascertained by the application of the general law of contract<sup>2</sup>. The great majority of those carrying on business as carriers profess to carry only in accordance with standard terms and conditions; and the following paragraphs deal with the special problems of their incorporation in particular contracts of carriage. Standard conditions of carriage may be incorporated either by express agreement, oral<sup>3</sup> or written, in which case no problem arises<sup>4</sup>, or by implication, which will usually arise either where the contract is made by the issue of a ticket or other contractual document<sup>5</sup> or from a course of dealing between the parties<sup>6</sup>.

1 See PARA 80.

2 See **CONTRACT** vol 9(1) (Reissue) PARAS 601-1169.

3 Traders frequently arrange to have their goods carried by a particular carrier on a regular basis, the agreement for a particular assignment being made orally. See further PARA 76.

4 Ie unless they are avoided by statute: see PARA 80.

5 See PARA 74.

6 See PARA 76.

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#### **72. Signed documents.**

A document containing an exclusion clause which is signed by the passenger or consignor of goods will be incorporated into the contract of carriage provided that it was intended to be a contractual document<sup>1</sup>. Such terms will, in the absence of fraud or misrepresentation on the part of the carrier or his employee or agent<sup>2</sup>, be binding on the passenger or consignor whether

he knew of the terms or not<sup>3</sup>. It has been held in the past that it makes no difference that the terms were of a particularly onerous or unusual nature<sup>4</sup> or that the passenger or consignor could not read English<sup>5</sup>, but the provisions of the Unfair Contract Terms Act 1977 must be taken into consideration<sup>6</sup>.

1 *Harris v Great Western Rly Co* (1876) 1 QBD 515; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, DC; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA; *Bahamas Oil Refining Co v Kristiansands Tankrederie A/S and Shell International Marine Ltd, The Polyduke* [1978] 1 Lloyd's Rep 211; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164.

2 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, DC; *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805, [1951] 1 All ER 631, CA.

3 *Harris v Great Western Rly Co* (1876) 1 QBD 515; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, CA; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA; *Bahamas Oil Refining Co v Kristiansands Tankrederie A/S and Shell International Marine Ltd, The Polyduke* [1978] 1 Lloyd's Rep 211; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164.

4 *Bahamas Oil Refining Co v Kristiansands Tankrederie A/S and Shell International Marine Ltd, The Polyduke* [1978] 1 Lloyd's Rep 211.

5 *The Luna* [1920] P 22.

6 See the Unfair Contract Terms Act 1977; PARA 80; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

## UPDATE

### 72 Signed documents

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 73. Unsigned documents.

An exclusion clause which is not contained in a document signed by the passenger or consignor will not form part of the contract of carriage unless the passenger or consignee has sufficient notice of it before or at the time at which the contract is concluded<sup>1</sup>. Documents which are delivered or otherwise come to the notice of the passenger or consignor after the contract of carriage is concluded will be of no effect in that particular transaction<sup>2</sup>.

Whether or not the passenger or consignor has sufficient notice of the exclusion clause is a question of fact and will depend on the circumstances of each case<sup>3</sup>. Sufficient notice may be actual or constructive<sup>4</sup>.

1 *Parker v South Eastern Rly Co* (1877) 2 CPD 416, CA; *Richardson, Spence & Co and Lord Gough Steamship Co Ltd v Rowntree* [1894] AC 217, HL; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL.

2 *Chapelton v Barry UDC* [1940] 1 KB 532, [1940] 1 All ER 356, CA; *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70; *Daly v General Steam Navigation Co Ltd, The Dragon* [1979] 1 Lloyd's Rep 257

(affd on other grounds [1980] 3 All ER 696, [1981] 1 WLR 120, CA). Cf *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450.

3 *Cooke v T Wilson Sons & Co Ltd* (1915) 85 LJB 888, CA; *Nunan v Southern Rly Co* [1923] 2 KB 703 (affd [1924] 1 KB 223, CA); *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450; *Metaalhandel J A Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197 ('mailshots' insufficient notice of standard terms).

4 *Parker v South Eastern Rly Co* (1877) 2 CPD 416, CA; *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)* [1988] 2 Lloyd's Rep 427, CA.

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## 74. Contract by ticket.

The issue of a ticket to a passenger in return for the payment of his fare is evidence of a contract to carry him with reasonable care to the named destination within a reasonable time<sup>1</sup>. However, the contract of carriage may have been made at some time prior to the receipt by the passenger of the ticket, in which case conditions contained in or referred to in it will be of no effect<sup>2</sup>.

Where the contract is concluded on receipt of the ticket, the ticket may include other terms and conditions, either expressed on the ticket itself or incorporated in the contract by reference, on the ticket, to some other document containing these terms and conditions<sup>3</sup>. The terms and conditions are not binding upon the passenger unless he impliedly or expressly assents to them<sup>4</sup>. If he accepts a ticket, without objection, he will be taken as a general rule to have assented to the conditions contained or referred to on it<sup>5</sup>; but he will not be taken to have assented to them where he has no opportunity to dissent<sup>6</sup> nor unless the carrier shows either that the passenger knew there was writing on the ticket containing or referring to the conditions, or that he had done all that was reasonably sufficient to give the passenger notice of the existence of the conditions and the place where their terms might be considered<sup>7</sup>. What is reasonably sufficient in such cases depends on the severity of the term or condition concerned<sup>8</sup>.

If the passenger has had notice, or if it be shown that he had knowledge that there was writing on the ticket containing or referring to the conditions, the ticket, together with the documents referred to on it, forms the contract between the passenger and the carrier<sup>9</sup>. Thus a passenger or a consignor of goods who accepts a contractual document<sup>10</sup> in these circumstances is estopped from denying his assent<sup>11</sup>. Such an estoppel applies only to the particular contract and may not assist the carrier in subsequent transactions in the absence of something more than mere receipt of the contractual document in relation to the earlier transaction<sup>12</sup>.

1 *Great Western Rly Co v Blake* (1862) 7 H & N 987, Ex Ch; *Hurst v Great Western Rly Co* (1865) 19 CBNS 310; *Hobbs v London and South Western Rly Co* (1875) LR 10 QB 111; *Cooke v Midland Rly Co* (1892) 57 JP 388, CA. See also *Skinner v London, Brighton and South Coast Rly Co* (1850) 5 Exch 787.

2 *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70; *Daly v General Steam Navigation Co Ltd, The Dragon* [1979] 1 Lloyd's Rep 257. Cf *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450.

3 *Thompson v Midland Rly Co* (1875) 34 LT 34; *Marriott v Yeoward Bros* [1909] 2 KB 987; *Great Eastern Rly Co v Kirkley* (1914) 58 Sol Jo 239; *Grand Trunk Rly Co of Canada v Robinson* [1915] AC 740, PC; *Canadian Pacific Rly Co v Parent* [1917] AC 195, PC; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL. Thus the words 'This ticket is issued subject to the regulations and conditions stated in the company's timetables and bills', printed on a ticket, are sufficient to incorporate those conditions in the contract of carriage: *Le Blanche v London and North Western Rly Co* (1876) 1 CPD 286, CA; *McCartan v North Eastern Rly Co* (1885) 54 LJQB 441;

*Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA; *Gray v London and North Eastern Rly Co* 1930 SC 989; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL. As to what constitutes sufficient notice of terms see PARA 75.

4 *Henderson v Stevenson* (1875) LR 2 Sc & Div 470, HL; *Harris v Great Western Rly Co* (1876) 1 QBD 515; *Watkins v Rymill* (1883) 10 QBD 178, DC.

5 *Nunan v Southern Rly Co* [1923] 2 KB 703 (affd [1924] 1 KB 223, CA); *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA; *Duckworth v Lancashire and Yorkshire Rly Co* (1901) 84 LT 774.

6 Eg where the first intimation to him of the condition in question is given by means of a ticket issued by an automatic machine into which he has inserted the money for his fare: *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA.

7 *Parker v South Eastern Rly Co* (1877) 2 CPD 416, CA (approved in *Richardson, Spence & Co and Lord Gough Steamship Co Ltd v Rowntree* [1894] AC 217, HL; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL); *Nunan v Southern Rly Co* [1923] 2 KB 703 (affd [1924] 1 KB 223, CA); *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA; *Gray v London and North Eastern Rly Co* 1930 SC 989. See also *Henderson v Stevenson* (1875) LR 2 Sc & Div 470, HL (nothing on face of ticket referring to conditions on back; held insufficient); *Parker v South Eastern Rly Co* ('see back' on face of ticket; held not necessarily sufficient); *Woodgate v Great Western Rly Co* (1884) 51 LT 826, DC ('see back' on face of ticket; 'subject to conditions on time bills' on back; held sufficient); and cf *Stewart v London and North Western Rly Co* (1864) 3 H & C 135 (overruled on another point by *Cohen v South Eastern Rly Co* (1877) 2 ExD 253, CA); *Richardson, Spence & Co and Lord Gough Steamship Co Ltd v Rowntree* (ticket containing conditions was folded up so that conditions were not visible unless opened, and there was nothing to draw attention to them; held insufficient); *Hooper v Furness Rly Co* (1907) 23 TLR 451, DC ('at passengers' own risk' on face of ticket; condition printed on back; held that no reasonably sufficient notice was given); *Cooke v T Wilson Sons & Co Ltd* (1915) 85 LJB 888, CA (conditions on face of ticket in small clear type; held sufficient); *Williamson v North of Scotland and Orkney and Shetland Steam Navigation Co* 1916 SC 554 (conditions in very small type without any device to draw attention to them; held insufficient); *Penton v Southern Rly Co* [1931] 2 KB 103 (reduced fare ticket issued on demand for a ticket; 'for conditions see back' on face of ticket; special condition on back of ticket; held sufficient); *Sugar v London, Midland and Scottish Rly Co* [1941] 1 All ER 172 ('for conditions see back' obliterated by date stamp; held insufficient); *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450 (persons booking passage by ship should expect ticket to contain conditions excluding or limiting the shipowner's liability). See also PARA 75 note 5.

8 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, [1988] 1 All ER 348, CA; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265; *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep 446, [2000] 1 All ER (Comm) 519, CA.

9 *McCartan v North Eastern Rly Co* (1885) 54 LJB 441; *Woodgate v Great Western Rly Co* (1884) 51 LT 826, DC; *Burke v South Eastern Rly Co* (1879) 5 CPD 1.

10 See PARA 75 note 5.

11 *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL.

12 See PARA 76.

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## 75. Sufficient notice of terms.

Whether the passenger had knowledge of the terms and conditions of the contract of carriage, and whether all reasonable steps were taken to give him notice, are questions of fact<sup>1</sup>. With regard to the question whether reasonable steps were taken to give notice, the passenger is not entitled to rely on his illiteracy, for the carrier is entitled to assume that his passengers have possession of those faculties ordinarily held by human beings, and the passenger cannot contend that reasonable steps were not taken, because it would have taken him considerable time and trouble to ascertain precisely what the conditions were<sup>2</sup>. But if, in the case of a special

contract of carriage, the document containing the conditions is handed to the passenger at so short a time before the commencement of the journey that he has no time to examine it, there may be no communication of the conditions or no implication of their acceptance<sup>3</sup>.

Where an oral contract has been concluded, further terms cannot be added by the later handing over of a receipt or other document containing them or a reference to them<sup>4</sup>.

The display of a notice in the office where an oral contract is made stating that carriage is only undertaken upon certain terms may have the effect of incorporating these terms in the contract of carriage<sup>5</sup>; but will do so only if the notice is effectively brought to the customer's attention<sup>6</sup>.

The degree of notice required before a clause will be incorporated into the contract of carriage will vary with the nature of the clause itself; the more unusual the term or the more onerous its conditions, the greater the steps which will need to be taken to bring it to the attention of the passenger or consignor<sup>7</sup>.

1 *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL; *Skrine v Gould* (1912) 29 TLR 19, CA.

2 *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA; *Gray v London and North Eastern Rly Co* 1930 SC 989.

3 *Fosbrooke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108.

4 *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70; *Daly v General Steam Navigation Co Ltd, The Dragon* [1979] 1 Lloyd's Rep 257. Many documents which pass between the parties are not contractual, but merely incidental to the performance of the contract. See further *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA.

5 *Drayson v Horne* (1875) 32 LT 691; *Joshua Buckton & Co Ltd v London and North Western Rly Co* (1917) 87 LKB 234.

6 See the cases cited in note 5; and *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA; *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, [1957] 1 All ER 35, CA; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL; *TICC Ltd v Cosco (UK) Ltd* [2001] EWCA Civ 1862, [2002] CLC 346, [2001] All ER (D) 45 (Dec).

7 *Crooks v Allan* (1879) 5 QBD 38; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, [1988] 1 All ER 348, CA. See also PARA 74 note 8.

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## **76. Contract by course of dealing.**

Carriers usually make a practice of informing their customers, both actual and potential, that they will undertake business only upon the terms of their own or a trade association's standard conditions of carriage, and sending the customer a copy of these conditions or stating that they are available for inspection if desired. Where this has been done, the conditions will be incorporated by implication in contracts of carriage made thereafter by the customer requesting the carrier to carry a particular consignment and the carrier's acceptance.

It often happens, however, that the carrier is unable to prove that he has expressly so informed a particular customer, and in such a case the carrier who wishes to rely upon these conditions of carriage will be able to do so only if he can establish that they have been incorporated in the

contract of carriage in question by a 'course of dealing' between the parties. The principle is that if two parties have made a series of similar contracts each containing certain conditions, and they then make another without expressly referring to those conditions, it may be that those conditions ought to be implied<sup>1</sup>. Further, where a carrier has regularly sent to his customer documents such as consignment notes or statements of account stating the terms upon which he does business, and the customer has continued to deal with him without objection to those terms, the customer must be taken to have assented to do business in the future upon these terms<sup>2</sup> even though the documents, not being contractual, may not affect the contract in respect of which they are sent<sup>3</sup>. The carrier will be able to rely upon his conditions of carriage if the course of dealing, including the documents sent to the customer, should have led the customer to believe that the carrier was only willing to do business on those terms<sup>4</sup>.

It is the consistency of the course of conduct which gives rise to the implication. Thus where previous dealings have been on the basis of a signed document, the conditions contained in such a document will not be imported in a later oral contract<sup>5</sup>, except perhaps where the parties are both engaged in the same trade<sup>6</sup>; and no such implication can arise from a few isolated transactions over a long period<sup>7</sup>. Although one of the facts to be taken into account, in considering whether there has been a course of dealing from which a term is to be implied into the contract, is whether the consignor actually knew what were the terms contained in documents passing between the parties in previous transactions<sup>8</sup>, this is by no means decisive<sup>9</sup>.

1 *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL.

2 *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL; *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)* [1988] 2 Lloyd's Rep 427, CA.

3 See *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 All ER 309, [1966] 1 WLR 287, CA (affd sub nom *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL); *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)* [1988] 2 Lloyd's Rep 427, CA.

4 *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL; *British Crane Hire Corp'n Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA; *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470 (affd [1980] 1 Lloyd's Rep 53, CA).

5 *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL.

6 *British Crane Hire Corp'n Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA; *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570.

7 Eg *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA (three or four occasions in five years not sufficient); *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197 (isolated affairs not sufficient). Cf *Chevron International Oil Co Ltd v A/S Sea Team, The TS Havprins* [1983] 2 Lloyd's Rep 356.

8 See *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL.

9 See *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71 at 78, [1972] 1 All ER 399 at 404, CA, where Salmon LJ expressed the view that the effect of the decision in *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL, was that the dictum of Lord Devlin to the contrary, in *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430 at 437, [1964] 1 WLR 125 at 134, HL, would appear to be wrong. See also *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)* [1988] 2 Lloyd's Rep 427, CA.

CONTRACTUAL TERMS/(i) Terms of the Contract/77. Common conditions of carriage of passengers.

## **77. Common conditions of carriage of passengers.**

Subject to statutory limitations, carriers are free to include such terms as they please in their contracts with their passengers, but certain terms are usually included.

In the absence of stipulation to the contrary, notification in a timetable of a time of departure of a conveyance amounts to a promise that it will be available to accommodate any person who tenders the fare; and if no transport is provided, the carrier is liable in damages to any person who is misled and in consequence suffers damage<sup>1</sup>. The mere notification of the time of departure of the conveyance is no warranty that it will start at that time; and the issue of a ticket does not of itself impose any liability on the carrier if the conveyance does not start when expected<sup>2</sup>. When the timetables and conditions contain provisions that a carrier will not be responsible for transport not running punctually, a passenger taking a ticket which incorporates the timetables and conditions has no remedy for loss or inconvenience through delay, or through missing connections at junctions<sup>3</sup>. A condition which frees a carrier from liability for delay 'from accident or other cause', does not protect him when delay is due to negligence<sup>4</sup>; and a condition which purports to free him from liability for delay, but contains a statement that 'every attention will be paid to ensure punctuality', is a promise to use diligence, and the carrier is liable for delay due to negligence<sup>5</sup>.

The contract made by the buying and selling of a ticket is for a definite journey, and the passenger is not entitled to break the journey into two portions and require the carrier to carry him by two separate transits<sup>6</sup>, unless the conditions of issue of the ticket so permit. A passenger is only entitled to travel the agreed journey: where it is a condition of the contract that if a ticket is used for any other station or any other train or mode of transport than that for which it is issued, the ticket will be forfeited and the full fare charged for the journey actually taken, the carrier is entitled to enforce the condition if the ticket is used for any place beyond the agreed destination or, where the fare for the shorter journey is higher than that for the longer, if it is used for any place short of that destination<sup>7</sup>. Although a carrier may issue a through ticket for a journey partly over his own system and partly on the system of other carriers, he may entirely protect himself by conditions from liability for anything occurring on any other system<sup>8</sup>.

1 *Denton v Great Northern Rly Co* (1856) 5 E & B 860.

2 *Hurst v Great Western Rly Co* (1865) 19 CBNS 310; *Lockyer v International Sleeping Car and European Express Trains Co* (1892) 61 LJQB 501.

3 *McCartan v North Eastern Rly Co* (1885) 54 LJQB 441; *Woodgate v Great Western Rly Co* (1884) 51 LT 826, DC; *Duckworth v Lancashire and Yorkshire Rly Co* (1901) 84 LT 774.

4 *Buckmaster v Great Eastern Rly Co* (1870) 23 LT 471.

5 *Le Blanche v London and North Western Rly Co* (1876) 1 CPD 286, CA; *Buckmaster v Great Eastern Rly Co* (1870) 23 LT 471; and see PARA 784.

6 *Ashton v Lancashire and Yorkshire Rly Co* [1904] 2 KB 313; *Bastable v Metcalfe* [1906] 2 KB 288. See also *London and North Western Rly Co v Hinchcliffe* [1903] 2 KB 32.

7 *Great Northern Rly Co v Winder* [1892] 2 QB 595; *Great Northern Rly Co v Palmer* [1895] 1 QB 862; *London and North Western Rly Co v Hinchcliffe* [1903] 2 KB 32.

8 *Burke v South Eastern Rly Co* (1879) 5 CPD 1; *Fitzgerald v Midland Rly Co* (1876) 34 LT 771.

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## **78. Common conditions of carriage of goods.**

Carriers of goods usually undertake to carry on terms contained in standard conditions of carriage<sup>1</sup>. Except in the case of national or statutory carriers, which are deemed by statute not to be common carriers<sup>2</sup>, these conditions almost invariably provide that the carrier will not accept goods for carriage as a common carrier.

Standard conditions invariably contain provisions limiting or excluding liability for loss of or damage to goods; and, in so far as they seek to exclude or restrict the carrier's liability for breach of any contractual or common law duty to take reasonable care or exercise reasonable skill, they are subject to a test of reasonableness<sup>3</sup>. Other provisions commonly included in standard conditions of carriage deal with the power to sub-contract<sup>4</sup>, undelivered and unclaimed goods, warehousing charges, dangerous goods, liability for indirect or consequential damage or loss of a market<sup>5</sup>, and indemnity against claims by third parties. It is also usual to seek to provide that the carrier's employees and agents are to have the benefit of the conditions<sup>6</sup>. Conditions of carriage often include express terms giving the carrier a general lien upon the goods carried in addition to his particular lien for his charges for carrying them, and power to sell the goods and recoup his charges from the proceeds of sale if the lien is not satisfied within a reasonable time of giving notice of its exercise<sup>7</sup>.

Where there is an inconsistency<sup>8</sup> between the terms of standard conditions of carriage and the express terms of the contract agreed between the parties, it is clear that where the parties have taken the trouble to resolve any inconsistencies themselves, by expressly establishing a hierarchy between one part of the contract and another, then the courts will give effect to the parties' intentions and allow the source preferred by the parties, be it the standard form or a special condition, to prevail<sup>9</sup>. Where, on the other hand, there is no express clause in the contract establishing a hierarchy between standard terms and special conditions, then the special conditions will prevail<sup>10</sup>.

Where a contract of carriage stipulates that the carrier is to insure the goods, this will not of itself limit the liability of the carrier, common or private, for loss, damage or delay. The proper inference from the contract may be that he is to insure on his own behalf, so as to give the customer better security for the satisfaction of the carrier's liability, or it may be that he is to insure as agent for the customer, in which case the customer would not lose his rights against the carrier but would be at liberty, in the event of loss, damage or delay, to proceed against either the carrier or the insurers<sup>11</sup>.

1 See PARA 71.

2 See PARA 5.

3 See the Unfair Contract Terms Act 1977 ss 1, 2; and **CONTRACT** vol 9(1) (Reissue) PARA 822. As to the reasonableness test see s 11; and **CONTRACT** vol 9(1) (Reissue) PARA 831. Where goods are carried by ship or hovercraft, however, the reasonableness test applies only where the cargo-interest is 'dealing as a consumer': see the Unfair Contract Terms Act 1977 Sch 1 para 3; and **CONTRACT** vol 9(1) (Reissue) PARAS 828, 832.

4 See PARA 86.

5 See PARA 775 et seq.

6 For the effect of such provisions see PARA 85. As to the carrier's right to sub-contract see PARA 86.

7 As to the carrier's lien in the absence of express agreement see PARA 761 et seq.

8 As to the meaning of 'inconsistency' in this regard see *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565 at 575, [1987] 2 Lloyd's Rep 342 at 350, per Bingham LJ ('it is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses').

9 See *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565 at 572-574, [1987] 2 Lloyd's Rep 342 at 349, per Bingham LJ and at 576-577, 352-353 per Woolf LJ (who recommended that where standard terms and special conditions are used, the parties should resolve conflict by expressly establishing a hierarchy between the standard form and the special agreement of the parties).

10 See *Indian Oil Corpn v Vanol Inc* [1991] 2 Lloyd's Rep 634 (revsd on other grounds [1992] 2 Lloyd's Rep 563); *Metalfer Corpn v Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd's Rep 632; *Bayoil SA v Seawind Tankers Corpn, The Leonidas* [2001] 1 All ER (Comm) 392, [2001] 1 Lloyd's Rep 533.

11 *Hill v Scott* [1895] 2 QB 371; affd [1895] 2 QB 713, CA. See also *Post Office v British World Airlines Ltd* [2000] 1 All ER (Comm) 532.

## UPDATE

### 78 Common conditions of carriage of goods

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## (ii) Deviation, Misconduct and Exception Clauses

### 79. Construction of conditions of carriage.

No principle is more firmly settled than that exceptions to the general liability of a carrier must be construed strictly, so that if a word or clause is capable of bearing two meanings, the narrower meaning should be adopted<sup>1</sup>. However, a clause which limits rather than excludes altogether a particular liability will be more generously construed<sup>2</sup>. Where a carrier seeks to protect himself from liability for the negligence of his employees he must do so in clear and unambiguous language<sup>3</sup>.

General words in a contract of carriage with a common carrier avoiding or limiting his liability will be construed as relieving him from his liability as an insurer, but not from liability for his or his employees' or agents' negligence unless the words expressly or by necessary implication confer that further exemption<sup>4</sup>. Where a condition exempts a carrier from liability for delay 'from accident or other cause', it does not protect him when the delay is due to negligence<sup>5</sup>; and where a condition states that a carrier is not to be accountable for loss or damage which may arise through delay but states that 'every attention will be paid to ensure punctuality', the carrier is liable for delay resulting from negligence<sup>6</sup>. The general rules for the construction of exemption clauses are:

- 5 (1) the person seeking exemption from liability is not exempted from liability for the negligence of himself or his employees unless adequate words are used;
- 6 (2) his liability apart from the exempting words must be ascertained; and

- 7 (3) the particular clause in question must be considered, and if it appears that his only potential liability is for negligence, the clause will more readily operate to exempt him<sup>7</sup>.

It does not follow, however, that a clause providing that a private carrier will not be responsible for loss or damage from a particular cause must relieve him of liability from negligence simply because he would not otherwise be liable for loss or damage without negligence<sup>8</sup>. Such a clause may be open to the construction that it exempts the carrier from his contractual liability to take reasonable care to carry and deliver safely within a reasonable time, but does not exempt him from a wider liability in tort<sup>9</sup>. It may also be open to the construction that it is a mere warning that the carrier is not liable for loss or damage arising from that cause in the absence of negligence<sup>10</sup>, although such a construction will not be possible where the clause expressly exempts a party from liability for negligence<sup>11</sup>.

There is no rule of law whereby an exclusion clause, no matter how widely drafted, can never exempt a party for a fundamental breach of contract; in all cases the question whether an exclusion clause covers the consequences of any given breach is simply one of construction<sup>12</sup>, and there is no longer a qualification that very clear wording is required in order to exempt a carrier for a serious breach of a carriage contract<sup>13</sup>.

1 *Alexander v Railway Executive* [1951] 2 KB 882 at 893, [1951] 2 All ER 442 at 447 per Devlin J. This is a particular application of the contra proferentem rule (see **CONTRACT** vol 9(1) (Reissue) PARA 776). The contra proferentem rule is, however, confined to cases of ambiguity: *Macey v Qazi* (1987) Times, 13 January, CA. Further, there is a rule of construction that exemption clauses must be construed strictly, and that very clear words are required to provide that a contracting party is not to be liable for failure to perform his obligations: *The Cap Palos* [1921] P 458 at 472, CA, per Atkin LJ; and see *Burton v English* (1883) 12 QBD 218, CA; *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL; *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL. Although the rules of construction overlap to a large extent they do not completely coincide. Cf *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL. See further **CONTRACT** vol 9(1) (Reissue) PARA 800 et seq.

2 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101, [1983] 1 WLR 964, HL; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep 216, [2008] All ER (D) 383 (Apr).

3 *London and North Western Rly Co v Neilson* [1922] 2 AC 263, HL; *Kilroy Thompson Ltd v Perkins and Homer Ltd* [1956] 2 Lloyd's Rep 49; *Charles Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep 422; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL.

4 *Price & Co v Union Lighterage Co* [1904] 1 KB 412, CA ('any loss or damage ... which can be covered by insurance'); *Sutton & Co v Ciceri & Co* (1890) 15 App Cas 144, HL ('rates ... do not cover any insurance risk but are simply for freight'); *Rutter v Palmer* [1922] 2 KB 87, CA ('at customers' sole risk'). See also *Steinman & Co v Angier Line* [1891] 1 QB 619, CA ('thieves of whatever kind' does not cover theft by persons in the employ of the ship); *Rosin and Turpentine Import Co v B Jacob & Sons* (1910) 102 LT 81, HL; *Page v London, Midland and Scottish Rly Co* [1943] 1 All ER 455.

5 *Buckmaster v Great Eastern Rly Co* (1870) 23 LT 471.

6 *Le Blanche v London and North Western Rly Co* (1876) 1 CPD 286, CA; *Buckmaster v Great Eastern Rly Co* (1870) 23 LT 471.

7 *Rutter v Palmer* [1922] 2 KB 87 at 92, CA, per Scrutton LJ, following *McCawley v Furness Rly Co* (1872) LR 8 QB 57, and *Reynolds v Boston Deep Sea Fishing and Ice Co Ltd* (1922) 38 TLR 429, CA; *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; *Canada Steamship Lines Ltd v R* [1952] AC 192, [1952] 1 All ER 305, PC; *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA; *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 All ER 210, [1954] 1 WLR 459, CA.

8 *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA, explaining the dictum of Lord Greene MR in *Alderslade v Hendon Laundry Ltd* [1945] KB 189 at 192, [1945] 1 All ER 244 at 245, CA (that where negligence is the only ground of liability it must be covered, otherwise the clause would lack subject matter), and overruling *Turner v Civil Service Supply Association Ltd* [1926] 1 KB 50 and *Fagan v Green and Edwards Ltd* [1926] 1 KB 102. See also *Lamport & Holt Lines Ltd v Coubro & Scrutton (M and I) Ltd, The Raphael*

[1982] 2 Lloyd's Rep 42, CA; *Seven Seas Transportation Ltd v Pacifico Union Marina Corpn, The Oceanic Amity* [1983] 1 All ER 672 (affd [1984] 2 All ER 140, CA); *Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA, The Emmanuel C* [1983] 1 All ER 686; *Spriggs v Sotheby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep 487, CA; *Swiss Bank Corpn v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

9 *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA.

10 *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA, following *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA.

11 *Spriggs v Sotheby Parke Bernet & Co* [1986] 1 Lloyd's Rep 487, CA.

12 See *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL (overruling *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep 14; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683, [1963] 2 All ER 432, CA); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1. It is not decided whether this is still the case where the breach complained of amounts to a deviation from the terms of a contract of carriage: see PARA 81.

13 *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1 (overruling *Wibau Maschinenfabrik Hartman SA v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494).

## UPDATE

### 79 Construction of conditions of carriage

NOTE 7--*Canada Steamship*, cited, applied: *Onego Shipping and Chartering BV v JSC Arcadia Shipping, M/V 'Socal 3'* [2010] EWHC 777 (Comm), [2010] All ER (D) 179 (Apr).

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### 80. Restrictions on exception clauses.

A contract for the conveyance of a passenger in a public service vehicle<sup>1</sup> is void so far as it purports to negative or restrict the liability of a person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability<sup>2</sup>. An employee travelling with a free pass is not covered by this provision<sup>3</sup>, although a member of the public using a free pass is<sup>4</sup>.

An agreement whereby the liability<sup>5</sup> of the user of a vehicle on a road<sup>6</sup> in respect of the death of, or personal injury to, any person<sup>7</sup> carried in or upon the vehicle or entering, getting on to or alighting from it, is negated or restricted, or whereby conditions are imposed with respect to its enforcement, is of no effect<sup>8</sup>. The fact that such a person has willingly accepted as his the risk of negligence on the part of the user is not to be treated as negating any such liability of the user<sup>9</sup>.

A person acting in the course of business<sup>10</sup> cannot by reference to any contract term or notice given to persons generally<sup>11</sup> exclude or restrict his liability for death or personal injury resulting from the breach of any contractual or common law duty to take reasonable care or exercise reasonable skill<sup>12</sup>. Similar provisions apply to the duties which arise from the occupation of

premises for business purposes<sup>13</sup>. In the case of other loss or damage, any term which excludes or restricts liability for the above-mentioned obligations must satisfy a test of reasonableness<sup>14</sup>.

With regard to carriage by air, any term in a contract tending to relieve the carrier from liability or to fix a lower limit of liability than that provided by the appropriate rules otherwise than as provided by the rules is null and void, without prejudice, however, to the validity of the contract, which remains subject to the appropriate rules<sup>15</sup>. Any clause in the contract and all special agreements by which the parties purport to infringe the appropriate rules, whether by deciding what law is to be applied or by altering the rules as to jurisdiction (other than an arbitration clause in the case of carriage of cargo), are likewise null and void<sup>16</sup>.

With regard to the international carriage of passengers and luggage by rail, any terms or conditions of carriage or agreements concluded between the railway authority and the passenger which purport to exempt the authority in advance, either totally or partially, from liability under the Convention concerning International Carriage by Rail (the 'COTIF Convention')<sup>17</sup> are null and void, although this nullity does not avoid the contract of carriage, which remains subject to the provisions of the Convention<sup>18</sup>. With regard to the international carriage of goods by road, any stipulation which would directly or indirectly derogate from the provisions of the Convention on the Contract for the International Carriage of Goods by Road (the 'CMR Convention')<sup>19</sup> is null and void, although the nullity of such a stipulation does not involve the nullity of the other provisions of the contract<sup>20</sup>. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof, is null and void<sup>21</sup>.

1 As to the meaning of 'public service vehicle' for these purposes see the Public Passenger Vehicles Act 1981 s 1; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1136.

2 See the Public Passenger Vehicles Act 1981 s 29; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1175. As to agreements to travel at own risk see PARA 79.

3 *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258, CA. A negligent driver would not be protected by such a condition in a free pass issued by his employer: *Cosgrove v Horsfall* (1945) 175 LT 334, CA.

4 *Gore v Van der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA.

5 Other than contractual liability: see the Road Traffic Act 1988 s 145(4)(f); and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 945.

6 'Road' means any highway and any other road to which the public has access, and includes bridges over which a road passes: Road Traffic Act 1988 s 192(1).

7 This does not include employees of the user: see the Road Traffic Act 1988 s 145(4)(a); and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 945.

8 See the Road Traffic Act 1988 s 149(1), (2), (4); and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 949.

9 See the Road Traffic Act 1988 s 149(3); and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 949. This does not apply to vehicles owned by certain public authorities and driven for certain purposes (see s 144; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 938), nor to a vehicle owned by and driven under the control of a person who has deposited a specified sum with the Accountant General of the Supreme Court (see ss 143, 144, 149; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 937, 938, 949). See further **INSURANCE** vol 25 (2003 Reissue) PARA 729 et seq.

10 See the Unfair Contract Terms Act 1977 s 1(3); and **CONTRACT** vol 9(1) (Reissue) PARA 822.

11 Thus removing the distinction between contracts and conditional licences which formed the basis of the decision in *Gore v Van der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA.

12 See the Unfair Contract Terms Act 1977 ss 1(1), 2(1); and **CONTRACT** vol 9(1) (Reissue) PARA 822.

13 See the Unfair Contract Terms Act 1977 ss 1(1)(c), (3)(b), 2(1); and **CONTRACT** vol 9(1) (Reissue) PARA 822.

14 See the Unfair Contract Terms Act 1977 s 2(2); and **CONTRACT** vol 9(1) (Reissue) PARA 822. As to the reasonableness test see s 11; and **CONTRACT** vol 9(1) (Reissue) PARA 831.

15 See PARA 154.

16 See PARA 133.

17 See the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), which is given the force of law by the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 3. See PARA 683 et seq.

18 See the COTIF Convention Appendix A (CIV) art 5; and PARA 690.

19 See the Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956, Cmd 2260) (CMR), which is given effect by the Carriage of Goods by Road Act 1965, Schedule. See PARA 650 et seq.

20 Carriage of Goods by Road Act 1965, Schedule art 41 para 1.

21 Carriage of Goods by Road Act 1965, Schedule art 41 para 2.

## UPDATE

### 80 Restrictions on exception clauses

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### 81. Deviation.

It is a term of a contract of carriage that the carrier should carry the goods by his usual customary route<sup>1</sup>; and the carrier will be in breach where he deviates unnecessarily<sup>2</sup> from that route<sup>3</sup>. A common carrier is not bound to carry by the shortest route but only by the route by which he usually carries and by which he professes to go<sup>4</sup>. In the case of a private carrier, the route to be followed must be determined by the terms of the contract, express or implied, and by the surrounding circumstances<sup>5</sup>.

Contracts for carriage by sea frequently contain provisions enabling the carrier to call at ports other than those on the direct route from the port of origin to the destination<sup>6</sup>. These provisions are strictly construed<sup>7</sup>, and, in particular, are construed so as to be consistent with the main object of the voyage, namely, to give liberty to proceed only to ports which are in the course of the voyage in a business sense<sup>8</sup>. Similar considerations apply to carriage by land<sup>9</sup>. Thus carriage by a route other than that provided by the contract<sup>10</sup>, or carriage by goods train where the contract provides for carriage by passenger train<sup>11</sup>, is a deviation. Even where the contract of carriage permits discharge of the goods at a substituted destination, discharge at that destination without taking proper precautions for the security of the goods may amount to deviation<sup>12</sup>.

Delay in carriage may amount to deviation where it is such as to substitute a wholly different transit from that contemplated by the contract<sup>13</sup>.

1 *Davis v Garrett* (1830) 6 Bing 716; and see PARA 64.

2 As to when deviation may be excused see PARA 82.

3 *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660, CA; *London and North Western Rly Co v Neilson* [1922] 2 AC 263, HL; *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA; cf *Kenya Railways v Antares Co Pte Ltd, The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424, CA; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1.

4 *Hales v London and North Western Rly Co* (1863) 4 B & S 66; *Myers v London and South Western Rly Co* (1869) LR 5 CP 1.

5 Thus a parcel or part load of a vehicle may be carried to places not on the direct route between the place of dispatch and the destination, in the course of delivering other parcels or the other part load: *AF Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352.

6 See PARA 250.

7 See *Leduc & Co v Ward* (1888) 20 QBD 475, CA; and PARA 250.

8 *Glynn v Margetson & Co* [1893] AC 351, HL; *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, [1956] 3 All ER 957, HL. See also PARA 250 note 5.

9 *London and North Western Rly Co v Neilson* [1922] 2 AC 263, HL.

10 *Mallet v Great Eastern Rly Co* [1899] 1 QB 309.

11 *Gunyon v South Eastern and Chatham Rly Co's Managing Committee* [1915] 2 KB 370, DC.

12 *Cunard Steamship Co Ltd v Buerger* [1927] AC 1, HL.

13 *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, CA.

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## 82. Where deviation is excusable.

In cases of carriage by sea, deviation from the contemplated voyage is excused at common law:

- 8 (1) where it resulted from efforts to save life<sup>1</sup>;
- 9 (2) where it was due to stress of weather or necessity to avoid imminent danger<sup>2</sup>;
- 10 (3) where the charterer of a ship had undertaken to provide a full and complete cargo and had failed to do so<sup>3</sup>; and
- 11 (4) where a contract made express provision<sup>4</sup>.

Under the Hague-Visby Rules<sup>5</sup>, cases where deviation is permissible include saving or attempting to save property at sea and other reasonable deviations<sup>6</sup>.

In the case of carriage by land, it is submitted that similar principles will apply. Thus the consignor of a part load can scarcely complain if the vehicle deviates from the direct route from the point of departure to the destination, in order to pick up another part load<sup>7</sup>.

A carrier, like any other bailee, is relieved from liability for loss of or damage to goods being carried by him, and from any obligation to insure them against loss or damage, caused by war<sup>8</sup>. He will not, however, be relieved from this liability for loss of or damage to goods occurring while they are being kept or transported in a manner or at a place which is contrary to the terms of any contract relating to their custody or transport, unless he satisfies the court that he had reasonable grounds for believing that the goods were less likely to be lost or damaged while being so kept or transported than while being kept or transported in accordance with the terms of the contract<sup>9</sup>.

1 *Scaramanga v Stamp* (1880) 5 CPD 295, CA. Deviation is not excused at common law where it resulted from efforts to save property alone: see PARA 249; and the text to note 6.

2 See PARA 249.

3 *Wallems Rederij AS v WH Muller & Co, Batavia* [1927] 2 KB 99.

4 See PARA 250.

5 See PARAS 367-401.

6 See the Hague-Visby Rules art IV r 4; and PARAS 371, 378, 385.

7 *AF Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352; cf *Myers v London and South Western Rly Co* (1869) LR 5 CP 1.

8 Liability for War Damage (Miscellaneous Provisions) Act 1939 s 1 (amended by the Consumer Credit Act 1974 Sch 4 Pt I para 9). See further **BAILMENT** vol 3(1) (2005 Reissue) PARA 92. 'Loss by war' and 'damage by war' mean respectively loss (including destruction) and damage caused by or in repelling enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by or in repelling enemy action: Liability for War Damage (Miscellaneous Provisions) Act 1939 s 8(2).

9 Liability for War Damage (Miscellaneous Provisions) Act 1939 s 1(2) (as amended: see note 8). As to the effect of deviation generally see PARA 83.

## UPDATE

### 82 Where deviation is excusable

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### 83. Effect of deviation.

It was certainly once the case that the effect of a deviation was to deprive a common or private carrier of the benefit of exception clauses in the contract of carriage, whether or not the loss or damage resulted from or occurred in the course of the deviation<sup>1</sup>. However, judicial opinion is divided as to whether this rule has survived the abolition of the doctrine of fundamental breach of contract<sup>2</sup>, whereby as a matter of substantive law an exception clause, no matter how widely drafted, could never exempt a party for a fundamental breach<sup>3</sup>. It is submitted, however, that the logic of the abolition of the doctrine of fundamental breach and the consequent conclusion that even the most serious breach of contract may be covered by a suitably drafted exclusion clause compels the conclusion that a suitably drafted exclusion clause should also cover a case of deviation<sup>4</sup>.

If, contrary to this conclusion, a deviation does automatically and without more deprive a carrier of any exceptions in the contract of carriage, the following limits to the doctrine must be noted. Firstly, the doctrine only applies to those situations involving a bailment, so that it has no application in the case of a carriage of passengers<sup>5</sup>. Secondly, a common carrier will escape liability for loss or damage occurring in the course of deviation through an excepted peril, such as that occasioned by the Queen's enemies, where he can show that the loss or damage would have occurred in any event had there been no deviation<sup>6</sup>.

1 *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660, CA. For other effects of deviation see PARA 64.

2 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL (overruling *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep 14, CA; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683, [1963] 2 All ER 432, CA); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL.

3 In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 845, [1980] 1 All ER 556 at 563, HL, Lord Wilberforce stated that it may be preferable that the deviation cases should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons. However, in *Kenya Railways v Antares Co Pte Ltd, The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424 at 430, CA, Lloyd LJ thought it desirable that the deviation cases be assimilated within the general law of contract. To similar effect see *State Trading Corp of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 288-289, CA, per Lloyd LJ; *Wibau Maschinenfabrik Hartman SA v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494 (overruled on another point by *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1). See also PARAS 248 note 8, 378 note 12.

4 See PARA 79, and the cases cited therein.

5 *Hobbs v London and South Western Rly Co* (1875) LR 10 QB 111.

6 *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783, CA. As to excepted perils see PARA 17.

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#### **84. Misconduct.**

The courts lean strongly against carriers seeking to relieve themselves of liability in case of misconduct on the part of their employees<sup>1</sup>. If a contract purports to relieve a carrier from liability for any 'fault or negligence', the carrier remains liable in case of misconduct<sup>2</sup>. Misconduct is not necessarily established by proving even culpable negligence<sup>3</sup>. It is a common term of contracts for carriage 'at owner's risk' that the carrier shall not be liable for loss,

damage or delay except upon proof that it arose from the wilful misconduct of the carrier or his employees<sup>4</sup>.

The onus of proving misconduct lies on the party alleging it<sup>5</sup>, and misconduct will not be presumed from the mere fact of misdelivery<sup>6</sup>, or of unreasonable delay<sup>7</sup>, or of unexplained injury<sup>8</sup>, or of failure to give timely notice of arrival<sup>9</sup>, or of the driver crashing the vehicle after falling asleep at the wheel<sup>10</sup>. When goods are not delivered at all, the carrier's refusal to account for their loss does not justify the inference that it arose from wilful misconduct<sup>11</sup>.

If the misconduct alleged consists of several minor acts of carelessness, none of which in itself amounts to misconduct, it is not permissible to put them together and find that together they amount to misconduct; but such a series of acts may be evidence of the state of mind of the person doing them such as to make them wilful misconduct<sup>12</sup>.

It is also misconduct for the carrier's employee to deliver goods to a person who, as he knows, is not the consignee or his agent<sup>13</sup>. If misconduct on the part of a carrier's employee is alleged, it must be shown that the employee actually responsible for the transaction was guilty of a wrongful act; for knowledge on the part of the carrier, or of other employees, that an act was likely to cause injury is not sufficient to prove misconduct on the part of any employee not having that knowledge<sup>14</sup>.

Where a carrier who has, by contract, limited his liability for misconduct to misconduct of his own employees, is required by that contract to deliver on a route over part of which the goods will be carried by another carrier, then, if misconduct during the journey is proved, the burden of proof will lie on the contracting carrier to prove that it was not his employees who were guilty of that misconduct<sup>15</sup>.

1 *Ashendon v London, Brighton and South Coast Rly Co* (1880) 5 ExD 190; *Ronan v Midland Rly Co* (1884) 14 LR Ir 157; *Lewis v Great Western Rly Co* (1877) 3 QBD 195, CA; *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442. But cf PARAS 36, 61.

2 *Ronan v Midland Rly Co* (1884) 14 LR IR 157.

3 *Glenister v Great Western Rly Co* (1873) 29 LT 423; *Forder v Great Western Rly Co* [1905] 2 KB 532.

4 Wilful misconduct is misconduct to which the will is a party, and is something opposed to accident and far beyond negligence: *Lewis v Great Western Rly Co* (1877) 3 QBD 195, CA; *Joshua Buckton & Co Ltd v London and North Western Rly Co* (1916) 87 LJB 234; *Forder v Great Western Rly Co* [1905] 2 KB 532. It involves a person knowing and appreciating that he is acting wrongly or wrongfully omitting to act, and yet persisting in so acting or omitting to act regardless of the consequences, or acting or omitting to act with reckless indifference as to what the results may be: *Graham v Belfast and Northern Counties Rly Co* [1901] 2 IR 13; *Forder v Great Western Rly Co*; *Sheppard & Son v Midland Rly Co* (1915) 85 LJB 283; *Norris v Great Central Rly Co* (1915) 85 LJB 285n; *Horabin v British Overseas Airways Corp* [1952] 2 All ER 1016; cf *Bastable v North British Rly Co* (1912) 49 SLR 446. As to the meaning of 'wilful neglect or default' see *Re City Equitable Fire Insurance Co* [1925] Ch 407, CA. A grave error of judgment is not wilful misconduct if the carrier thought he was acting in the best interests of the persons affected: *Horabin v British Overseas Airways Corp* [1952] 2 All ER 1016.

5 As to the burden of proof in situations in which the dispute centres on the establishment, in circumstances of employee misconduct, of an initial liability rather than the exclusion of an existing liability see PARAS 61-62, 79.

6 *Stevens v Great Western Rly Co* (1885) 52 LT 324, DC. See *Webb v Great Western Rly Co* (1877) 26 WR 111.

7 *Graham v Belfast and Northern Counties Rly Co* [1901] 2 IR 13.

8 *Haynes v Great Western Rly Co* (1879) 41 LT 436.

9 *Hartstoke Fruiterers Ltd v London Midland and Scottish Rly Co* [1943] KB 362, [1943] 1 All ER 470, CA.

10 *TNT Global Spa v Denfleet International Ltd* [2007] EWCA Civ 405, [2008] 1 All ER (Comm) 97, sub nom *Denfleet International Ltd v TNT Global Spa* [2007] 2 Lloyd's Rep 504.

11 *HC Smith Ltd v Great Western Rly Co* [1922] 1 AC 178, HL, distinguishing *Curran v Midland Great Western Rly Co of Ireland* [1896] 2 IR 183 (where it was held that if the evidence justifies the inference that the goods are still in the carrier's possession, an unexplained refusal to deliver amounts in law to wilful misconduct), and indicating that the decision required further consideration.

12 *Horabin v British Overseas Airways Corp* [1952] 2 All ER 1016.

13 *Hoare v Great Western Rly Co* (1877) 37 LT 186. See *Goldsmith v Great Eastern Rly Co* (1881) 44 LT 181.

14 *Forder v Great Western Rly Co* [1905] 2 KB 532. Cf *Bastable v North British Rly Co* (1912) 49 SLR 446; *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd* [1967] 2 QB 250, [1966] 3 All ER 593, CA.

15 *Mahoney v Waterford, Limerick and Western Rly Co* [1900] 2 IR 273.

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### **85. Availability of exceptions to the liability of carrier's employees or agents.**

The carrier's employees or agents owe no contractual duty to the consignor or owner of goods or to a passenger being carried by their employer or principal, but may incur liability in tort for trespass, conversion or negligence through breach of a duty of care arising independently of contract. Generally, they cannot in defence set up any provision in the contract exempting the carrier from or limiting his liability, since they are not parties to the contract of carriage<sup>1</sup>; but they may be afforded the protection of limiting and exempting provisions in a number of ways, as described below.

First, the court may find that the employee or agent has entered into a contract with the consignor or owner of the goods or a passenger on terms identical to those contained in the contract with the carrier, either because the carrier acted as the agent of the employee or agent concerned when the contract of carriage was concluded, or because the employee or agent accepted an offer of immunity from the consignor or owner of goods or passenger when he commenced work under the contract of carriage<sup>2</sup>. Secondly, the carrier might give to his employees or agents an enforceable indemnity and provide in the contract of carriage that the customer should undertake not to make any claim against his employees or agents in excess of that permitted by the exempting or limiting clauses, at the same time informing the customer of the existence of the indemnity<sup>3</sup>. Thirdly, if the contract of carriage contained a provision that the consignor would not make such a claim against an employee or agent of the carrier, the carrier might apply to the court for a stay to restrain the consignor from doing so<sup>4</sup>, although the employee or agent would not be so entitled<sup>5</sup>. Fourthly, it has been held that an exclusion or limitation of liability in the contract of carriage may in certain circumstances operate so as to qualify the common law duty of care owed to the consignor or owner of the goods or the passenger by the employee or agent<sup>6</sup>. Finally, a clause in the contract of carriage may typically extend the exceptions, limitations and so on, which protect the carrier, so as to operate for the benefit of the carrier's servants, agents or sub-contractors<sup>7</sup>.

1 *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA, applying *Cosgrove v Horsfall* (1945) 62 TLR 140, CA; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Genys v Matthews* [1965] 3 All ER 24, [1966] 1 WLR 758; cf *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA (but quare whether this decision can stand with *Scruttons Ltd v Midland Silicones Ltd*). See also, as to the position of a carrier's employees or agents, the Contracts (Rights of Third Parties) Act 1999; and **CONTRACT**.

2 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd, The Eurymedon* [1975] AC 154, [1974] 1 All ER 1015, PC; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980]

3 All ER 257, [1981] 1 WLR 138, PC. See further *The Makhutai* [1996] AC 650, [1996] 3 All ER 502, [1996] 3 WLR 1, PC, explaining (but declining to extend) *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*, *The Eurymedon* and *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd*, *The New York Star*; *Homburg Houtimport BV v Agrosin Private Ltd*, *The Starsin* [2003] UKHL 12, [2004] 1 AC 715, [2003] 2 All ER 785, [2003] 1 Lloyd's Rep 571; *Borvigilant (Owners) v Owners of the Romina G* [2003] EWCA Civ 935, [2003] 2 All ER (Comm) 736, [2003] 2 Lloyd's Rep 520; and cf *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155.

3 See *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *The Makhutai* [1996] AC 650, [1996] 3 All ER 502, [1996] 3 WLR 1, PC.

4 *Nippon Yusen Kaisha v International Import and Export Co Ltd*, *The Elbe Maru* [1978] 1 Lloyd's Rep 206. The court has a discretion whether or not to grant a stay (see **PRACTICE AND PROCEDURE** vol 37 (Reissue) PARA 930) and will only do so where the applicant has a sufficient interest in preventing the impending litigation: *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356, CA (revsd on other grounds [1983] 2 All ER 508, [1983] 1 WLR 642, CA).

5 *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

6 *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA. Cf *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd*, *The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL. See also *The Makhutai* [1996] AC 650, [1996] 3 All ER 502, [1996] 3 WLR 1, PC.

7 This is the 'Himalaya' clause, which takes its name from the ship involved in *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA. For an analysis of the development of this clause, and the case-law which informed that development, see *The Makhutai* [1996] AC 650, [1996] 3 All ER 502, [1996] 3 WLR 1, PC, and the cases cited in note 2.

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### **(iii) Sub-contractors**

#### **86. Right to sub-contract.**

In modern conditions the performance of the contract of carriage by the carrier in his own vehicle will seldom, at any rate in carriage by road, be within the contemplation of the parties to the contract at the time of its making. Where the carrier carries on the business of a substantial transport undertaking with his own vehicles maintained and driven by his own employees, the parties to the contract may well expect that the whole or a substantial part of the carriage will be performed in the carrier's own vehicles driven by and under the control of his own employees. As in the case of any other contract, the question whether performance can properly be carried out by the employment of a sub-contractor must depend upon the proper inference to be drawn from the contract itself, its subject matter, and any other material surrounding circumstances<sup>1</sup>. In general, a contract may be performed vicariously unless the contracting party expressly or impliedly undertakes to perform it personally or by his own employees or agents<sup>2</sup>. Although in certain types of bailment<sup>3</sup> the bailee is not entitled to part with possession of the goods to a sub-contractor, a carrier is, in general, entitled to employ a sub-contractor without express authority<sup>4</sup>.

If the contract contains express terms permitting or prohibiting the employment of sub-contractors, this will conclude the matter, although the mere fact that standard conditions of carriage, incorporated into an oral contract of carriage by, for example, a course of dealing, provide that 'In these conditions 'contractor' means ... and (unless the context forbids) includes the contractor's employees and agents and any person or persons carrying goods under a sub-contract with the contractor' will not of itself authorise the employment of sub-contractors if

there is no mention of the matter in the conversation in which the contract is made<sup>5</sup>. Where there is no such express term, the carrier's right to sub-contract will depend upon the circumstances of the particular case. However, where the goods to be carried require specialist handling<sup>6</sup>, or where they are valuable or otherwise especially attractive to thieves<sup>7</sup>, then there will be an implication that sub-contractors may not be employed without express authority<sup>8</sup>.

1 See *Davies v Collins* [1945] 1 All ER 247, CA; *Southway Group Ltd v Wolff* (1991) 57 BLR 33, CA; cf *Kollerich & Cie SA v State Trading Corp of India* [1980] 2 Lloyd's Rep 32, CA; and see **CONTRACT** vol 9(1) (Reissue) PARA 926.

2 *British Waggon Co and Parkgate Waggon Co v Lea & Co* (1880) 5 QBD 149, DC; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414, HL; cf *Southway Group Ltd v Wolff* (1991) 57 BLR 33, CA; and see **CONTRACT** vol 9(1) (Reissue) PARA 926.

3 Eg storage of furniture: *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA.

4 *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA; *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940.

5 *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940.

6 See *British Waggon Co and Parkgate Waggon Co v Lea & Co* (1880) 5 QBD 149, DC; *Davies v Collins* [1945] 1 All ER 247, CA; *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA.

7 *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940 (copper wire 'the gold of thieves').

8 *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940.

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## 87. Modes of sub-contracting.

In this context, 'sub-contracting' means entrusting the performance of the whole or a part of the carriage to a person other than the contractor's own employees; thus it would not include the use of a vehicle hired without its driver, but would include the employment of a vehicle hired with its driver in circumstances in which the driver remained the employee of the owner of the vehicle although working under the direction of the contractor and his staff<sup>1</sup>. It also includes 'through carriage' or carriage by successive carriers<sup>2</sup>.

1 See *Learoyd Bros & Co and Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142.

2 See PARAS 91, 654.

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## 88. Rights of contractor and sub-contractor inter se.

The rights and liabilities of a carrier and sub-contractor inter se are governed by the sub-contract between them. If the sub-contractor's standard conditions of carriage are effectively incorporated into the sub-contract<sup>1</sup>, each party is bound by them. In other respects, the relationship of contractor and sub-contractor is that of consignor and carrier, so that, if the sub-contractor is a common carrier he has the ordinary duty to carry and the ordinary liability as an insurer<sup>2</sup>, whereas if he is a private carrier he will only be liable for negligence<sup>3</sup>.

The contractor is a bailee of the goods and provided he has some possessory title to the goods<sup>4</sup> he can maintain a claim in tort against anyone, including the sub-contractor, who wrongfully causes their loss, destruction or damage, even though this may not involve him in any liability to his bailor<sup>5</sup>. In such a claim, he can recover not merely the value of his interest in the goods but also their full value, if they are lost or destroyed, or the full diminution of their value, if they are damaged<sup>6</sup>. He will be liable to account to his bailor for the amount recovered in respect of the loss or damage, retaining for himself only such amount as represents his own interest in the goods<sup>7</sup>.

Because of the sub-contractor's liability to a claim in tort by the consignor or owner of the goods and the possibility that he may be unprotected by terms in his contract with the contractor which exclude or limit his liability for loss of or damage to the goods<sup>8</sup>, it is common to include in such contracts a provision that the contractor will indemnify the sub-contractor against claims by any person interested in the goods in excess of his liability under the sub-contract.

Such provisions are very narrowly construed, and, since it is thought to be unlikely that one man should agree to indemnify another for the consequences of the latter's negligence<sup>9</sup>, they will not cover claims based upon the sub-contractor's negligence unless such claims are included by express words or necessary implication<sup>10</sup>. The mere fact that the sub-contractor would not be liable for loss or damage without the negligence of himself or his employee will not necessarily lead to such implication<sup>11</sup>.

1 This will be determined by the same considerations as apply to any contract between a carrier and his customer: see PARA 71 et seq.

2 See PARA 16.

3 See PARAS 59-61.

4 *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA; *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

5 *The Winkfield* [1902] P 42, CA, overruling *Claridge v South Staffordshire Tramway Co* [1892] 1 QB 422; *O'Sullivan v Williams* [1992] 3 All ER 385, CA. See also the Torts (Interference with Goods) Act 1977; and **TORT**.

6 le by analogy with *The Winkfield* [1902] P 42, CA. See *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *O'Sullivan v Williams* [1992] 3 All ER 385, CA.

7 *Turner v Hardcastle* (1862) 11 CBNS 683; *Swire v Leach* (1865) 18 CBNS 479; *The Winkfield* [1902] P 42, CA; *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197, PC; *The Joannis Vatis* [1922] P 92, CA; *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; *Chabbra Corpn Pte Ltd v Jag Shakti (Owners)*, *The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC.

8 See PARA 89.

9 *Walters v Whessoe Ltd and Shell Refining Co Ltd* [1968] 2 All ER 816n, CA; and see *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028 (where the former case is considered).

10 *Smith v South Wales Switchgear Co Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL; *Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, [1967] 1 WLR 1508, HL; *Gillespie Bros &*

*Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *Thompson v T Lohan (Plant Hire) Ltd (JW Hurdiss Ltd, third party)* [1987] 2 All ER 631, [1987] 1 WLR 649, CA. Cf *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 2 All ER 957, [1986] 1 WLR 995, HL.

11 See *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA.

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### **89. Rights of consignor or owner of goods and sub-contractor inter se.**

If a direct contractual relationship is established between the consignor and the sub-contractor, as, for example, where the contractor makes the sub-contract as agent for one or both, their relationship is regulated by the terms of the contract. The sub-contractor is bound to carry and deliver the goods and to take reasonable care of them, if a private carrier<sup>1</sup>, or to be responsible as an insurer for their safety, if a common carrier<sup>2</sup>, and the consignor is bound to pay the sub-contractor's carriage charges and to take delivery of the goods<sup>3</sup>.

There is usually no such direct contractual relationship, the contractor undertaking to perform the whole of the carriage and employing the sub-contractor to perform vicariously the whole or part of the carriage. In these circumstances, the sub-contractor will owe no contractual obligation to the consignor to carry or deliver the goods, but will be subject to the ordinary common law duty of care to avoid damage to them<sup>4</sup>, and may be subject to the obligations of a bailee for reward<sup>5</sup>.

If there is no bailment of the goods to the sub-contractor, his duty in respect of the goods is no higher than the common law duty to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbour<sup>6</sup>; he is under no general duty to safeguard the goods from being stolen by a third party<sup>7</sup>. Where there is no privity of contract between the consignor and the sub-contractor, the latter cannot rely upon any exempting conditions in his contract with the contractor<sup>8</sup>.

Although the relationship of bailor and bailee is usually created by contract, it can exist independently of contract, for example, by one person voluntarily taking into his custody the goods of another<sup>9</sup>. Where a bailee entrusts goods to a sub-bailee, this creates the relationship of bailment between the original bailor and the sub-bailee<sup>10</sup>. As possession of the goods is usually entrusted to the sub-contractor by the contractor who has undertaken to carry them, the sub-contractor usually becomes a bailee and has the rights and duties of a bailee for reward where he is rewarded<sup>11</sup>. In this case, it would seem that both the owner and the first bailee have concurrently the rights of a bailor against the sub-contractor according to the nature of the sub-bailment<sup>12</sup>. The duties of the sub-contractor as a bailee are therefore owed not only to the consignor but to the owner of the goods and to anyone else having an interest in them, for example, a hirer with the right to possession. The term 'owner' is used hereafter to describe those persons to whom the sub-contractor's duty as a bailee is owed<sup>13</sup>.

Where the contractor hires a vehicle without a driver to carry the goods, the owner of the vehicle does not obtain possession of the goods loaded in it and is not liable as a bailee of the goods<sup>14</sup>; but where the contractor hires a vehicle with a driver in circumstances in which the driver remains the employee of the vehicle owner<sup>15</sup> even though he is working under the directions of the contractor and his staff, the owner of the vehicle is in the position of a bailee of the goods carried in the vehicle<sup>16</sup>, and owes to the owner of the goods the duties of a bailee even though there is no bailment strictly so called<sup>17</sup>.

In his capacity as bailee, the sub-contractor owes to the owner of the goods a duty at common law to take reasonable care to keep them safe and not to do any intentional act inconsistent with the owner's rights in them (for example, not to convert them)<sup>18</sup>.

1 See PARA 58 et seq.

2 See PARA 16.

3 In relation to 'through carriage' see PARA 91.

4 *Meux v Great Eastern Rly Co* [1895] 2 QB 387, CA.

5 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA. See further *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, where one sub-contractor (out of a number who had undertaken successive stages of a carriage), was held not liable in bailment because the loss in question occurred at a different stage of the carriage. As to the different types of bailment see PARA 58 et seq.

6 *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL, per Lord Atkin.

7 *Deyong v Shenburn* [1946] KB 227, [1946] 1 All ER 226, CA. It is not true to say that wherever a man finds himself in such a position that unless he does a certain act another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do it: *Deyong v Shenburn*; *Tinsley v Dudley* [1951] 2 KB 18, [1951] 1 All ER 252, CA; *Edwards v West Herts Group Hospital Management Committee* [1957] 1 All ER 541, [1957] 1 WLR 415, CA; *Pringle of Scotland Ltd v Continental Express Ltd* [1962] 2 Lloyd's Rep 80 (reluctance of the courts to impose upon parties by implied terms, apart from express terms, an implication to guard against fraud); *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215; *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, [1976] 2 All ER 641, HL; *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342, [1983] 3 All ER 161, CA; *Paterson Zochonis & Co Ltd v Merfarken Packaging Ltd* [1986] 3 All ER 522, CA; *Banque Financière de la Cité SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co Ltd (formerly Hodge General and Mercantile Co Ltd)* [1991] 2 AC 249, [1990] 2 All ER 947, HL. Cf *Maloco v Littlewoods Ltd* [1987] AC 241, sub nom *Smith v Littlewoods Organisation Ltd* [1987] 1 All ER 710, HL.

8 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL. Cf *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA, where the terms of a contract to which the plaintiff was, but the defendant was not, a party were used to qualify the duty of care in negligence owed by the defendant to the plaintiff at common law. It is difficult to see how the decision can stand with *Scruttons Ltd v Midland Silicones Ltd*, a case which was not cited to the court. See further *The Makhutai* [1996] AC 650, [1996] 3 All ER 502, [1996] 3 WLR 1, PC; *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2004] 1 AC 715, [2003] 2 All ER 785, [2003] 1 Lloyd's Rep 571; and cf the doctrine of sub-bailment on terms, under which obligations and immunities may be enforceable between a head bailor and a sub-bailee irrespective of contract (see PARA 66).

9 *Morris v CW Martin & Sons* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA.

10 *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL. There may be a quasi-bailment or a substitutional bailment: see PARA 65.

11 *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535.

12 See *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

13 To sustain a claim for the tort of negligence, a claimant must show that he was the legal owner or entitled to possession of the goods at the time when the negligence occurred: *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL; *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219, [1967] 3 All ER 775. However, when a carrier wrongfully converts goods by delivering them to a person not entitled to them, it is no answer to a demand by a person entitled to them to say that his title did not accrue until after the delivery: *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653, CA.

14 For a similar provision relating to the carriage of goods by sea, where goods are carried on a ship under a demise charterparty, see PARA 264 note 1.

15 See *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1, [1946] 2 All ER 345, HL.

16 *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *Learoyd Bros & Co and Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142; *Gallaher Ltd v British Road Services Ltd and Containerway and Roadferry Ltd* [1974] 2 Lloyd's Rep 440.

17 See *Learoyd Bros & Co and Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142.

18 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

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## **90. Effect of exempting conditions in contract subject to which sub-contractor is employed.**

When the sub-contractor has accepted possession of the goods from the contractor subject to contractual conditions of carriage which include terms excluding or limiting his liability for loss or damage, the question whether he can rely upon those terms in answer to a claim by the owner<sup>1</sup> for loss or damage presents some difficulty.

Where the relationship of bailor and bailee is established between the owner of the goods and the sub-contractor, then, if the owner can maintain his claim by showing the breach of a duty arising at common law out of that relationship, he is not obliged to rely on a contract; but if his cause of claim is that the sub-contractor ought to have done something or taken some precaution, which would not be embraced by the common law liability arising out of the relationship of bailor and bailee, then he is obliged to rely on the contract<sup>2</sup>.

Where the owner has to rely upon a contract, he must accept the operation of the exemption clauses. Where he does not do so and his claim is based on tort<sup>3</sup>, the question is whether the sub-contractor can rely upon the exemption clauses even though there is no privity of contract between him and the owner. There is much to be said on each side. On the one hand, it is hard on the owner if his just claim is defeated by exempting conditions of which he knew nothing and to which he was not a party and in several decisions at first instance it has been held that sub-contracting carriers cannot rely upon exemption clauses in the sub-contract in answer to a claim by the owner of the goods for loss or damage<sup>4</sup>. On the other hand, it is hard on the sub-contractor if he is held liable to a greater responsibility than he agreed to undertake<sup>5</sup>. One answer to the problem which enjoys the support of modern authority is that the owner is bound by the conditions in the contract if he has expressly or impliedly consented to the contractor making a sub-bailment containing those conditions, but not otherwise<sup>6</sup>. Another solution, and one which does not depend on the express or implied consent of the owner, is that if the owner could maintain his claim independently of bailment, then the sub-contractor would not be entitled to rely upon the exempting conditions<sup>7</sup>; but if the owner had to rely upon the bailment, then he would be bound by the conditions upon which the sub-contractor received the goods<sup>8</sup>.

Where there is a relationship of neither contract nor bailment between the owner of the goods and the sub-contractor, and the sub-contractor is sued in negligence, it may be possible for the sub-contractor to use the exempting terms contained in the contract between himself and the contractor to qualify the duty of care owed by him to the owner of the goods<sup>9</sup>.

1 As to the meaning of 'owner' for these purposes see PARA 89 text to note 13.

- 2 *Turner v Stallibrass* [1898] 1 QB 56, CA.
- 3 *Turner v Stallibrass* [1898] 1 QB 56, CA; *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107.
- 4 *WLR Traders (London) Ltd v British and Northern Shipping Agency Ltd and I Leftley Ltd* [1955] 1 Lloyd's Rep 554; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* as reported in [1964] 1 Lloyd's Rep 300; *L Harris (Harella) Ltd v Continental Express Ltd and Burn Transit Ltd* [1961] 1 Lloyd's Rep 251.
- 5 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA. See PARA 89.
- 6 See *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC. For a fuller list of authorities see PARA 66. Cf *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570.
- 7 *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA.
- 8 As suggested, albeit obiter, by Donaldson J in *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215 at 221-222. See also *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA; *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC. Donaldson J's view is also consistent with the effect of the decision in *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, HL, and with the view therein expressed of Lord Sumner (with whom Lord Dunedin agreed) that a 'bailment on terms' includes the exceptions and limitations of liability stipulated in 'a known and contemplated bill of lading', and with the view of Viscount Finlay that when the act complained of is done in the course of rendering the very services provided for in the bill of lading, the limitation therein contained must attach, whatever the form of claim and whether the owner or charterer be sued.
- 9 *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA. This decision is, however, contrary to *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL.

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## **(iv) Through Carriage**

### **91. Through carriage.**

The term 'through carriage' is used to describe the carriage of passengers or goods where the journey involves more than one carrier, for example, a journey partly by rail and partly by road.

International carriage by air<sup>1</sup>, road<sup>2</sup>, rail<sup>3</sup> and sea<sup>4</sup> is governed by international conventions which have been given by statute the force of law in the United Kingdom<sup>5</sup>, and which regulate the rights and duties of successive carriers.

When the carrier issues a through ticket for a journey to be undertaken partly in his own transport and partly in that of another carrier, he enters into a contract that the passenger is to be carried for the whole journey and that he will be carried with all due care, it being understood that he will procure part of the carriage to be performed by other persons<sup>6</sup>. If the passenger is injured by the negligence of another carrier or his employees, the contracting carrier is liable to the passenger<sup>7</sup>. The carrier issuing a through ticket may exclude or limit his liability in respect of matters occurring whilst the passenger is travelling by the service of another carrier<sup>8</sup>. The non-contracting carrier is, however, also liable for the consequences of negligence by himself or his employees or agents, even though he has no contract with the passenger<sup>9</sup>. Where a through ticket is used subject to conditions limiting or excluding certain liabilities to the passenger<sup>10</sup>, they will protect the second carrier even though there is one contract for the entire journey to which the second carrier is not a party<sup>11</sup>, because the

passenger impliedly authorises the first carrier to arrange for the second carrier to carry him upon the same terms<sup>12</sup>.

Where goods are to be carried by successive carriers, it was formerly held that the first carrier contracted to carry the goods for the whole journey and that there was no contract between the consignor and the second carrier<sup>13</sup>. Nowadays, conditions of carriage commonly limit the liability of the contracting carrier to the carriage to be performed by him or his employees or agent or sub-contractors employed by him, and authorise him to enter into contracts for further carriage as agent of the consignor. It appears that where parties contemplate that more than one carrier will be involved, the proper inference may well be that the contracting carrier undertakes to perform part of the carriage himself and to act as a forwarding agent<sup>14</sup> to make a contract for the onward carriage<sup>15</sup>. Where there is a contract with the second carrier to which the consignor is a party, the second carrier can rely upon his own conditions of carriage if they have been incorporated in that contract<sup>16</sup>. Where there is no contract with the second carrier, it is submitted that the second carrier's liability to the consignor will be that of a bailee for reward, and that he will be entitled to rely upon any terms and conditions upon which he received the goods<sup>17</sup>.

On most of the major trade routes of the world much of the traffic is carried, often in containers, by different modes of transport between inland terminals in different states under a single contract for the whole journey with a combined transport operator, etc. The carriage of such containers traffic is regulated by the international conventions applicable to each mode of transport used in the transit<sup>18</sup>.

1 See PARAS 121-172.

2 See PARAS 650-682.

3 See PARAS 683-747.

4 See PARAS 205-649.

5 Cf PARAS 94, 98, 101.

6 *Thomas v Rhymney Rly Co* (1871) LR 6 QB 266; *Buxton v North Eastern Rly Co* (1868) LR 3 QB 549; *Belbin v SMT (Eastern) Ltd* [1948] 1 DLR 414, NB App Div.

7 *Great Western Rly Co v Blake* (1862) 7 H & N 987; *Thomas v Rhymney Rly Co* (1871) LR 6 QB 266; *Belbin v SMT (Eastern) Ltd* [1948] 1 DLR 414, NB App Div.

8 *Burke v South Eastern Rly Co* (1879) 5 CPD 1. This is subject to the statutory provisions avoiding any conditions which may be made by carriers, restricting or excluding their liability for death of or bodily injury to passengers: see PARA 80.

9 *Self v London, Brighton and South Coast Rly Co* (1880) 42 LT 173, CA; *Foulkes v Metropolitan District Rly Co* (1880) 5 CPD 157, CA.

10 See note 8.

11 See *Directors of Bristol and Exeter Rly v Collins* (1859) 7 HL Cas 194.

12 *Hall v North Eastern Rly Co* (1875) LR 10 QB 437.

13 *Directors of Bristol and Exeter Rly v Collins* (1859) 7 HL Cas 194.

14 As to forwarding agents see PARAS 92-93.

15 See *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA; *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146. Cf *Charles Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep 422; *Tetroc Ltd v Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep 192; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49.

16 See PARA 89.

17 See PARA 90. See also PARA 89.

18 See the Freight Containers (Safety Convention) Regulations 1984, SI 1984/1890; and **HEALTH AND SAFETY AT WORK**. As to international carriage by road and rail generally see PARA 650 et seq.

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## **(v) Forwarding Agents**

### **92. Characteristics of forwarding agents.**

A forwarding agent is one who carries on the business of arranging for the carriage of goods for other people; his task is to arrange carriage rather than to effect it<sup>1</sup>. A forwarding agent is not, in general, a carrier: he does not ordinarily obtain possession of the goods and he does not ordinarily undertake the delivery of them at their destination. In normal circumstances his function is merely to act as agent<sup>2</sup> for the goods owner to make arrangements with those contractors who do carry (such as shipowners, road hauliers, railway authorities and air carriers) and to make whatever arrangements are necessary for the intermediate steps between the ship and the rail, the customs or anything else<sup>3</sup>.

The fact that a person describes himself as a forwarding agent is not conclusive. It is a question of fact to be decided according to the circumstances of each case whether a person normally carrying on business as a forwarding agent contracts solely as agent so as to establish a direct contractual link between his customer and a carrier<sup>4</sup> (or possibly with several carriers, each undertaking a different part of the transit), or whether he contracts as principal to carry the goods, the customer appreciating that he will perform the contract vicariously through the engagement of sub-contractors<sup>5</sup>. The nature of the carriage<sup>6</sup>, the language used by the parties in describing the role of the person concerned<sup>7</sup>, the general implication to be gathered from the wording of the contract documents<sup>8</sup>, the method of invoicing and the route along which payment is to be made and enforced<sup>9</sup>, and any course of dealing between the parties will be relevant factors.

Although there is a clear distinction between a forwarding agent and a carrier, the same person may conduct both activities at once and may contract sometimes as one and sometimes as the other<sup>10</sup>. Persons properly described as shipping and forwarding agents often act as carriers themselves with respect to part of the carriage, for example, by performing collection and delivery services between the customers' premises, their own depots, and warehouses, docks and carriers' depots<sup>11</sup>. In such cases, they have the rights and duties of carriers with respect to such carriage as they undertake personally<sup>12</sup>, but the rights and duties of forwarding agents with respect to the remainder of the transit<sup>13</sup>.

1 *EMI (New Zealand) Ltd v William Holyman & Sons Pty Ltd* [1976] 2 NZLR 566, NZ SC; *Moto Vespa SA v MAT (Brittania Express) Ltd and Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175 at 179 per Mocatta J ('their function here seems to have been that of the ordinary forwarding agent, namely, to make the necessary and proper arrangements for the carriage of someone else's property'). It is this element of non-involvement in the carrying operation itself which principally distinguishes the forwarding agent from the primary carriage contractor under a quasi-bailment (see PARA 65). Under a quasi-bailment, the primary contractor has permission to delegate the entirety of the carriage without personally acquiring possession of the goods, but he remains contractually responsible for the manner in which the carriage is conducted by his delegate and answerable for the latter's defaults, irrespective of any personal want of care in appointing or supervising him. Of course, the primary carriage contractor under a quasi-bailment is additionally liable for any personal want of care in regard to the delegation of performance: *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197; and see PARAS 59, 61.

2 In theory a party might act as a forwarding agent although he is not an agent in the literal sense and does not effect a contract between the party engaging him and the carrier or other independent contractor whose services he engages. In such a case, the forwarding agent might contract as a principal towards third parties, while not contracting as a carrier (and not undertaking primary responsibility for the carriage) towards the party engaging him; such cases, however, are bound to be rare. Cf *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

3 *Jones v European and General Express Co Ltd* (1920) 90 LJKB 159; approved in *Troy v Eastern Co of Warehouses, Insurance and Transport of Goods and Advances Ltd (of Petrograd)* (1921) 91 LJKB 632, CA. See also *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd and World Transport Agencies* [1974] 1 Lloyd's Rep 443; *Moto Vespa SA v MAT (Brittania Express) Ltd and Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49 (the last two cases being decisions under the Carriage of Goods by Road Act 1965, as to which see PARA 650 et seq). See further *Platzhoff v Lebean* (1865) 4 F & F 545; *Lynch Bros Ltd v Edwards and Fase* (1921) 90 LJKB 506.

4 See notes 1, 2.

5 *Lynch Bros Ltd v Edwards and Fase* (1921) 90 LJKB 506; *WLR Traders (London) Ltd v British and Northern Shipping Agency Ltd and I Leftley Ltd* [1955] 1 Lloyd's Rep 554; *L Harris (Harella) Ltd v Continental Express Ltd and Burn Transit Ltd* [1961] 1 Lloyd's Rep 251; *AF Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352; *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280. See also *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, CA; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49 (decisions under the Carriage of Goods by Road Act 1965). Cf *Charles Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep 422; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 (cases of sub-bailment where the primary bailees were held to have undertaken carriage of the goods, and to have transferred possession to the carriers, as principals in their own right).

6 Eg where the person concerned undertakes to send the goods by a particular railway, shipping line or air carrier.

7 This must be considered vis-à-vis the consignor and the actual carrier. Thus a forwarding agent may make himself liable as a principal to the actual carrier although he is in fact acting as agent for the consignor: see *Gadd v Houghton* (1876) 1 ExD 357, CA; *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, HL, distinguished on the facts in *Tudor Marine Ltd v Tradax Export SA, The Virgo* [1976] 2 Lloyd's Rep 135, CA, and in *Jugoslavenska Linijska Plovidba v Hulsman (t/a Brusse & Sippel Import-Export), The Primorje* [1980] 2 Lloyd's Rep 74. See also *Badgerhill Properties Ltd v Cottrell* (1991) 54 BLR 23, CA; and **AGENCY** vol 1 (2008) PARA 157.

8 *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49 (a decision under the Carriage of Goods by Road Act 1965).

9 *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49; but cf *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA; *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd and World Transport Agencies* [1974] 1 Lloyd's Rep 443. See also *Charles Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep 422; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 (sub-bailment).

10 See *Hellaby v Weaver* (1851) 17 LTOS 271; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280 (where a person carrying on business as a shipping, customs and forwarding agent was held to have made separate contracts as a principal with his customer and with the actual carrier of the goods); *Troy v Eastern Co of Warehouses, Insurance and Transport of Goods and Advances Ltd (of Petrograd)* (1921) 91 LJKB 632, CA; *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd's Rep 57; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49 at 52 per Hobhouse J ('forwarding agents act in very many capacities'). See also *EMI (New Zealand) Ltd v William Holyman & Sons Pty Ltd* [1976] 2 NZLR 566, NZ SC. Cases where a forwarding agent acts as a carrier in his own right are likely to be exceptional: *Langley Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297. See PARA 216.

11 See *AF Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280.

12 A forwarding agent will normally act as a private carrier in respect of those parts of the overall carriage operation which he performs personally, but he may act as a common carrier if the conditions relative to that status (see PARAS 3-55) are satisfied: *Hellaby v Weaver* (1851) 17 LTOS 271; *Date & Cocke v GW Sheldon & Co (London) Ltd* (1921) 7 Ll L Rep 53. As to the liabilities of a common carrier see PARA 7 et seq.

13 See PARA 93. Cf the position of the primary carriage contractor under a quasi-bailment: see PARA 65.

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### **93. Rights and liabilities of forwarding agents.**

The rights and liabilities of a forwarding agent are governed by general principles of the law of agency<sup>1</sup> and by the terms of any special contract<sup>2</sup>. A forwarding agent is entitled to be indemnified against all expenses incurred on behalf of his principal<sup>3</sup> and to be paid his proper charges<sup>4</sup> for his services.

A forwarding agent is liable for failure to make proper arrangements for the carriage of the goods and for any ancillary matters which he undertakes, such as customs clearance<sup>5</sup>. Where he expressly promises to perform a particular act or service, he may be strictly liable for failure to perform that act or service<sup>6</sup>. A forwarding agent must exercise reasonable care in selecting and appointing<sup>7</sup> the carrier and any other independent contractor involved in the carriage of the goods<sup>8</sup> but he is not otherwise liable for the defaults of such parties and owes no general duty to supervise them<sup>9</sup>. Provided that he engages contractors whom he can reasonably expect to perform their normal obligations competently, he is entitled to leave performance of those duties to their discretion<sup>10</sup>. A forwarding agent is not, therefore, ordinarily answerable for the failings of those whom he engages on his principal's behalf unless he knew or should reasonably have known of those failings and could reasonably have been expected either to remedy them personally or (at least) to inform his principal so that damage might be avoided or mitigated<sup>11</sup>.

In ordinary transactions a forwarding agent is not liable for failing to insure the goods in the absence of instructions to that effect from his customer<sup>12</sup>. In certain circumstances, however, he may be liable for not consulting his customer and for not advising him as to the appropriate transport and insurance arrangements to be made for valuable goods<sup>13</sup>.

A forwarding agent does not normally owe a personal obligation to pay the charges of carriers whom he engages to carry goods on behalf of his principal<sup>14</sup>; but there is a custom of the London freight market that forwarding agents incur personal liability to shipowners for the payment of freight or of dead freight for booked space left unfilled<sup>15</sup>.

A forwarding agent who tenders dangerous goods to carriers without warning them of their nature or of the precautions which should be taken in their carriage is personally liable to the carriers for any resulting damage through breach of the implied warranty that the goods are fit for carriage<sup>16</sup>.

1 See **AGENCY** vol 1 (2008) PARA 1 et seq.

2 Standard terms are in frequent use: cf *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

3 See **AGENCY** vol 1 (2008) PARA 111.

4 I.e. charges whose amount or mode of calculation has been agreed, or charges calculated upon a quantum meruit: see **AGENCY** vol 1 (2008) PARA 102. Statute provides that where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge: see the Supply of Goods and Services Act 1982 s 15(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 99. What is a reasonable charge is a question of fact: see s 15(2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 99. See also PARA 9.

5 *Von Trautenberg v Davies, Turner & Co Ltd* [1951] 2 Lloyd's Rep 462, CA.

6 See PARAS 58, 63.

7 A forwarding agent might be liable to his principal where the contract which he concludes with the carrier or other independent contractor is (while binding on the principal) not on proper terms: cf *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79 (a case of substitutional bailment, where an allegation to similar effect was not substantiated).

8 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA. See also *Langley Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297. Statute provides that, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill: see the Supply of Goods and Services Act 1982 s 13; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 97.

9 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA.

10 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA.

11 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306, CA.

12 *WLR Traders (London) Ltd v British and Northern Shipping Agency Ltd and I Leftley Ltd* [1955] 1 Lloyd's Rep 554.

13 *Von Trautenberg v Davies, Turner & Co Ltd* [1951] 2 Lloyd's Rep 462, CA.

14 The position is likely to be otherwise in those exceptional cases where a forwarding agent, while not undertaking the carriage of the customer's goods, contracts as principal with the carrier or other party engaged to handle those goods: see PARA 92 note 7.

15 *Anglo-Overseas Transport Co Ltd v Titan Industrial Corp'n (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152; *Perishables Transport Co Ltd v N Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep 379; *Langley, Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297; *Cory Bros Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep 58.

16 *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA.

## UPDATE

### 93 Rights and liabilities of forwarding agents

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## (5) CARRIERS WITH SPECIAL RIGHTS AND DUTIES

### (i) Carriers by Air, Sea, Road, Rail and Inland Waterway

#### 94. Carriers by air.

The international carriage of passengers, baggage and cargo by air is governed by a series of Conventions dating back to the Warsaw Convention of 1929<sup>1</sup>, which are applied in United Kingdom law via the Carriage by Air Act 1961, the Carriage by Air (Supplementary Provisions) Act 1962, subordinate legislation made under those Acts and European Community legislation

on air carrier liability<sup>2</sup>. Successive amendments to the Warsaw Convention have produced a series of modified versions<sup>3</sup> which have now been consolidated in the Montreal Convention of 1999<sup>4</sup>; carriage within the European Community is governed exclusively by the Montreal Convention<sup>5</sup>, while international carriage will be governed by either the Montreal Convention or one of the versions of the Warsaw Convention depending on the identity of the carrier involved and which of the Conventions their state of registration or licensing has ratified<sup>6</sup>. Provision regulating carriage by air is also made under the Air Navigation Order<sup>7</sup>, and there is a residual class of carriage to which the statutory rules do not apply, which is subject to rules of common law<sup>8</sup>.

1    le the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929; TS 11 (1933); Cmnd 4284).

2    See the Carriage by Air Act 1961 s 1; the Carriage by Air (Supplementary Provisions) Act 1962 s 1; the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899; EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air; and PARA 121 et seq.

3    le, principally, the Warsaw-Hague Convention following amendments made by the Hague Protocol of 1955 (28 September 1955; Misc 5 (1956); Cmd 9824) and the Warsaw-Hague-MP4 Convention following amendments made by Montreal Additional Protocol No 4 (25 September 1975; Misc 17 (1976); Cmnd 6483); these versions of the Warsaw Convention are enacted in the Carriage by Air Act 1961 Schs 1, 1A. The Warsaw Convention was also amended the Guatemala Protocol of 1971 (Guatemala City, 8 March 1971; Misc 4 (1971, Cmnd 4691), which has never been brought into force, and by three further Additional Protocols agreed at Montreal in 1975 (25 September 1975; Misc 17 (1976); Cmnd 6480-6482), which to the extent they have any effect are of minor significance. There are also circumstances in which the Warsaw Convention continues to apply in unamended form, and where the supplementary provisions of the Guadalajara Convention of 1961 (ie the Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara, 18 September 1961; TS 23 (1964); Cmnd 2354) (superseding Misc 13 (1961); Cmnd 1568)) have effect. For a detailed treatment of the Warsaw Convention in its various guises see PARA 121.

4    le the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999; TS 44 (2004); Cm 6369), enacted in the Carriage by Air Act 1961 Sch 1B (added by SI 2002/263). Where it applies, the Montreal Convention prevails over any other set of rules which apply to international carriage by air: see art 55; and PARA 121.

5    See EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in the event of accidents; and PARA 122.

6    See PARA 122; and as to ratifications see PARA 123.

7    Aircraft registered in a contracting state to the Convention on International Civil Aviation (Chicago, 7 December 1944; TS 8 (1953); Cmd 8742) (see **AIR LAW** vol 2 (2008) PARA 1 et seq) other than the United Kingdom, or in a foreign country, may not take on board or discharge any passengers or cargo in the United Kingdom, being passengers or cargo carried for valuable consideration, except with the permission of the Secretary of State granted to the operator or charterer of the aircraft or to the government of the country in which the aircraft is registered and in accordance with any conditions to which that permission may be subject; unless it is exercising traffic rights permitted by virtue of the relevant European Community legislation on access for Community air carriers to intra-Community air routes: see the Air Navigation Order 2005, SI 2005/1970, art 138(1); and **AIR LAW** vol 2 (2008) PARA 363. See also the Chicago Convention arts 5, 7; the Civil Aviation Act 1982 s 60(3)(f), (ff); and **AIR LAW** vol 2 (2008) PARA 353. As to the registration of aircraft see **AIR LAW** vol 2 (2008) PARAS 358, 367 et seq. As to Community air carriers see PARA 122. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355. Aircraft engaged in the public transport of passengers (see **AIR LAW** vol 2 (2008) PARA 363) may land or depart only from licensed or other specified aerodromes (see the Air Navigation Order 2005, SI 2005/1970, art 126(1); and **AIR LAW** vol 2 (2008) PARA 226 et seq), and must comply with the customs procedure (see **AIR LAW** vol 2 (2008) PARA 309 et seq). A passenger commits an offence if he travels in any part of an aircraft not designed for the accommodation of persons or stows himself away, recklessly or negligently acts in a manner likely to endanger the safety of an aircraft or of any person in it or to cause or permit it to endanger any person or property, is drunk in an aircraft, smokes in a part of an aircraft where smoking is not permitted, or acts in a disruptive manner: see arts 71, 73-76, 78, 79; and **AIR LAW** vol 2 (2008) PARAS 524-527, 627. The Air Navigation Order 2005, SI 2005/1970, also makes provision in connection with the carriage of dangerous goods and weapons and munitions of war by air (see PARAS 193-204).

8 As to this class of carriage, and as to the classes of liability governed by the common law rules, see PARA 1 et seq.

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## **95. Control of air transport.**

A detailed examination of the authorities concerned with carriage by air is outside the scope of this title<sup>1</sup>. The Civil Aviation Authority is established with the task of regulating the British aviation industry as a whole<sup>2</sup>, and is charged with the duty of performing its functions<sup>3</sup> in the manner which it considers is best calculated to secure that British airlines provide air transport services which satisfy all substantial categories of public demand (so far as British airlines may reasonably be expected to provide such services) at the lowest charges consistent with a high standard of operational safety and an economic return to efficient operators on the sums invested in providing the services and with securing the sound development of the civil air transport industry of the United Kingdom and to further the reasonable interests of users of air transport services<sup>4</sup>. The Secretary of State retains direct responsibility for matters involving considerations beyond the Authority's scope<sup>5</sup>.

Responsibility for the management of aerodromes is vested in BAA plc<sup>6</sup>.

1 As to the authorities concerned with carriage by air see **AIR LAW** vol 2 (2008) PARA 33 et seq.

2 As to the constitution of the Civil Aviation Authority see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq.

3 The functions of the Civil Aviation Authority are set out in the Civil Aviation Act 1982 s 3: see **AIR LAW** vol 2 (2008) PARA 51.

4 See the Civil Aviation Act 1982 s 4(1); and **AIR LAW** vol 2 (2008) PARA 52.

5 See the Civil Aviation Act 1982 s 1; and see **AIR LAW** vol 2 (2008) PARAS 33-34. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

6 See the Airports Act 1986 s 2; and **AIR LAW** vol 2 (2008) PARA 182.

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## **96. Air transport licensing.**

No aircraft registered in the United Kingdom<sup>1</sup> or in a relevant overseas territory<sup>2</sup> may be used on any flight for the purpose of public transport, unless the operator holds an air transport licence granted by the Civil Aviation Authority authorising that flight and the terms of the licence are observed<sup>3</sup>. However, the Civil Aviation Authority may exempt flights or series or descriptions of flights from the need for a licence<sup>4</sup>.

The Civil Aviation Authority has additional licensing and supervisory functions arising out of European Community legislation concerning the licensing of air carriers and the grant and maintenance of air carrier operating licences<sup>5</sup>.

1 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man is within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3.

2 le any of the Channel Islands, the Isle of Man and any colony: Civil Aviation Act 1982 s 105(1) (definition amended by the Aviation and Maritime Security Act 1990 Sch 4).

3 See the Civil Aviation Act 1982 s 64(1), (2); and **AIR LAW** vol 2 (2008) PARA 106. For the law relating to the grant, etc of air transport licences (which apply to scheduled and charter services) see **AIR LAW** vol 2 (2008) PARA 98 et seq. As to the Civil Aviation Authority see PARA 95; and **AIR LAW** vol 2 (2008) PARA 50 et seq.

4 See the Civil Aviation Act 1982 s 64(2)(a), (b); and **AIR LAW** vol 2 (2008) PARA 106. No licence is required for a flight by an aircraft of which the Civil Aviation Authority is the operator or for the undertaking of carriage by air for which a valid operating licence issued in accordance with EC Council Regulation 2408/92 (OJ L240, 24.8.92, p 8) is required: see the Civil Aviation Act 1982 s 64(2)(c), (d); and **AIR LAW** vol 2 (2008) PARA 106.

5 See **AIR LAW** vol 2 (2008) PARA 98 et seq.

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## **97. Setting of air fares and cargo rates by Community air carriers.**

Air carriers<sup>1</sup> operating within the European Community must inform the public, on request, of all air fares<sup>2</sup> and standard cargo rates<sup>3</sup>. Charter fares and seat and cargo rates charged by Community air carriers<sup>4</sup> must be set by free agreement between the parties to the contract of carriage<sup>5</sup>.

Without prejudice to the provisions described in this paragraph, Community air carriers may freely set air fares<sup>6</sup>. Member states may require air fares to be filed with them in prescribed form<sup>7</sup>, but such filing may not be required more than 24 hours before fares come into effect; in the case of matching an existent fare, mere prior notification is required<sup>8</sup>. An air fare may be available for sale and carriage as long as it is not withdrawn<sup>9</sup>.

A member state may decide at any moment to withdraw a basic fare which is too high<sup>10</sup>, or to stop further fare decreases in a market where there has been sustained downward development of fares<sup>11</sup>. Such a decision must be notified to the EC Commission and other member states involved<sup>12</sup>, and, in the absence or on the resolution of disagreement<sup>13</sup>, the first member state may instruct an air carrier to withdraw the fare or abstain from further fare decreases, as the case may be<sup>14</sup>.

At the request of a member state the Commission must examine whether a decision so to act complies with the requirements for such a decision<sup>15</sup>. The Commission may also conduct such an examination on the basis of a complaint made by a party with a legitimate interest<sup>16</sup>. An air fare remains in force during such examination, unless the Commission has in the previous six months decided that the same or a similar fare did not fulfil the necessary criteria<sup>17</sup>. The Commission must reach a decision, taking into account all information from interested parties, as soon as possible, and in any event within 20 working days of receiving sufficient information from the carriers<sup>18</sup>. The Commission must without delay communicate its reasoned decision to the member state and carriers concerned<sup>19</sup>. A member state may within one month refer that decision to the EC Council, which may reach a different decision<sup>20</sup>.

The Commission must at least once a year consult on air fares and related matters with representatives of air transport user organisations<sup>21</sup>.

1 'Air carrier' means an air transport undertaking with a valid operating licence: EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) on fares and rates for air services, art 2(g). As to operating licences see **AIR LAW** vol 2 (2008) PARA 98 et seq. In the Air Fares Regulations 1992, SI 1992/2994, 'Council Regulation' means EC Council Regulation 2409/92 as it has effect in accordance with the EEA Agreement as amended by the Decision of the EEA Joint Committee no 7/94 of 21 March 1994 and in accordance with the Decision of the Council, and of the Commission as regards the Agreement on Scientific and Technological co-operation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation, in so far as it applies to the Agreement between the European Community and the Swiss Confederation on Air Transport: Air Fares Regulations 1992, SI 1992/2994, reg 2(1) (amended by SI 1993/100; SI 1993/3041; SI 1994/1735; SI 2004/1256).

2 'Air fares' means the prices expressed in ecus or local currency to be paid by passengers to air carriers or their agents for the carriage of them and for the carriage of their baggage on air services and any conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services: EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 2(a).

3 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 4. In the United Kingdom, an air carrier which fails to do so without reasonable excuse is guilty of an offence: Air Fares Regulations 1992, SI 1992/2994, reg 7. An offence under reg 7 or reg 8 (see the text and notes 8-20) is punishable on summary conviction, with a fine not exceeding the statutory maximum, and on conviction on indictment, with a fine or to imprisonment for a term not exceeding two years or both: reg 9. The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 Sch 1 (definition added by the Criminal Justice Act 1988 Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. 'Prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

For the purposes of determining in pursuance of the Air Fares Regulations 1992, SI 1992/2994, reg 7 or reg 8(2) (b)-(f) (see the text and notes 14-20) whether an offence has been committed by a person it is immaterial that the contravention occurred outside the United Kingdom if when it occurred that person: (1) was a United Kingdom national; (2) was a body incorporated under the law of any part of the United Kingdom; or (3) was a person (other than a United Kingdom national or such a body) maintaining a place of business in the United Kingdom: reg 10. As to the meaning of 'United Kingdom National' for these purposes see the Civil Aviation Act 1982 s 105(1); and **AIR LAW** vol 2 (2008) PARA 52 (definition applied by the Air Fares Regulations 1992, SI 1992/2994, reg 2(1)).

Where an offence under reg 7 or reg 8 has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly: reg 11(1). Where the affairs of a body corporate are managed by its members, this applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 11(2).

4 'Community air carrier' means an air carrier with a valid operating licence issued by a member state in accordance with EC Council Regulation 2407/92 (OJ L240, 24.8.92, p 1) on licensing of air carriers: EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 2(h). See further **AIR LAW** vol 2 (2008) PARA 98 et seq.

5 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 3. As to the meanings of 'charter fares' 'seat rates' and 'cargo rates' see art 2(b)-(d). Only Community air carriers may introduce new products or lower fares than the ones existing for identical products: art 1(3).

6 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 5.1.

7 This function is performed for the United Kingdom by the Civil Aviation Authority ('CAA'): see the Air Fares Regulations 1992, SI 1992/2994, reg 4. As to the Civil Aviation Authority see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq.

8 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 5.2. Failure to comply with the requirement to file air fares is, in the United Kingdom, an offence: see the Air Fares Regulations 1992, SI 1992/2994, reg 8(2) (a). As to offences see note 3.

9 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 5.4.

10 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 6.1(a). See also note 11.

- 11 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 6.1(b). It is the duty of the CAA to give notice to the Secretary of State with reasons if it considers that in relation to an air fare the conditions obtain which would make the powers conferred by those provisions exercisable by the Secretary of State and that, in its opinion, the air fare should be withdrawn or stopped as the case may be: Air Fares Regulations 1992, SI 1992/2994, reg 6. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.
- 12 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 6.2.
- 13 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) arts 6.3, 6.4.
- 14 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 6.3. In the United Kingdom, charging a fare in respect of which an instruction to withdraw has been issued, or failing to abstain as instructed from further fare decreases, is an offence, unless the fare is under examination under art 7 (see the text and note 15): see the Air Fares Regulations 1992, SI 1992/2994, reg 8(2)(b), (c). As to offences see note 3.
- 15 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 7.1. The member state must at the time inform the other member states and air carriers concerned: art 7.1.
- 16 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 7.2.
- 17 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 7.3. However, the Commission may decide that an air fare in force is to be withdrawn pending final determination, where the carrier supplies incorrect or incomplete information, or supplies information late: art 7.6. In such a case, the carrier may not, during the examination, charge a higher basic fare than the one applicable immediately before the one under examination: art 7.3. In the United Kingdom, charging a fare which is not permitted to be in force under art 7.3, or is contrary to a decision under art 7.6 (unless it is under examination by the EC Council or the EC Council has reached a different decision) is an offence: Air Fares Regulations 1992, SI 1992/2994, reg 8(2)(d), (e). As to offences see note 3.
- 18 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 7.4. As to the power to require information from carriers and to impose time limits see art 7.5; as to the consequences of failure to do so see note 17. In the United Kingdom, charging a fare which is contrary to a decision under art 7.4 (unless it is under examination by the EC Council or the Council has reached a different decision) is an offence: Air Fares Regulations 1992, SI 1992/2994, reg 8(2)(e). As to offences see note 3.
- 19 EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 7.7.
- 20 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 7.8. In the United Kingdom, charging a fare which is contrary to a decision of the Council under art 7.8 is an offence: Air Fares Regulations 1992, SI 1992/2994, reg 8(2)(f). As to offences see note 3.
- 21 See EC Council Regulation 2409/92 (OJ L240, 24.8.92, p 15) art 8.

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## **98. Carriage of goods by sea.**

Where the contract is covered by a bill of lading or similar document of title<sup>1</sup>, the rights and liabilities of carriers of goods by sea are governed by the Hague-Visby Rules<sup>2</sup>. These require the carrier, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy<sup>3</sup>, properly to man, equip and supply the ship<sup>4</sup>, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation<sup>5</sup>. The carrier must also properly and carefully load, handle, stow, keep, care for and discharge the goods carried<sup>6</sup>. After receiving the goods the carrier must, on demand by the shipper, issue to the shipper a bill of lading, identifying the goods in accordance with information supplied by the shipper and stating the apparent order and condition of the goods<sup>7</sup>. The carrier's liability is limited to a specified amount unless the

nature and value of the goods has been declared by the shipper before shipment and inserted in the bill of lading<sup>8</sup>.

Implied obligations also arise under common law, the most important of which is the obligation on the shipowner to furnish a seaworthy ship<sup>9</sup>, to prosecute the voyage with reasonable diligence and without unjustified deviation<sup>10</sup>, and to take reasonable care of the goods in his custody. Under a voyage charter or bill of lading<sup>11</sup>, there is at common law an absolute warranty of seaworthiness at the beginning of each stage of the voyage<sup>12</sup>. The principal obligations of the charterer under a charterparty<sup>13</sup> are to furnish cargo reasonably complying with the charter in reasonable time to enable it to be loaded within the lay days<sup>14</sup>, to nominate the loading or discharging ports or berths if the charter requires him to do so, to perform his part in the loading and discharging operations, and to pay the freight punctually in the agreed manner<sup>15</sup>.

1 See the Carriage of Goods by Sea Act 1971 s 1(2); the Hague-Visby Rules art I(b); and PARAS 206, 372. As to bills of lading see PARA 313 et seq. An increasingly used alternative to the bill of lading is the non-transferable sea waybill, in particular in connection with container traffic: see PARA 364.

2 See the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924; TS 17 (1931); Cmd 3806), which is given legislative effect in the United Kingdom by the Carriage of Goods by Sea Act 1971. See further PARA 367 et seq. The Hague-Visby Rules apply to every bill of lading relating to the carriage of goods, other than deck cargo and animals, between ports in two different states if: (1) the bill of lading is issued in a contracting state; (2) the carriage is from a port in a contracting state; or (3) the contract contained in or evidenced by the bill of lading provides that the rules, or legislation of any state giving effect to them, are to govern the contract: see arts I(c), X; and PARA 367. The operation of the rules is extended to coastal shipping in the United Kingdom and carriage from ports in British possessions specified by Order in Council: see the Carriage of Goods by Sea Act 1971 ss 1(3), 5; and PARAS 367, 369. The Hague-Visby Rules do not apply to charterparties but are frequently incorporated in charterparties by agreement.

3 See the Hague-Visby Rules art III r 1(a); and PARA 376. The carrier is only liable for loss or damage arising from unseaworthiness if he has failed to exercise due diligence: see Schedule art IV r 1; and PARA 385.

4 See the Hague-Visby Rules art III r 1(b); and PARA 377.

5 See the Hague-Visby Rules art III r 1(c); and PARA 377.

6 See the Hague-Visby Rules art III r 2; and PARA 383. The carrier's liability for loss or damage arising or resulting from a variety of causes is excluded by Schedule art IV r 2: see PARA 389.

7 See the Hague-Visby Rules art III r 3; and PARA 379. This bill of lading is prima facie evidence of the receipt of the goods by the carrier: see Schedule art III r 4, art IV r 5(f); and PARAS 380, 394.

8 See the Hague-Visby Rules art IV r 5(a); and PARA 394.

9 The undertaking of seaworthiness implied at common law no longer exists in contracts to which the Hague-Visby Rules apply: see the Carriage of Goods by Sea Act 1971 s 3; and PARA 376.

10 See PARAS 81-83; and PARA 71 et seq.

11 The carrier's obligations under a bill of lading are usually modified by the effect of the Hague-Visby Rules (see the text and notes 1-8) to one of exercising due diligence. These rules are occasionally expressly incorporated into charterparties.

12 See, however, note 9. Under a time charter, the shipowner only undertakes that the vessel will be seaworthy at the commencement of the charter service; under a demise charter, he merely undertakes that the ship will be as fit as reasonable skill and care can make her at the commencement of the charter service: see PARA 376.

13 As to charterparties see PARA 205 et seq.

14 The period for which the charterer is entitled to hold the vessel for loading and discharging is known as lay days or lay time.

15 See PARA 205 et seq.

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## **99. Carriage of passengers and their luggage by sea.**

The liability of carriers in the carriage by sea of passengers and luggage is governed by the Convention relating to the Carriage of Passengers and their Luggage by Sea 1974<sup>1</sup>, commonly known as the Athens Convention<sup>2</sup>.

The common law liability of carriers by sea as regards the carriage of passengers is limited to the use of due care, skill and foresight to carry the passengers safely<sup>3</sup>; there is no absolute warranty of seaworthiness, but the shipowner is liable for unseaworthiness or want of safety occasioned by the negligence of his employees or independent contractors<sup>4</sup>. The liability, so far as statute allows<sup>5</sup>, may be excluded by conditions in the contract<sup>6</sup>.

In the absence of special contract<sup>7</sup>, a shipowner's liability in respect of passengers' luggage is the same as his common law liability in respect of cargo<sup>8</sup>, but he is not liable for loss to luggage in the passenger's control resulting from the passenger's want of care<sup>9</sup>.

1 The Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 13 December 1974; TS 40 (1987); Cm 202) (the 'Athens Convention'). The Convention is set out in the Merchant Shipping Act 1995 Sch 6 Pt I, and applies both to international carriage and carriage within the British Islands (see PARA 634). It is not intended to modify the rights or duties of the carrier, the performing carrier, or their servants or agents provided for in international conventions relating to the limitation of liability of owners of seagoing ships: see Athens Convention art 19; and PARA 634. The Unfair Contract Terms Act 1977 has no application to contracts of carriage governed by the Athens Convention: see the Unfair Contract Terms Act 1977 s 28; and **CONTRACT** vol 9(1) (Reissue) PARA 819. As to 'carriers', 'international carriage', 'passengers' and 'luggage' for this purpose see PARA 634.

2 For a full treatment of the Athens Convention see PARAS 638-649.

3 See *Readhead v Midland Rly Co* (1869) LR 4 QB 379, Ex Ch; *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC.

4 *John v Bacon* (1870) LR 5 CP 437.

5 See the Unfair Contract Terms Act 1977; PARA 80; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

6 For the various ways in which the clause excluding liability may be incorporated into the contract of carriage see PARAS 79-85.

7 *Taubman v Pacific Steam Navigation Co* (1872) 1 Asp MLC 336; *The Stella* [1900] P 161.

8 See PARA 3.

9 *Great Western Rly Co v Bunch* (1888) 13 App Cas 31, HL; *Steers v Midland Rly Co* (1920) 36 TLR 703; *Vosper v Great Western Rly Co* [1928] 1 KB 340.

## **UPDATE**

## **99 Carriage of passengers and their luggage by sea**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### **100. Statutory limitation of liability of carriers by sea.**

In the case of British ships, the owner, charterer and certain other persons<sup>1</sup> are exempted by statute from liability for loss of and damage to goods on board caused by fire, and for loss of and damage to certain kinds of valuables the true nature of which was not declared at the time of shipment<sup>2</sup>. In addition, in the case of both British and foreign ships, the same persons are entitled to limit their liability in respect of loss of life or personal injury caused to any person carried in the ship and for loss of or damage to goods on board, and the circumstances in which liability may be so limited are not restricted to loss of life or personal injury to persons carried in the ship or damage to goods on board<sup>3</sup>. The benefit of these provisions is, however, lost if it is shown that the damage resulted from an act or omission of the person seeking the benefit of them done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result<sup>4</sup>.

1 See the Convention on Limitation of Liability for Maritime Claims (London, 1 to 19 November 1976; TS 13 (1990); Cm 955) (Scheduled to the Merchant Shipping Act 1995 Sch 7 Pt I); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042 et seq.

2 See the Merchant Shipping Act 1995 s 186; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059.

3 See the Convention on Limitation of Liability for Maritime Claims art 2; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1044.

4 See the Convention on Limitation of Liability for Maritime Claims art 4; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1046.

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### **101. Carriage by road and rail.**

The international carriage of goods (other than dangerous goods<sup>1</sup>) by road is governed by the Convention on the Contract for the International Carriage of Goods by Road (the 'CMR Convention')<sup>2</sup>, which is implemented in the United Kingdom by statute<sup>3</sup>. There are also some bilateral agreements concerned with the reciprocal licensing of carriers<sup>4</sup>. The international carriage of passengers by road is not currently the subject of domestic legislation<sup>5</sup>, although provision is made at European Community level in connection with the international carriage of passengers by coach and bus<sup>6</sup>.

International carriage by rail is governed by the Convention concerning International Carriage by Rail (the 'COTIF Convention')<sup>7</sup>, which is implemented in the United Kingdom by statutory instrument<sup>8</sup>. Specifically, international carriage of goods (other than dangerous goods<sup>9</sup>) by rail

is governed by the provisions set out in Appendix B (the 'CIM Convention') and international carriage of passengers by rail is governed by the provisions set out in Appendix A (the 'CIV Convention')<sup>10</sup>.

1 In connection with the carriage of dangerous goods see PARAS 105-107.

2 Geneva, 19 May 1956; Cmnd 2260.

3 See the Carriage of Goods by Road Act 1965; and PARA 650 et seq.

4 See eg the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Sweden on the International Carriage of Goods by Road (Cmnd 3781); the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Republic of Romania on International Road Transport (Cmnd 4413); the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands on the International Carriage of Goods by Road (Cmnd 4424); the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic on the International Carriage of Goods by Road (Cmnd 4324); and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic on the International Carriage of Goods by Road (Cmnd 4919).

5 The United Kingdom is a signatory to the Convention on the Contract for the International Carriage of Passengers and Luggage by Road (Geneva, 1 March 1973; Misc 17(1974); Cmnd 5622), but has never brought the Convention into force. The United Kingdom legislation implementing the Convention (ie the Carriage of Passengers by Road Act 1974) was repealed by the Statute Law (Repeals) Act 2004 without having been brought substantively into force and has not been replaced.

6 See EC Council Regulation 684/92 (OJ L74, 20.3.92, p 1) on common rules for the international carriage of passengers by coach and bus; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1651-1655.

7 Berne, 9 May 1980; Cm 41.

8 See the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092; and PARAS 683-684. These regulations replaced the provision formerly made for this purpose by the International Transport Conventions Act 1983 ss 1-8 (repealed by SI 2005/2092), following the enactment of the Modifying Protocol signed at Vilnius in 1999 (Cm 4873).

9 See note 1.

10 See PARA 683 et seq.

## **UPDATE**

### **101 Carriage by road and rail**

NOTE 6--Regulation 684/92 replaced with effect in part from 4 June 2010 and in part from 4 December 2011: European Parliament and EC Council Regulation 1073/2009 (OJ L300, 14.11.2009, p 88).

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### **102. Regulation of goods and passenger-carrying vehicles.**

Provision for the licensing of drivers of large goods and passenger-carrying vehicles is made under the Road Traffic Act 1988<sup>1</sup>. Public passenger vehicles are regulated under the Public

Passenger Vehicles Act 1981 and the Transport Act 1985<sup>2</sup>, while provision for the licensing of operators of goods vehicles is made under the Goods Vehicles (Licensing of Operators) Act 1995<sup>3</sup>. Drivers' hours are regulated under the Transport Act 1968<sup>4</sup> and applicable European Community legislation<sup>5</sup>.

1 See the Road Traffic Act 1988 Pt IV (ss 110-122); and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 488 et seq.

2 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1132 et seq.

3 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1319 et seq.

4 See the Transport Act 1968 Pt VI (ss 95-103); and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1380 et seq.

5 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1380 et seq.

## UPDATE

### 102 Regulation of goods and passenger-carrying vehicles

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### 103. Taxis and private-hire vehicles.

Outside the metropolitan police district and the City of London<sup>1</sup>, the principal statute relating to hackney carriages (that is, taxis)<sup>2</sup> is the Town Police Clauses Act 1847<sup>3</sup>, which provides for the licensing and regulation of taxis and their drivers. The law relating to hackney carriages and private hire vehicles is modified by the Local Government (Miscellaneous Provisions) Act 1976<sup>4</sup> in those areas in which that Act applies<sup>5</sup>; the Act also provides for the licensing and regulation in such areas of private hire vehicles, their drivers and operators<sup>6</sup>.

In the metropolitan police district and the City of London a separate set of statutes applies to taxis<sup>7</sup>, and the Private Hire Vehicles (London) Act 1998<sup>8</sup> provides for the licensing of private hire vehicles. There are also a number of statutory provisions which apply to taxis in all parts of England and Wales<sup>9</sup>.

1 As to the metropolitan police district see the London Government Act 1963 s 76; and **POLICE** vol 36(1) (2007 Reissue) PARA 137. As to the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 31. As to taxis in London see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1477 et seq.

2 See eg the Transport Act 1980 s 64(1) (see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1473), the Transport Act 1985 s 13(3) (see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1495), and the Disability Discrimination Act 1995 s 32(5) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 627). As to the meaning of 'hackney carriage', and as to the duties of hackney carriage drivers as common carriers, see PARA 6.

3 Ie the Town Police Clauses Act 1847 ss 37-66, 68: see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1434 et seq.

4 See the Local Government (Miscellaneous Provisions) Act 1976 Pt II (ss 45-80): see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1433 et seq.

5 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1433.

8 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1447 et seq.

7 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1477-1494.

8 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1500-1530.

9 See **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1495-1499.

## UPDATE

### 103 Taxis and private-hire vehicles

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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#### 104. Carriers by inland waterway.

Canal companies<sup>1</sup> are authorised by statute to carry as common carriers on canals and railways and to carry out functions incidental to such carriage<sup>2</sup>. Provision is also made at European Community level for the use of inland waterways by carriers of goods and passengers<sup>3</sup>.

1 As to the powers and duties of canal companies generally see **WATER AND WATERWAYS** vol 101 (2009) PARA 780.

2 See the Canal Carriers Act 1845 ss 1, 3; and **WATER AND WATERWAYS** vol 101 (2009) PARA 782.

3 See (in particular) EEC Council Regulation 3921/91 (OJ L373, 31.12.91, p 1) laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a member state; and **WATER AND WATERWAYS** vol 101 (2009) PARA 716 (European legislation affecting inland waterways generally).

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### (ii) Carriage of Dangerous Goods

#### 105. Implied warranty by consignor.

A common carrier is bound to carry according to his profession, but he does not profess to carry goods dangerous to life and limb<sup>1</sup>. Whether a consignor of goods sends them by private or by common carrier, he impliedly warrants that the goods are fit to be carried in the ordinary way and are not dangerous, unless the carrier, when he accepts the goods for carriage, is aware by notice or otherwise that the goods are dangerous. Unless liability for breach of this implied warranty is excluded by the express terms of the contract<sup>2</sup>, the consignor is liable for all damage that may result from such a breach, whether or not he himself knew or ought to have known that the goods were in fact dangerous<sup>3</sup>.

The goods which are regarded as dangerous for the purposes of the implied warranty include not only those which may be dangerous to life and limb<sup>4</sup>, but also those which may do damage to the carrier's vehicle or property<sup>5</sup> or to other goods being carried<sup>6</sup>.

1 *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94, CA. As to the international carriage of dangerous goods by road and rail see PARA 101; and PARA 650 et seq.

2 *C Burley Ltd v Stepney Corpn* [1947] 1 All ER 507. As to the statutory restrictions on the limitation or exclusion of liability see the Unfair Contract Terms Act 1977; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

3 *Farrant v Barnes* (1862) 11 CBNS 553; *Williams v East India Co* (1802) 3 East 192; *Brass v Maitland* (1856) 6 E & B 470; *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94, CA; *C Burley Ltd v Stepney Corpn* [1947] 1 All ER 507. As to the exclusion of the liability of common carriers by reason of inherent vice of the goods see PARA 21. See also PARA 260.

4 *Farrant v Barnes* (1862) 11 CBNS 553 (injury to carrier's employee through carriage of carboy of nitric acid); *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94, CA (death and injury through carriage of ferro-silicon).

5 *C Burley Ltd v Stepney Corpn* [1947] 1 All ER 507 (damage to carrier's barge).

6 *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA (injury to felt goods carried by escape of corrosive fluid from carboys); *Ministry of Food v Lamport and Holt Line Ltd* [1952] 2 Lloyd's Rep 371 (damage to maize cargo from leakage of tallow).

## UPDATE

### 105 Implied warranty by consignor

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 106. Regulation of carriage of dangerous goods.

International conventions and statutory provisions made in the interests of public safety regulate the carriage of dangerous goods by road or rail<sup>1</sup>, sea<sup>2</sup> and air<sup>3</sup>. Provision is also made in connection with the possession of dangerous substances in ports, docks and harbours<sup>4</sup>, and airports and aerodromes<sup>5</sup>. Particular safeguards are in place regarding the handling and transport of radioactive material<sup>6</sup>.

Where a breach of these provisions results in injury or damage to persons or property, the question whether the injured party can maintain a claim for damages for breach of statutory duty will depend upon whether, on its true construction, the provision was intended to be a ground of civil liability to the class of persons of whom the claimant is one<sup>7</sup>; but in many cases the breach of a statutory obligation will afford the strongest evidence of negligence<sup>8</sup>.

1 The international carriage of dangerous goods by road is dealt with by the European Agreement Concerning the International Carriage of Dangerous Goods by Road (Geneva, 30 September 1957; Cmnd 3769) ('ADR') and the carriage of dangerous goods by rail is dealt with by the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41) (the 'COTIF Convention') Appendix C (the 'RID Convention'); in the case of both road and rail provision is also made at European Community level (see EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) on the approximation of the laws of the member states with regard to the transport of dangerous goods by road and EC Council Directive 99/49 (OJ L235, 17.9.96, p 25) on the approximation of the laws of the member states with regard to the transport of dangerous goods by rail) and for United Kingdom implementation (see the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573). For a detailed treatment of international carriage of dangerous goods by road and rail see PARAS 748-751.

2 As to the carriage of dangerous goods by sea, and the rules regulating such carriage, see eg the Merchant Shipping (Gas Carriers) Regulations 1994, SI 1994/2464 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 599); the Merchant Shipping (Reporting Requirements for Ships Carrying Dangerous or Polluting Goods) Regulations 1995, SI 1995/2498 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 659); the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997/2367 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657); and the Merchant Shipping (Carriage of Packaged Irradiated Nuclear Fuel etc) (INF Code) Regulations 2000, SI 2000/3216 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 658). As to the loading of dangerous goods see further PARA 436.

3 See the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786; and PARA 193 et seq.

4 See **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 699 et seq.

5 As to the provision and management of airports and aerodromes see **AIR LAW** vol 2 (2008) PARA 175 et seq.

6 See eg the Nuclear Installations Act 1965 s 11 (carriage of nuclear materials: see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1498); the Radioactive Material (Road Transport) Act 1991 (see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1661-1662); the Transfrontier Shipment of Radioactive Waste Regulations 1993, SI 1993/3031 (see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1477 et seq); and the Nuclear Industries Security Regulations 2003, SI 2003/403 (see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1552 et seq).

7 See *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, [1949] 1 All ER 544, HL. See further **TORT** vol 45(2) (Reissue) PARA 395 et seq.

8 See *Blamires v Lancashire and Yorkshire Rly Co* (1873) LR 8 Exch 283; *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1, HL. Cf *London Passenger Transport Board v Upson* [1949] AC 155, [1949] 1 All ER 60, HL.

## UPDATE

### 106 Regulation of carriage of dangerous goods

NOTE 1--SI 2007/1573 replaced: Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009, SI 2009/1348.

NOTE 6--SI 1993/3031 replaced: Transfrontier Shipment of Radioactive Waste and Spent Fuel Regulations 2008, SI 2008/3087.

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### 107. Firearms and ammunition.

A person carrying on the business of a carrier or warehouseman or the employee of such a person may have in his possession in the course of that business a firearm or ammunition without holding a firearm certificate<sup>1</sup> or shotgun certificate<sup>2</sup> which would otherwise be required<sup>3</sup>. Such a person commits an offence if he fails either to take reasonable precautions for the safe custody of any firearm or ammunition which he has in his possession, or to report the loss of any such firearm or ammunition to the police forthwith<sup>4</sup>.

Particular provision is made with regard to the carriage of weapons and munitions by air<sup>5</sup>.

1 As to firearms certificates see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 637.

2 As to shotgun certificates see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 635.

3 See the Firearms Act 1968 s 9(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 648.

4 See the Firearms (Amendment) Act 1988 s 14(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 648.

5 See the Air Navigation Order 2005, SI 2005/1970, art 69; and PARA 204.

## **UPDATE**

### **107 Firearms and ammunition**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### **(iii) Carriage of Animals**

#### **108. Common law duties during and after transit.**

Subject to the specific duties imposed on a carriers of animals under European Community legislation<sup>1</sup>, the duty of a common carrier of animals is no higher than to provide vehicles reasonably suitable and sufficient for such animals as he professes to carry, and to take all other reasonable steps to ensure their safety<sup>2</sup>, and to provide fit and proper places for loading and unloading<sup>3</sup>. Where owners choose to take the risk of sending animals in vehicles not intended for that purpose, and in return for taking that risk obtain the advantage of a cheap rate, there is no implied warranty that the vehicles are fit for the carriage of those animals<sup>4</sup>.

Although he is an insurer of their safety, the carrier is not liable for accidents happening through the animals' inherent vice, but only for accidents happening from adventitious causes<sup>5</sup>.

It may become the duty of a carrier to feed cattle in transit where there is delay, for loss of condition amounts to injury<sup>6</sup>. Apart from his statutory obligations<sup>7</sup>, where it is his custom to feed animals in transit, he may be liable for any injury to the animals through leaving them unfed<sup>8</sup>.

It is the duty of the consignee of an animal to be ready to receive the animal at the end of the transit<sup>9</sup>. If this duty is not performed, the carrier is entitled to incur reasonable expense in having the animal cared for, and to recover this expense from the owner<sup>10</sup>.

Where a carrier is ready to deliver cattle at the end of a transit, and the consignee takes possession of them but does not remove them from the carrier's premises, the carrier is no longer responsible as a carrier<sup>11</sup>.

1 See PARA 110.

2 *Blower v Great Western Rly Co* (1872) LR 7 CP 655; *M'Manus v Lancashire and Yorkshire Rly Co* (1859) 4 H & N 327, Ex Ch; *Combe v London and South Western Rly Co* (1874) 31 LT 613. See also *Amies v Stevens* (1718) 1 Stra 127; and PARA 17.

3 *Rooth v North Eastern Rly Co* (1867) LR 2 Exch 173.

4 *Nevin v Great Southern and Western Rly Co* (1891) 30 LR Ir 125.

5 *Blower v Great Western Rly Co* (1872) LR 7 CP 655.

6 *Allday v Great Western Rly Co* (1864) 5 B & S 903. Where the delay was due to such a snowstorm as came under the description 'act of God', the carrier was held not to be liable for such injury: *Briddon v Great Northern Rly Co* (1858) 28 LJEx 51. See further PARA 13.

7 See PARA 110.

8 *Curran v Midland Great Western Rly Co of Ireland* [1896] 2 IR 183.

9 *Wise v Great Western Rly Co* (1856) 1 H & N 63; *Great Northern Rly Co v Swaffield* (1874) LR 9 Exch 132.

10 *Great Northern Rly Co v Swaffield* (1874) LR 9 Exch 132.

11 *Shepherd v Bristol and Exeter Rly Co* (1868) LR 3 Exch 189.

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### 109. Liability for negligence.

If it is made a condition of a contract for the carriage of animals that the carrier is not to be liable for injury to horses and cattle by kicking or plunging from fear and restiveness, this only applies to fear or restiveness caused by the ordinary incidents of carriage; the condition does not protect the carrier if the fear or restiveness is induced by his negligence<sup>1</sup>.

Where cattle are carried at a lower rate, on condition that the carrier is liable for injury only in the case of negligence, the onus of proof of negligence lies upon the person who alleges it<sup>2</sup>, for the carrier is not carrying as a common carrier. However, where an animal is found injured in the vehicle and it is proved that the mode by which it was carried was not a proper one, that is evidence that its injuries were caused by negligence<sup>3</sup>.

Where an animal is delivered to a carrier to be carried, and the carrier is provided by the owner with means of securing it, the carrier cannot be found to have been negligent merely because the animal escaped through the insufficiency of those means for the purpose<sup>4</sup>, although the case may be different if the nature of the means of securing the animal and their insufficiency can be seen by the carrier when the animal is delivered<sup>5</sup>.

1 *Gill v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 QB 186; *Moore v Great Northern Rly Co* (1882) 10 LR 1r 95.

2 *Harris v Midland Rly Co* (1876) 25 WR 63; *Smith v Midland Rly Co* (1887) 57 LT 813. Cf *Prior v London and South Western Rly Co* (1885) 2 TLR 89; *Carter v Ferguson* (1943) 2 DLR 647, Alta SC; *Trenholm v Dominion Express Co Ltd* (1914) 43 NBR 98 (all these cases support the contrary view that the injury to or death of an animal is prima facie evidence of negligence).

3 *Pickering v North Eastern Rly Co* (1889) 4 TLR 7, CA; *Russell v London and South Western Rly Co* (1908) 24 TLR 548, CA; and see also *Moffat v Great Western Rly Co* (1867) 15 LT 630; *Ainsby v Great Northern Rly Co* (1891) 8 TLR 148, DC.

4 *Richardson v North Eastern Rly Co* (1872) LR 7 CP 75.

5 *Stuart v Crawley* (1818) 2 Stark 323.

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### **110. Statutory control.**

The facilities to be provided by carriers of animals for feeding and watering them during transit, the requirements to be observed in respect of the vehicle or vessel in which they are carried and the precautions to be taken against disease and suffering and to ensure cleanliness are the subject of extensive statutory control<sup>1</sup>.

1 See **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1978; **ANIMALS** vol 2 (2008) PARAS 868-871.

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### **(iv) Carriage of Perishable Foodstuffs**

#### **111. Regulation of standards.**

The United Kingdom is a signatory to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage ('ATP')<sup>1</sup>, which is implemented in United Kingdom law by the International Carriage of Perishable Foodstuffs Act 1976<sup>2</sup>. The Act empowers the Secretary of State<sup>3</sup> to make regulations<sup>4</sup> as to the standards for transport equipment<sup>5</sup> used or intended to be used for the international carriage<sup>6</sup> of perishable foodstuffs<sup>7</sup> by road or rail, or by a sea crossing of less than 150 kilometres, or any combination of them<sup>8</sup>. Such regulations may also:

- 12 (1) prescribe foodstuffs or classes of foodstuffs as perishable for the purposes of the Act<sup>9</sup>;
- 13 (2) prescribe temperature limits for the international carriage of perishable foodstuffs<sup>10</sup>;
- 14 (3) make different provision for different classes of foodstuffs or as respects the same class in different circumstances<sup>11</sup>;

- 15 (4) prescribe classes of transport equipment to be used for the international carriage of prescribed classes of foodstuffs, and prescribe different standards for different classes or as respects the same class in different circumstances<sup>12</sup>;
- 16 (5) make exemptions in respect of transport equipment or foodstuffs<sup>13</sup>.

1 Geneva, 1 September 1970; TS 52 (1987); Cm 250.

2 See the long title to the International Carriage of Perishable Foodstuffs Act 1976. In that Act, 'Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage (ATP)' means the agreement of that name concluded in Geneva on 1 September 1970: see note 1; and the International Carriage of Perishable Foodstuffs Act 1976 s 19(1). The Agreement has been subsequently further amended (see the definition of 'ATP' contained in the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 2 (substituted by SI 2000/3196)).

Provision is made for amendment by Order in Council of the International Carriage of Perishable Foodstuffs Act 1976, subject to approval by each House of Parliament, if ATP is revised and such revision has been agreed to by the United Kingdom government: International Carriage of Perishable Foodstuffs Act 1976 s 16(1) (s 16(1) substituted, s 16(1A) added, by the International Transport Conventions Act 1983 Sch 2 para 4). 'Revision' includes omission from, addition to or alteration of ATP, and the replacement of ATP or part of it with another agreement: International Carriage of Perishable Foodstuffs Act 1976 s 16(1A) (as so added). As to the meaning of 'United Kingdom' see PARA 96 note 1.

3 As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

4 As to the regulations made under the International Carriage of Perishable Foodstuffs Act 1976 s 1(1) see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071 (amended by SI 1992/2682; SI 1995/1716; SI 2000/3196; SI 2003/1693).

5 'Transport equipment' means goods vehicles, railway wagons and containers: International Carriage of Perishable Foodstuffs Act 1976 s 19(1).

6 'International carriage' means carriage either between a place in the United Kingdom and a place outside the United Kingdom, the Channel Islands and the Isle of Man or, if the journey passes through any part of the United Kingdom, between places both of which are outside the United Kingdom, the Channel Islands and the Isle of Man: International Carriage of Perishable Foodstuffs Act 1976 s 19(1).

7 'Perishable foodstuffs' means foodstuffs prescribed as such: International Carriage of Perishable Foodstuffs Act 1976 s 19(1). 'Prescribed' means prescribed by regulations made by the Secretary of State: s 19(1). As to the regulations made for these purposes see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 4.

8 International Carriage of Perishable Foodstuffs Act 1976 s 1(1). As to international carriage of goods by road and rail see PARA 650 et seq. As to international carriage of goods by sea PARA 205 et seq.

9 International Carriage of Perishable Foodstuffs Act 1976 s 1(2)(a). As to the foodstuffs prescribed see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 4.

10 International Carriage of Perishable Foodstuffs Act 1976 s 1(2)(b). As to the temperature limits prescribed see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 5.

11 International Carriage of Perishable Foodstuffs Act 1976 s 1(2)(c).

12 International Carriage of Perishable Foodstuffs Act 1976 s 1(2)(d), (e). As to the classes and standards of transport equipment see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 6.

13 International Carriage of Perishable Foodstuffs Act 1976 s 1(2)(f).

## 112. Examination and testing.

Regulations<sup>1</sup> may provide for the examination and testing<sup>2</sup> by qualified persons<sup>3</sup> of transport equipment<sup>4</sup> for the purpose of ascertaining whether it complies with the prescribed standards<sup>5</sup>.

The Secretary of State may provide and maintain stations<sup>6</sup> and designate premises (known as 'designated stations')<sup>7</sup> where examination and testing may be carried out, and may provide and maintain apparatus for the carrying out of examination and testing<sup>8</sup>. Examination and testing must be carried out with apparatus approved for the purpose by the Secretary of State<sup>9</sup>.

Regulations may provide for:

- 17 (1) the authorisation of qualified persons and of certifying officers<sup>10</sup>, the imposition of conditions to be complied with, and the withdrawal of authorisations<sup>11</sup>;
- 18 (2) the issue by a certifying officer of a certificate or certification plate<sup>12</sup> indicating that the transport equipment is approved for use in the international carriage of perishable foodstuffs of a specified class<sup>13</sup>;
- 19 (3) the refusal to issue such a certificate or certification plate<sup>14</sup>;
- 20 (4) prescribing designated marks to be affixed to transport equipment which has been so certified<sup>15</sup>;
- 21 (5) the manner in which and the conditions under which testing must be carried out, and the inspection of premises and apparatus used for carrying out such testing<sup>16</sup>;
- 22 (6) the manner and time in which application may be made for examination and testing, the manner in which and time within which appeals may be brought, and the form and particulars of examination and test reports<sup>17</sup>;
- 23 (7) the fees payable in connection with examination and testing<sup>18</sup>;
- 24 (8) the form and particulars of certificates and certification plates, and of notifications of refusal or cancellation of certification<sup>19</sup>;
- 25 (9) the issue of certified copies of certificates or duplicates of certification plates, and the fees payable for them<sup>20</sup>;
- 26 (10) the affixing of designated marks or certification plates, and the carrying of certificates in such manner and in such place as may be prescribed<sup>21</sup>;
- 27 (11) the period of validity of certificates or certification plates and the circumstances and conditions under which they may be renewed, cancelled, transferred or surrendered<sup>22</sup>;
- 28 (12) the notification of damage or alteration to certified transport equipment<sup>23</sup>;
- 29 (13) the periodic examination and testing of certified transport equipment<sup>24</sup>;
- 30 (14) the recognition of prescribed documents or certification plates issued outside the United Kingdom or issued by such bodies as may be authorised by the Secretary of State<sup>25</sup>;
- 31 (15) the keeping of records by designated stations<sup>26</sup>, qualified persons and certifying officers, and the furnishing to the Secretary of State of examination and test reports and information<sup>27</sup>;
- 32 (16) exemption for prescribed classes of transport equipment from all or any of the provisions of the regulations<sup>28</sup>.

If the Secretary of State is satisfied that a vehicle<sup>29</sup> of a particular class meets the prescribed standards and that adequate arrangements have been made to ensure that other vehicles purporting to conform to that vehicle as respects the prescribed standards, will so conform, he may approve that vehicle as a type vehicle of that class<sup>30</sup>. Following such approval, if a certifying officer is satisfied, after examination if he thinks fit, that any other vehicle conforms with the type vehicle he may issue a certificate certifying that that other vehicle does so

conform, and such a certificate is deemed to be a certificate issued under head (2) above and has effect accordingly<sup>31</sup>. Approval may be withdrawn at any time<sup>32</sup>.

1 The regulations made by the Secretary of State under the International Carriage of Perishable Foodstuffs Act 1976: see PARA 111. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355. As to the regulations made see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071; the text and notes 2-32; and PARA 111.

2 As to the meanings of 'examination' and 'testing' see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 2(1).

3 The persons authorised by the Secretary of State to examine and test transport equipment for the purpose of ascertaining whether the prescribed standards are complied with: International Carriage of Perishable Foodstuffs Act 1976 s 2(1) (amended by SI 1983/1123).

4 As to the meaning of 'transport equipment' see PARA 111 note 5.

5 See the International Carriage of Perishable Foodstuffs Act 1976 s 2(1); and the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, regs 9-11. As to the prescribed standards see PARA 111.

6 International Carriage of Perishable Foodstuffs Act 1976 s 2(3)(a).

7 International Carriage of Perishable Foodstuffs Act 1976 s 2(3)(b). Regulations may provide for the conditions to be complied with in relation to such premises ('designated stations'), and for the withdrawal of approval of such stations: s 3(1)(c). As to the regulations made see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 8. The Secretary of State may, with the consent of the Treasury, make loans to the owners or occupiers of designated stations or of premises which he considers suitable to be designated stations: International Carriage of Perishable Foodstuffs Act 1976 s 5. The money for such loans is provided by Parliament: s 18(1)(b) (amended by SI 1981/1670).

8 International Carriage of Perishable Foodstuffs Act 1976 s 2(3)(c). Any expenses of the Secretary of State under the International Carriage of Perishable Foodstuffs Act 1976 are payable out of money provided by Parliament: s 18(1)(a).

9 International Carriage of Perishable Foodstuffs Act 1976 s 2(4).

10 The persons appointed or authorised by the Secretary of State for the purpose of issuing a certificate stating that transport equipment has been approved for use in the international carriage of perishable foodstuffs as equipment of the class specified in the certificate: International Carriage of Perishable Foodstuffs Act 1976 s 2(1)(a) (ss 2(1)(a), (b), 3(1)(f), (g), (i), (k), (l), (m), (3) amended, s 3(1)(gg) added, by SI 1983/1123). As to the meanings of 'international carriage' and 'perishable foodstuffs' see PARA 111 notes 6, 7.

11 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(a).

12 'Certification plate' means a plate issued under the International Carriage of Perishable Foodstuffs Act 1976 s 2, and includes a duplicate plate issued under s 3 and a plate recognised under that provision: s 19(1) (definition added by SI 1983/1123).

13 International Carriage of Perishable Foodstuffs Act 1976 s 2(1)(a) (as amended: see note 10). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 12.

14 International Carriage of Perishable Foodstuffs Act 1976 s 2(1)(b) (as amended: see note 10). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 12. A person aggrieved by a decision of a certifying officer may appeal within six weeks to the Secretary of State: see the International Carriage of Perishable Foodstuffs Act 1976 ss 2(2), 3(1)(d); and the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 23.

15 International Carriage of Perishable Foodstuffs Act 1976 s 2(1)(c). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 22.

16 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(b). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 9(3), (4).

17 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(d), (e). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, regs 9(2), 10, 11.

18 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(d). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 24, Schedule Pts I, III (Pt I substituted by SI 1992/2682; and amended by SI 2003/1693; International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, Schedule Pt III substituted by SI 1992/2682; and amended by SI 1995/1716; SI 2003/1693). As to fees for testing vehicles with thin side walls used for carriage of frozen and deep frozen goods between the United Kingdom and Italy see the International Carriage of Perishable Foodstuffs (Vehicles with Thin Side Walls) Regulations 1987, SI 1987/869.

19 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(f) (as amended: see note 10). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 13.

20 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(g) (as amended: see note 10). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, regs 17, 25 (amended by SI 2003/1693).

21 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(gg), (h), (j) (s 3(1)(gg) as added: see note 10). As to the manner and place prescribed for the carriage of certificates, and the position and manner in which certification plates and designated marks are to be affixed, see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, regs 15, 16.

22 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(i), (k) (as amended: see note 10). See the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, regs 14, 18-20.

23 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(l) (as amended: see note 10).

24 International Carriage of Perishable Foodstuffs Act 1976 s 3(1)(m) (as amended: see note 10).

25 International Carriage of Perishable Foodstuffs Act 1976 s 3(3) (as amended: see note 10). As to the prescribed documents and certification plates and authorised bodies see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 21.

26 See the text and notes 6-8.

27 International Carriage of Perishable Foodstuffs Act 1976 s 2(5).

28 International Carriage of Perishable Foodstuffs Act 1976 s 3(2). Such exemption may be made generally or in prescribed circumstances, and different provision may be made by the regulations for different cases or classes of case: see s 3(2).

29 For this purpose 'vehicle' means a goods vehicle, railway wagon or container: International Carriage of Perishable Foodstuffs Act 1976 s 4(7). 'Goods vehicle' means a motor vehicle constructed or adapted for use for the carriage or haulage of goods or burden of any description, or a trailer so constructed or adapted; 'motor vehicle' means a mechanically propelled vehicle intended or adapted for use on roads; and 'trailer' means a vehicle drawn by a motor vehicle: s 19(1). Any reference in the International Carriage of Perishable Foodstuffs Act 1976 to a motor vehicle drawing a trailer or by which a trailer is drawn must be construed as a reference to a motor vehicle to which a trailer is attached for the purpose of being drawn by it; and where two or more trailers are attached to each other for the purpose of being drawn by a single motor vehicle, that vehicle is treated as drawing each of them: s 19(3). Any reference to driving a vehicle must be construed, in relation to a trailer, as driving the vehicle by which the trailer is drawn: s 19(2). 'Container' means an article of equipment having a minimum volume of 8 cubic metres, designed and constructed for repeated use for the inter-modal carriage of goods by road, rail and water and for interchange between those forms of transport: s 19(1).

30 International Carriage of Perishable Foodstuffs Act 1976 s 4(1), (2). Payment of the appropriate fee is required: s 4(1). As to the appropriate fee see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, Schedule Pt II (substituted by SI 1992/2682; and amended by SI 2003/1693).

31 International Carriage of Perishable Foodstuffs Act 1976 s 4(3). A person aggrieved by a determination of a certifying officer may appeal within six weeks to the Secretary of State: see s 4(5), (6); and the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071, reg 23.

32 International Carriage of Perishable Foodstuffs Act 1976 s 4(4).

## UPDATE

### 112 Examination and testing

NOTES 18, 20, 30--See the Department for Transport (Fees) Order 2009, SI 2009/711 (amended by SI 2009/1185), which specifies for the purposes of the Finance (No 2) Act 1987 s 102(3) the functions to be taken into account in the determination of the fees to be fixed by the Secretary of State.

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### **113. Enforcement.**

Examiners are appointed by the Secretary of State<sup>1</sup> to ascertain whether regulations made in connection with the international carriage of perishable foodstuffs<sup>2</sup> are being observed<sup>3</sup>. An examiner is empowered:

- 33 (1) to enter and inspect at any time any transport equipment<sup>4</sup> which he reasonably believes to be used for the international carriage<sup>5</sup> of perishable foodstuffs<sup>6</sup>, and, in the case of a goods vehicle<sup>7</sup> or container<sup>8</sup> carried by it, to detain the vehicle or container for such time as is required for the inspection<sup>9</sup>;
- 34 (2) to enter, at any time which is reasonable in the circumstances, any premises where he reasonably believes transport equipment in respect of which a certificate of compliance<sup>10</sup> or certification plate<sup>11</sup> is in force is kept, and enter and inspect the equipment, and, in the case of a goods vehicle or container carried by it, detain the vehicle or container for such time as is required for the inspection<sup>12</sup>; and
- 35 (3) at any time to require the driver<sup>13</sup> of a goods vehicle being used for the international carriage of perishable foodstuffs to produce a certificate of compliance in respect of the vehicle or any container carried by it and to detain the vehicle or container for the purpose of inspecting it and copying the certificate<sup>14</sup>.

In each case the examiner must produce his authority on request<sup>15</sup>.

Any person who wilfully obstructs an examiner in the performance of his duty under head (1) or head (2) above, or any driver of a goods vehicle who refuses or fails without reasonable excuse to comply with the requirement in head (3) above, is guilty of an offence<sup>16</sup>.

<sup>1</sup> As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

<sup>2</sup> The regulations under the International Carriage of Perishable Foodstuffs Act 1976: see PARA 111. As to the regulations see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071; and PARAS 111-112.

<sup>3</sup> International Carriage of Perishable Foodstuffs Act 1976 s 6(1). For these purposes 'examiner' means an examiner appointed under s 6: s 6(1). The remuneration of examiners is paid out of money provided by Parliament: s 18(1)(b).

<sup>4</sup> As to the meaning of 'transport equipment' see PARA 111 note 5.

<sup>5</sup> As to the meaning of 'international carriage' see PARA 111 note 6.

<sup>6</sup> As to the meaning of 'perishable foodstuffs' see PARA 111 note 7.

<sup>7</sup> As to the meaning of 'goods vehicle' see PARA 112 note 29.

<sup>8</sup> As to the meaning of 'container' see PARA 112 note 29.

9 International Carriage of Perishable Foodstuffs Act 1976 s 6(2)(a).

10 'Certificate of compliance' means a valid certificate issued under the International Carriage of Perishable Foodstuffs Act 1976 s 2 (see PARA 112), and includes a certified copy issued, and a document recognised, under s 3 (see PARA 112): s 19(1).

11 As to the meaning of 'certification plate' see PARA 112 note 12.

12 International Carriage of Perishable Foodstuffs Act 1976 s 6(2)(b) (s 6(2)(b) amended, s 6(2A) added, by SI 1983/1123).

13 In relation to a motor vehicle, 'driver' includes any person in charge of the vehicle and if a separate person acts as steersman includes that person as well as any other person in charge of the vehicle or engaged in the driving of it; and, in relation to a trailer, 'driver' means any person who in accordance with the International Carriage of Perishable Foodstuffs Act 1976 s 19(1) is the driver of the motor vehicle by which the trailer is drawn: s 19(1). As to the meanings of 'motor vehicle' and 'trailer' see PARA 112 note 29.

14 International Carriage of Perishable Foodstuffs Act 1976 s 6(2)(c). This does not apply in relation to any vehicle or container to which a valid certification plate is affixed (see PARA 112), but an examiner may at any time detain any such vehicle or container for the purpose of inspecting the plate and copying the particulars contained in it: s 6(2A) (as added: see note 12).

15 International Carriage of Perishable Foodstuffs Act 1976 s 6(2), (2A) (as amended and added: see note 12).

16 International Carriage of Perishable Foodstuffs Act 1976 s 6(3). These offences are punishable by a fine not exceeding level 3 on the standard scale: s 6(3), (4) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 Sch 1 (definition added by the Criminal Justice Act 1988 Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144. As to proceedings for offences, offences by bodies corporate etc, see PARA 119.

## UPDATE

### 113-119 Enforcement ... Prosecution of offences

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(5) CARRIERS WITH SPECIAL RIGHTS AND DUTIES/(iv) Carriage of Perishable Foodstuffs/114. Use of uncertified transport equipment.

### 114. Use of uncertified transport equipment.

If any person, without reasonable excuse, uses, causes or permits to be used transport equipment<sup>1</sup> which is required to comply with regulations made in connection with the international carriage of perishable foodstuffs<sup>2</sup>, without there being either a certificate of compliance<sup>3</sup> in force for that equipment or a valid certification plate<sup>4</sup> affixed to it in accordance with such regulations, or without exhibiting the designated mark<sup>5</sup>, or in contravention of any such regulation, he is guilty of an offence<sup>6</sup>.

1 As to the meaning of 'transport equipment' see PARA 111 note 5.

2 The regulations under the International Carriage of Perishable Foodstuffs Act 1976: see PARA 111. As to the regulations see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071; and PARAS 111-112.

3 As to the meaning of 'certificate of compliance' see PARA 113 note 10.

4 As to the meaning of 'certification plate' see PARA 112 note 12.

5 As to designated marks see PARA 112; and as to offences in connection with designated marks see PARA 115.

6 International Carriage of Perishable Foodstuffs Act 1976 s 7(1) (amended by SI 1983/1123). This offence is punishable by a fine not exceeding level 3 on the standard scale: International Carriage of Perishable Foodstuffs Act 1976 s 7(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 113 note 16. It is a defence if the person charged is a carrier for hire or reward of the perishable foodstuffs in question and it is a term of the contract of carriage that he does not undertake to comply or to secure compliance with the regulation to which the charge relates: International Carriage of Perishable Foodstuffs Act 1976 s 7(3). As to proceedings for offences, offences by bodies corporate etc, see PARA 119.

## UPDATE

### 113-119 Enforcement ... Prosecution of offences

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(5) CARRIERS WITH SPECIAL RIGHTS AND DUTIES/(iv) Carriage of Perishable Foodstuffs/115. Offences in connection with designated marks.

### 115. Offences in connection with designated marks.

A person is guilty of an offence if:

- 36 (1) without reasonable excuse he affixes, or causes or permits to be affixed, a designated mark<sup>1</sup>, or permits a designated mark to remain affixed, to transport equipment<sup>2</sup> at a time when there is no valid certificate of compliance<sup>3</sup> in respect of that equipment<sup>4</sup>; or
- 37 (2) with intent to deceive he applies to transport equipment a mark so similar to a designated mark as to be calculated to deceive, or without reasonable excuse he fails to comply with a direction of an examiner<sup>5</sup> to remove such a mark<sup>6</sup>.

1 As to designated marks see PARA 112.

2 As to the meaning of 'transport equipment' see PARA 111 note 5.

3 As to the meaning of 'certificate of compliance' see PARA 113 note 10.

4 International Carriage of Perishable Foodstuffs Act 1976 s 8(1) (s 8(1), (2) amended by virtue of the Criminal Justice Act 1982 ss 38, 46). Offences under the International Carriage of Perishable Foodstuffs Act 1976

s 8 are punishable by a fine not exceeding level 3 on the standard scale: s 8(1), (2) (as so amended). As to the standard scale see PARA 113 note 16. As to proceedings for offences, offences by bodies corporate etc, see PARA 119.

5 As to the meaning of 'examiner' see PARA 113 note 3.

6 International Carriage of Perishable Foodstuffs Act 1976 s 8(2) (as amended: see note 4). As to this offence see further note 4.

## UPDATE

### 113-119 Enforcement ... Prosecution of offences

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(5) CARRIERS WITH SPECIAL RIGHTS AND DUTIES/(iv) Carriage of Perishable Foodstuffs/116. Forgery and misuse of certificates and plates.

### 116. Forgery and misuse of certificates and plates.

A person is guilty of an offence if, with intent to deceive, he:

- 38 (1) uses or lends to, or allows to be used by, any other person, a certificate of compliance<sup>1</sup>;
- 39 (2) makes or possesses any document so closely resembling a certificate as to be calculated to deceive<sup>2</sup>;
- 40 (3) forges<sup>3</sup>, or alters, or uses or lends to, or allows to be used by, any other person, a certification plate<sup>4</sup>; or
- 41 (4) makes or has in his possession a plate so closely resembling a certification plate as to be calculated to deceive<sup>5</sup>.

1 International Carriage of Perishable Foodstuffs Act 1976 s 9(1)(a) (amended by the Forgery and Counterfeiting Act 1981 Schedule Pt I). As to the meaning of 'certificate of compliance' see PARA 113 note 10. Offences under the International Carriage of Perishable Foodstuffs Act 1976 s 9 are punishable on conviction on indictment by a fine or by a term of imprisonment not exceeding two years or both, or on summary conviction by a fine not exceeding the prescribed sum: s 9(1) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)). 'Prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141. As to proceedings for offences, offences by bodies corporate etc, see PARA 119.

2 International Carriage of Perishable Foodstuffs Act 1976 s 9(1)(b). As to this offence see further note 1.

3 'Forges' means makes a false plate in order that it may be used as genuine: International Carriage of Perishable Foodstuffs Act 1976 s 9(3) (added by SI 1983/1123).

4 International Carriage of Perishable Foodstuffs Act 1976 s 9(2)(a) (s 9(2) as originally enacted repealed by the Forgery and Counterfeiting Act 1981 Schedule Pt I; added by SI 1983/1123). As to this offence see further note 1. As to the meaning of 'certification plate' see PARA 112 note 12.

5 International Carriage of Perishable Foodstuffs Act 1976 s 9(2)(b) (as added: see note 4). As to this offence see further note 1.

## UPDATE

### 113-119 Enforcement ... Prosecution of offences

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(5) CARRIERS WITH SPECIAL RIGHTS AND DUTIES/(iv) Carriage of Perishable Foodstuffs/117. False statements and withholding information.

#### 117. False statements and withholding information.

A person is guilty of an offence if:

- 42 (1) he knowingly makes a false statement for the purpose of obtaining the issue of a certificate of compliance<sup>1</sup> or certification plate<sup>2</sup> to himself or another<sup>3</sup>; or
- 43 (2) in supplying information or producing documents for the purposes of regulations made in connection with the international carriage of perishable foodstuffs<sup>4</sup>, he knowingly or recklessly makes a statement which is false in a material particular, or knowingly or recklessly produces, furnishes, sends or otherwise makes use of a document which is false in material particular<sup>5</sup>.

A person guilty of any such offence<sup>6</sup> is liable on summary conviction to a fine<sup>7</sup>.

1 As to the meaning of 'certificate of compliance' see PARA 113 note 10.

2 As to the meaning of 'certification plate' see PARA 112 note 12.

3 International Carriage of Perishable Foodstuffs Act 1976 s 10(1) (amended by SI 1983/1123). Offences under the International Carriage of Perishable Foodstuffs Act 1976 s 10 are punishable by a fine not exceeding level 4 on the standard scale: s 10(3) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 113 note 16. As to proceedings for offences, offences by bodies corporate etc, see PARA 119.

4 The regulations under the International Carriage of Perishable Foodstuffs Act 1976: see PARA 111. As to the regulations see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071; and PARAS 111-112.

5 International Carriage of Perishable Foodstuffs Act 1976 s 10(2). As to this offence see further note 3.

6 As to proceedings see PARA 119.

7 International Carriage of Perishable Foodstuffs Act 1976 s 10(3). The fine must not exceed level 4 on the standard scale: s 10(3) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 113 note 16.

## UPDATE

### 113-119 Enforcement ... Prosecution of offences

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION OF CARRIERS/(5) CARRIERS WITH SPECIAL RIGHTS AND DUTIES/(iv) Carriage of Perishable Foodstuffs/118. Foreign goods vehicles.

### 118. Foreign goods vehicles.

An examiner<sup>1</sup> may prohibit for the purpose of the international carriage<sup>2</sup> of perishable foodstuffs<sup>3</sup> the driving on a road<sup>4</sup> of a foreign goods vehicle<sup>5</sup> if:

- 44 (1) the vehicle is required to comply with regulations made in connection with the international carriage of perishable foodstuffs<sup>6</sup> and there is not produced to him in respect of the vehicle a certificate of compliance<sup>7</sup>, and no valid certification plate<sup>8</sup> is affixed to it in accordance with such regulations<sup>9</sup>;
- 45 (2) the vehicle or any container<sup>10</sup> carried by it is not marked with any designated mark required by regulations made under the Act<sup>11</sup>;
- 46 (3) it appears to the examiner that the vehicle is being used otherwise than in accordance with any condition specified in the certificate of compliance<sup>12</sup>; or
- 47 (4) the vehicle or any container carried by it is being used otherwise than in accordance with the regulations<sup>13</sup>.

Where an examiner so prohibits the driving of a vehicle he must give written notice to the driver<sup>14</sup> specifying the circumstances<sup>15</sup> as a result of which the prohibition is imposed<sup>16</sup>. He may direct the driver of the vehicle to remove it, and, if it is a motor vehicle drawing a trailer, also to remove the trailer to a specified place and subject to specified conditions; the prohibition on driving does not apply to the removal of the vehicle under such a direction<sup>17</sup>. Such a direction may be given in the notice of prohibition or in a separate written notice<sup>18</sup>.

It is an offence to drive a vehicle on a road or to cause or permit a vehicle to be driven on a road in contravention of a prohibition, or to refuse, neglect or otherwise fail to comply with a direction within a reasonable time<sup>19</sup>.

An examiner may remove a prohibition if satisfied that appropriate action has been taken to remove or remedy the circumstances in consequence of which the prohibition was imposed; he must forthwith give written notice to the driver of the removal of the prohibition<sup>20</sup>.

1 As to the meaning of 'examiner' see PARA 113 note 3. In the exercise of functions under the International Carriage of Perishable Foodstuffs Act 1976 s 11, an examiner must act in accordance with any general directions given by the Secretary of State: s 11(7). As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

2 As to the meaning of 'international carriage' see PARA 111 note 6.

3 As to the meaning of 'perishable foodstuffs' see PARA 111 note 7.

4 For this purpose 'road' means any highway and any other road to which the public has access, including bridges over which a road passes and any land forming part of a harbour or which is adjacent to a harbour and occupied wholly or partly for the purposes of harbour operations: International Carriage of Perishable Foodstuffs Act 1976 s 11(8)(a). As to the meanings of 'harbour' and 'harbour operations' see the Harbours Act 1964 s 57(1); and **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARAS 605, 611 (definition applied by the International Carriage of Perishable Foodstuffs Act 1976 s 11(8)(b)).

5 'Foreign goods vehicle' means a goods vehicle which has been brought into the United Kingdom and which, if a motor vehicle, is not registered in the United Kingdom or, if a trailer, is drawn by a motor vehicle not registered in the United Kingdom which has been brought into the United Kingdom: International Carriage of Perishable Foodstuffs Act 1976 s 19(1). As to the meanings of 'goods vehicle', 'motor vehicle' and 'trailer' see PARA 112 note 29. A motor vehicle which does not have exhibited on it a licence or trade plates issued under the Vehicle Excise and Registration Act 1994 (see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 718 et seq), is presumed to be registered outside the United Kingdom: International Carriage of Perishable Foodstuffs Act 1976 s 19(4) (amended by the Vehicle Excise and Registration Act 1994 Sch 3 para 9). Where a motor vehicle is presumed not to be registered in the United Kingdom but is subsequently proved to have been so registered, anything which has been done in relation to the vehicle or any trailer drawn by it, by a person relying in good faith on that presumption and purporting to act by virtue of a provision of the International Carriage of Perishable Foodstuffs Act 1976, and which would have been lawfully done under that provision if the presumption had been correct, is to be treated as lawfully done by virtue of that provision: s 19(5). As to the United Kingdom see PARA 96 note 1.

6 The regulations under the International Carriage of Perishable Foodstuffs Act 1976: see PARA 111. As to the regulations see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071; and PARAS 111-112.

7 As to the meaning of 'certificate of compliance' see PARA 113 note 10.

8 As to the meaning of 'certification plate' see PARA 112 note 12.

9 International Carriage of Perishable Foodstuffs Act 1976 s 11(1)(a) (substituted by SI 1983/1123).

10 As to the meaning of 'container' see PARA 112 note 29.

11 International Carriage of Perishable Foodstuffs Act 1976 s 11(1)(b). As to designated marks see PARA 112.

12 International Carriage of Perishable Foodstuffs Act 1976 s 11(1)(c).

13 International Carriage of Perishable Foodstuffs Act 1976 s 11(1)(d). As to the regulations see note 6.

14 As to the meaning of 'driver' see PARA 113 note 13.

15 The as mentioned in heads (1)-(4) in the text.

16 International Carriage of Perishable Foodstuffs Act 1976 s 11(3).

17 International Carriage of Perishable Foodstuffs Act 1976 s 11(2).

18 International Carriage of Perishable Foodstuffs Act 1976 s 11(3).

19 International Carriage of Perishable Foodstuffs Act 1976 s 11(5). This offence is punishable on summary conviction with a fine not exceeding level 4 on the standard scale: s 11(5) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 113 note 16. As to proceedings for offences, offences by bodies corporate etc, see PARA 119.

20 International Carriage of Perishable Foodstuffs Act 1976 s 11(4).

## **UPDATE**

### **113-119 Enforcement ... Prosecution of offences**

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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### 119. Prosecution of offences.

Summary proceedings for offences under the International Carriage of Perishable Foodstuffs Act 1976<sup>1</sup> may be commenced within six months from the date on which the prosecutor considers he has sufficient evidence to warrant proceedings<sup>2</sup>. However, no proceedings in respect of any such offence may be commenced more than three years after the date on which it was committed<sup>3</sup>.

Where a body corporate is guilty of an offence under the Act or the regulations made under it<sup>4</sup>, and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate or a person who purported to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly<sup>5</sup>.

For the purpose of conferring jurisdiction on a court<sup>6</sup>, any offence under the Act or regulations made under it may be treated as having been committed in any of:

- 48 (1) the place where the transport equipment<sup>7</sup> was being used when evidence of the offence first came to the attention of a constable<sup>8</sup> or examiner<sup>9</sup>;
- 49 (2) the place where the person charged resides or is believed to reside or to be when proceedings are commenced<sup>10</sup>; or
- 50 (3) the place where at that time the person in question has his place or principal place of business or his operating centre for the transport equipment concerned<sup>11</sup>.

A statement contained in a document<sup>12</sup> purporting to be:

- 51 (a) part of the records kept by the Secretary of State for the purposes of the Act<sup>13</sup>;
- 52 (b) a copy of a document forming part of those records<sup>14</sup>; or
- 53 (c) a note of any information contained in such records<sup>15</sup>,

and which purports to be authenticated by a person authorised for the purpose is admissible as evidence in any proceedings to the same extent as oral evidence of the fact in question is admissible in those proceedings<sup>16</sup>. However, this does not enable evidence to be given with respect to any matter other than a matter of the prescribed description<sup>17</sup>.

1 The offences in question are those under the International Carriage of Perishable Foodstuffs Act 1976 s 7 (offences as to use of transport equipment: see PARA 114), s 9 (forgery and misuse of certificates etc: see PARA 116), s 10 (false statements and withholding information: see PARA 117) and s 11 (offences as to foreign goods vehicles: see PARA 118).

2 International Carriage of Perishable Foodstuffs Act 1976 s 12(1). For the purposes of s 12, a certificate signed by or on behalf of the prosecutor or the Secretary of State, stating the date on which such evidence came to his knowledge, is conclusive evidence of that fact; and such a certificate purporting to be so signed is deemed to be so signed unless the contrary is proved: s 12(4). As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

3 International Carriage of Perishable Foodstuffs Act 1976 s 12(3).

4 As to the regulations see the International Carriage of Perishable Foodstuffs Regulations 1985, SI 1985/1071; and PARAS 111-112.

5 International Carriage of Perishable Foodstuffs Act 1976 s 13(1). Where the affairs of a body corporate are managed by its members, s 13 applies to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 13(2).

6 Any jurisdiction a court may have apart from the International Carriage of Perishable Foodstuffs Act 1976 s 14 is unaffected: see s 14.

7 As to the meaning of 'transport equipment' see PARA 111 note 5.

8 As to the office of constable see **POLICE** vol 36(1) (2007 Reissue) PARA 101 et seq.

9 International Carriage of Perishable Foodstuffs Act 1976 s 14(a). As to the meaning of 'examiner' see PARA 113 note 3. As to examiners generally under the International Carriage of Perishable Foodstuffs Act 1976 see PARA 113.

10 International Carriage of Perishable Foodstuffs Act 1976 s 14(b).

11 International Carriage of Perishable Foodstuffs Act 1976 s 14(c).

12 For this purpose 'statement' means any representation of fact, however made; and 'document' means anything in which information of any description is recorded: International Carriage of Perishable Foodstuffs Act 1976 s 15(2) (substituted by the Civil Evidence Act 1995 Sch 1 para 8; and amended by SI 1997/2983).

13 International Carriage of Perishable Foodstuffs Act 1976 s 15(1)(a).

14 International Carriage of Perishable Foodstuffs Act 1976 s 15(1)(b). 'Copy' means, in relation to a document, anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly: s 15(2) (as substituted and amended: see note 12).

15 International Carriage of Perishable Foodstuffs Act 1976 s 15(1)(1)(c).

16 International Carriage of Perishable Foodstuffs Act 1976 s 15(1).

17 International Carriage of Perishable Foodstuffs Act 1976 s 15(3). 'Prescribed' means prescribed by regulations made by the Secretary of State: s 19(1). At the date at which this volume states the law, no such regulations had been made.

## **UPDATE**

### **113-119 Enforcement ... Prosecution of offences**

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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## **(v) Postal Services**

### **120. The Post Office as a carrier.**

The Post Office is currently the universal service provider under the Postal Services Act 2000 with power to provide postal services in the United Kingdom<sup>1</sup>. No proceedings in tort lie against a universal service provider in respect of loss or damage suffered by any person in connection with the provision of a universal postal service because of anything done or omitted to be done

in relation to any postal packet in the course of transmission by post, or any omission to carry out arrangements for the collection of anything to be conveyed by post<sup>2</sup>. No officer, servant, employee, agent or sub-contractor of a universal service provider nor any person engaged in or about the conveyance of postal packets is subject, except at the suit or instance of the provider, to any civil liability for any loss or damage in the case of which liability of the provider is excluded<sup>3</sup>.

The universal service provider is, however, subject to a limited liability in respect of registered inland packets<sup>4</sup>. The acceptance by the Post Office of letters or packets for transmission through the post does not give rise to any contractual relationship with the sender or owner<sup>5</sup>.

1 See the Postal Services Act 2000 s 4; and **POST OFFICE**. As to the United Kingdom see PARA 96 note 1.

2 See the Postal Services Act 2000 s 90(1); and **POST OFFICE**. The Post Office's immunity from liability in tort extends to claims in bailment and cannot be avoided by suing for breach of bailment: *American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701; cf *Harold Stephen & Co Ltd v Post Office* [1978] 1 All ER 939 at 941-942, [1977] 1 WLR 1172 at 1177-1178, CA, per Lord Denning MR, and at 944 and 1179-1180 per Geoffrey Lane LJ (both of whom doubted whether the statutory immunity could be avoided by means of a claim in bailment, but the question did not fall for decision). See also *Lang v Devon General Ltd* [1987] ICR 4, EAT; *Irving and Irving v Post Office* [1987] IRLR 289, CA. Cf *Boaks v Postmaster-General* (1962) Times, 27 October, CA; *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247, [1965] 1 All ER 163, CA; *Moukattaf v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396 (decisions under the Crown Proceedings Act 1947 s 9 (repealed)). The Post Office's immunity from liability in tort also extends to any statutory cause of action created by the conventions governing carriage by air: see *American Express Co v British Airways Board*.

3 See the Postal Services Act 2000 s 90(2), (3); and **POST OFFICE**. See also *American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701; *Moukattaf v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396; and note 2.

4 See the Postal Services Act 2000 ss 91, 92; and **POST OFFICE**. See also *American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701. Proceedings against the Postmaster General in respect of registered packets under the Crown Proceedings Act 1947 s 9 (repealed) were entirely statutory: *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247, [1965] 1 All ER 163, CA. See also *American Express Co v British Airways Board* at 563 and 708, where Lloyd J appeared to accept that the cause of action against the Post Office in respect of registered packets under the Post Office Act 1969 s 30 (see now the Postal Services Act 2000 s 91) was also entirely statutory.

5 See *Triefus & Co Ltd v Post Office* [1957] 2 QB 352, [1957] 2 All ER 387, CA (following *Lane v Cotton* (1701) 1 Ld Raym 646; and *Whitfield v Lord Le Despencer* (1778) 2 Cowp 754); *American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701; *Irving and Irving v Post Office* [1987] IRLR 289, CA. The ratio decidendi was that the Postmaster General was responsible to the Crown for running a public service: see *Triefus & Co Ltd v Post Office*; *Postmaster-General v WH Jones & Co (London) Ltd* [1957] NZLR 829, NZ SC (article in custody of postal authority for carriage was not in transit for purpose of a New Zealand statute regarding seller's right of stoppage in transit). See also the Sale of Goods Act 1979 s 45; and PARAS 767-772. Cf *Badische Anilin und Soda Fabrik v Basle Chemical Works, Bindschedler* [1898] AC 200, HL.

## UPDATE

### 120 The Post Office as a carrier

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/121. The Convention system.

## 2. CARRIAGE BY AIR

## (1) THE APPLICABLE LAW

### 121. The Convention system.

The carriage of passengers, baggage and cargo by air is governed by international Conventions which are applied in United Kingdom law via the Carriage by Air Act 1961, the Carriage by Air (Supplementary Provisions) Act 1962, subordinate legislation made under those Acts and European Community legislation on air carrier liability<sup>1</sup>. The starting point for the law in this area is the Warsaw Convention of 1929<sup>2</sup>, which provided the first uniform international code relating to the liability of air carriers in respect of loss, injury and damage sustained in the course of, or arising out of, international carriage by air<sup>3</sup>. Successive amendments to the Warsaw Convention, progressively increasing the liability limits specified thereunder, produced a series of modified versions<sup>4</sup> which have now been consolidated in the Montreal Convention of 1999<sup>5</sup>. Which of the Montreal or Warsaw Conventions is applicable in any individual case, and if the latter which version thereof, depends on the identity of the carrier involved and which of the Conventions their state of registration or licensing has ratified<sup>6</sup>. Where the Montreal Convention applies it prevails over any other set of rules which apply to international carriage by air<sup>7</sup>. If none of the Conventions is applicable, the carrier's liability is governed by the common law<sup>8</sup>.

1 See the Carriage by Air Act 1961 s 1; the Carriage by Air (Supplementary Provisions) Act 1962 s 1; the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899; EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air; note 4; and PARA 122.

By Orders in Council made under powers conferred by the Carriage by Air Act 1961 ss 9, 10 (s 10 amended by SI 2002/263) and the Carriage by Air (Supplementary Provisions) Act 1962 s 5 (amended by SI 1999/1312), those Acts and the Conventions to which they give effect (see the text and notes 4, 5), and the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, and the Conventions to which it gives effect (see the text and notes 4, 5) have, with necessary modifications, been made part of the law of the bailiwicks of Jersey (see the Carriage by Air (Jersey) Order 1967, SI 1967/803, and the Carriage by Air Acts (Application of Provisions) (Jersey) Order 1967, SI 1967/806) and Guernsey (including Alderney) (see the Carriage by Air (Guernsey) Order 1967, SI 1967/804, and the Carriage by Air Acts (Application of Provisions) (Guernsey) Order 1967, SI 1967/807) and a number of overseas territories (ie Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, Falkland Islands and Dependencies, Gibraltar, Montserrat, St Helena and Ascension, and Turks and Caicos Islands: see the Carriage by Air (Overseas Territories) Order 1967, SI 1967/809, and the Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967, SI 1967/810 (amended by SI 1984/701)). Corresponding provision made in respect of the Isle of Man has been revoked (see the Civil Aviation (Isle of Man) (Revocation) Order 1995, SI 1995/1297, art 2) and this area is now the subject of Manx law. The effect of the instruments referred to above is to be distinguished from that of the instruments which state for the purposes of United Kingdom law the territories in respect of which the United Kingdom and other countries are parties to the Conventions: see PARA 124.

2 Ie the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929; TS 11 (1933); Cmnd 4284). The Convention came into force on 13 February 1933, 90 days after the deposit of the fifth instrument of ratification, in accordance with art 37(1), (2); it was originally given effect to in the United Kingdom by the Carriage by Air Act 1932 Sch 1 (repealed), and is now given effect to by the Carriage by Air Act 1961 Schs 1, 1A and the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Schs 2, 3, depending on which version is required (see note 4).

3 See *Sidhu v British Airways plc* [1997] AC 430, [1997] 1 All ER 193, HL.

4 The Warsaw Convention of 1929 was amended by the Hague Protocol of 1955 (28 September 1955; Misc 5 (1956); Cmd 9824), the Guatemala Protocol of 1971 (Guatemala City, 8 March 1971; Misc 4 (1971, Cmnd 4691) and a series of four Additional Protocols agreed at Montreal in 1975 (25 September 1975; Misc 17 (1976); Cmnd 6480-6483). Of these, the Hague Protocol and Montreal Additional Protocol No 4 are the significant amending Protocols from a United Kingdom perspective. The version of the Warsaw Convention produced by the Hague Protocol is generally referred to as the Warsaw-Hague Convention; it came into force on 1 August 1963 (ie 90 days after the deposit of the thirtieth instrument of ratification, in accordance with Hague Protocol art 22(1)) and is enacted in the Carriage by Air Act 1961 Sch 1 (amended by the Carriage by Air and Road Act 1979 s 4(1)

(b)). The version produced by Montreal Additional Protocol No 4 is generally referred to as the Warsaw-Hague-MP4 Convention; it came into force on 14 June 1998 (ie 90 days after the deposit of the thirtieth instrument of ratification, in accordance with Montreal Additional Protocol No 1 art 7(1)) and is enacted in the Carriage by Air Act 1961 Sch 1A (added by SI 2002/263).

Montreal Additional Protocol No 1 is of minor significance, making provision limiting the carrier's liability under the original Warsaw Convention or the Warsaw-Hague Convention which has been largely superseded from a United Kingdom perspective, although there remain certain states in respect of which those provisions continue to apply; additionally, there are some circumstances in which the Warsaw Convention applies in unamended form. Carriage under both the Unamended Warsaw Convention and the Warsaw-MP 1 Convention is governed by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Schs 2, 3. Montreal Additional Protocol No 2 may be regarded as spent, while the Guatemala Protocol and Montreal Additional Protocol No 3 (which was intended to replace it) failed to attract sufficient ratifications to bring them into force.

In cases where the Warsaw Convention (in any of its forms) applies, additional provision is made in respect of international carriage performed by a person other than the contracting carrier, by the Guadalajara Convention of 1961 (ie the Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara, 18 September 1961; TS 23 (1964); Cmnd 2354) (superseding Misc 13 (1961); Cmnd 1568)): see art I(a); the Carriage by Air (Supplementary Provisions) Act 1962 ss 1, 2(1)(b) (s 2(1)(b) amended by SI 1999/1312); and the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 2 Pt I para 1, Sch 3 Pt I para 1. The Guadalajara Convention came into force on 1 May 1964 (ie 90 days after the deposit of the fifth instrument of ratification, in accordance with Guadalajara Convention art XIII.1) and is set out in the Carriage by Air (Supplementary Provisions) Act 1962 Schedule. The effect of the Guadalajara Convention is to give the actual carrier the same protection as that to which the contracting carrier is entitled under the Warsaw Convention: see further PARA 131. The Montreal Convention makes its own provision in this regard for both international and non-international carriage: see arts 39-48; and PARA 131.

The United Kingdom implementing legislation may be amended when the Conventions are revised: Carriage by Air Act 1961 s 8A (added by the Carriage by Road and Rail Act 1979 s 3(1); and amended by the International Transport Conventions Act 1983 Sch 2 para 1); Carriage by Air (Supplementary Provisions) Act 1962 s 4A (added by the Carriage by Road and Rail Act 1979 s 3(2)).

5     le the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999; TS 44 (2004); Cm 6369). The United Kingdom instrument of ratification of the Montreal Convention was deposited on 29 April 2004 and the Convention entered into force for the United Kingdom (and the rest of the European Community) on 28 June 2004, as notified in the London Gazette of 7 May 2004 in accordance with the Montreal Convention art 53.3 and the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002, SI 2002/263, art 1(2). The Convention is enacted in the Carriage by Air Act 1961 Sch 1B (added by SI 2002/263). See further PARA 122.

6     As to the parties to the Conventions see PARA 123. The Conventions do not, in general, confer third party rights: see the Contracts (Rights of Third Parties) Act 1999 s 6(5), (8); and **CONTRACT**.

7     See the Montreal Convention art 55, which provides that the Convention prevails over any other rules which apply to international carriage by air: (1) between state parties to the Montreal Convention by virtue of those states commonly being party to the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala Protocol or the Montreal Additional Protocols; or (2) within the territory of a single state party by virtue of that state being party to one or more of the above instruments. The Montreal Convention therefore prevails over the Warsaw-Hague Convention, the Warsaw-Hague-MP 4 Convention and the Unamended Warsaw Convention and Warsaw-MP 1 Convention: note, however, that the Montreal Convention art 55 does not apply in the case of United Kingdom-only flights: see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (19).

8     As to the common law relating to carriage see PARA 1 et seq.

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## **122. Air carrier liability under the Conventions.**

If an air carrier has a valid operating licence granted by an EC member state<sup>1</sup> its liability in respect of passengers and their baggage is governed by all provisions of the Montreal Convention<sup>2</sup> relevant to such liability<sup>3</sup>. The European Community has ratified the Convention in

its capacity as a Regional Economic Integration Organisation<sup>4</sup> and has also made specific provision for implementing the Convention within the Community as a whole and within the territories of each member state<sup>5</sup>, all of whom have also ratified the Convention as individual parties<sup>6</sup>. Accordingly all United Kingdom carriers and all carriers licensed elsewhere in the Community are subject to the provisions of the Montreal Convention<sup>7</sup>. The liability of other carriers will be governed by either the Montreal Convention or the Warsaw Convention depending on which of those Conventions (and, in the case of the Warsaw Convention, which version thereof) has been ratified by the state which licensed or otherwise authorised the carrier in question<sup>8</sup>.

1     In accordance with the provisions of EC Council Regulation 2407/92 (OJ L240, 24.8.92, p 1) on the licensing of air carriers, as to which see **AIR LAW** vol 2 (2008) PARA 92 et seq. An air carrier with a valid operating licence granted by a member state is a 'Community air carrier': see EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, art 2.1(b) (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)). An air transport undertaking with a valid operating licence is an 'air carrier' for these purposes: art 2.1(a) (as so substituted). Member states may grant operating licences only in respect of undertakings owned by Community nationals and located in and operating from a member state: see EC Council Regulation 2407/92 (OJ L240, 24.8.92, p 1) art 4; and **AIR LAW** vol 2 (2008) PARA 102.

2     As to the Montreal Convention see PARA 121.

3     EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 3 (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)).

4     'Regional Economic Integration Organisation' means any organisation which is constituted by sovereign states of a given region which has competence in respect of certain matters governed by the Montreal Convention and has been duly authorised to sign and ratify, accept, approve or accede to the Convention: art 53.2. As to the ratification and coming into force of the Montreal Convention see PARA 121 note 5; and PARA 123.

5     See EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1), art 1 of which (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)) provides that the regulation implements relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air, lays down certain supplementary provisions, and extends the application of those provisions to carriage by air within a single member state. It is also provided that the Convention has the force of law in the United Kingdom, irrespective of the nationality of the aircraft performing the carriage, only in so far as the Council Regulation does not: see the Carriage by Air Act 1961 s 1(1), (2), (5)(c), (6)(c) (substituted by SI 2002/263); and the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 3. The Council Regulation does not provide an alternative cause of action to that provided by the main Convention system: see *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2002] EWHC 2825 (QB), [2003] 1 All ER 935, [2003] 1 All ER (Comm) 418 (affd on other grounds [2003] EWCA Civ 1005, [2004] QB 234, [2004] 1 All ER 445; [2005] UKHL 72, [2006] 1 AC 495, [2006] 1 All ER 786). As to the Convention system generally see PARA 121.

6     See PARA 123.

7     The Montreal Convention is modified in its application to carriage by air which takes place solely within the United Kingdom: see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 4, Sch 1 Pt I (the modified Montreal Convention itself being set out in Sch 1 Pt II); and PARAS 173-192.

8     Accordingly the various versions of the Warsaw Convention (see PARA 121) continue to have the force of law in the United Kingdom, irrespective of the nationality of the aircraft performing the carriage, to the extent that the Community Regulation does not: see the Carriage by Air Act 1961 s 1(1), (2), (5)(a), (b), (6)(a), (b) (substituted by SI 2002/263); and the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 3.

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### 123. Parties to Conventions.

The Montreal Convention and the various versions of the Warsaw Convention<sup>1</sup> employ inconsistent terminology to describe the contracting or ratifying parties to those Conventions. The Unamended Warsaw Convention and the Warsaw-MP1 Convention use the term 'states parties', but do not define it<sup>2</sup>. The Warsaw-Hague and Warsaw-Hague-MP4 Conventions use the term 'high contracting party' and define it as meaning a state whose ratification of or adherence to those versions of the Warsaw Convention has become effective and whose denunciation of it has not become effective<sup>3</sup>. The Montreal Convention returns to 'state party', but again without definition, although context suggests it must be interchangeable with 'high contracting party' as used in the Warsaw-Hague and Warsaw-Hague-MP4 Conventions<sup>4</sup> and in some contexts<sup>5</sup> includes Regional Economic Integration Organisations<sup>6</sup>.

The parties to the Warsaw and Montreal Conventions are specified by Order in Council<sup>7</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 See however *Philippson v Imperial Airways Ltd* [1939] AC 332, [1939] 1 All ER 761, HL, where it was held by Lords Atkin, Thankerton and Wright (Lords Russell of Killowen and Macmillan dissenting) that Belgium was in 1935 a high contracting party within the terms of the Warsaw Convention and of a contract based on it, although it had not then ratified the Convention. The Unamended Warsaw Convention and the Warsaw-MP 1 Convention are set out in the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 2 Pt II, Sch 3 Pt II: see PARA 121.

3 Warsaw-Hague Convention art 40A.1; Warsaw-Hague-MP4 Convention art 40A.1.

4 See note 2.

5 Ie otherwise than in the Montreal Convention arts 1.2, 3.1(b), 5(b), 23, 33, 46, 57(b) and in the references to 'a majority of the state parties' and 'one-third of the state parties' in art 24: art 53.2.

6 Montreal Convention art 53.2. As to the meaning of 'Regional Economic Integration Organisation' see PARA 122 note 4.

7 Carriage by Air Act 1961 s 2(1) (amended by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, arts 5(2)(a), (b), 6(2)(a), (b). By this means it can be certified who are the parties to the applicable Convention, in respect of what territories they are respectively parties (see PARA 124), and to what extent they have availed themselves of the provisions enabling them to exclude the application of the Convention to carriage performed by the state for non-commercial purposes in respect of its functions and duties as a sovereign state (see PARA 132). Except so far as it has been superseded by a subsequent order, such an order is conclusive of the matters which it certifies (Carriage by Air Act 1961 s 2(3)); it is conclusive not only that the states named in the orders are parties, but also that states not named are not (see *Philippson v Imperial Airways Ltd* [1939] AC 332 at 350-351, [1939] 1 All ER 761 at 767-768, HL, per Lord Atkin, at 353 and 770 per Lord Russell of Killowen, and at 370 and 781 per Lord Wright). Orders have no effect except in relation to the Carriage by Air Act 1961 (or the Carriage by Air Acts (Application of Provisions) Order 1967, SI 1967/480) (see *Philippson v Imperial Airways Ltd*). Orders may also contain such transitional and other consequential provisions as appear to be expedient: Carriage by Air Act 1961 s 2(4).

*Parties to the Warsaw Convention.* Afghanistan; Algeria; Angola; Antigua and Barbuda; Argentina; Australia; Austria; Bahamas; Bahrain; Bangladesh; Barbados; Belarus; Belgium; Belize; Benin; Bosnia and Herzegovina; Botswana; Brazil; Brunei Darussalam; Bulgaria; Burkina Faso; Cambodia; Cameroon; Canada; Chad; Chile; China; Colombia; Federal Islamic Republic of the Comoros; Republic of the Congo (Brazzaville); Democratic Republic of the Congo; Costa Rica; Côte d'Ivoire; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Dominica; Dominican Republic; Ecuador; Egypt; Equatorial Guinea; Estonia; Ethiopia; Fiji; Finland; France; Gabon; Gambia; Germany; Ghana; Grenada; Guatemala; Guinea; Guyana; Greece; Honduras; Hungary; Iceland; India; Indonesia; Iran; Iraq; Ireland; Israel; Italy; Jamaica; Japan; Jordan; Kenya; Kiribati; Kuwait; Laos; Latvia; Lebanon; Lesotho; Liberia; Libya; Liechtenstein; Luxembourg; Macedonia; Madagascar; Malawi; Malaysia; Maldives; Mali; Malta; Mauretania; Mauritius; Mexico; Moldova; Mongolia; Morocco; Myanmar (Burma); Namibia; Nauru; Nepal; Netherlands; New Zealand; Niger; Nigeria; Norway; Oman; Pakistan; Panama; Papua New Guinea; Paraguay; Peru; Philippines; Poland; Portugal; Qatar; Romania; Russia; Rwanda; Saint Christopher and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Samoa; Saudi Arabia; Senegal; Seychelles; Sierra Leone; Singapore; Slovakia; Solomon Islands; South Africa; Spain; Sri Lanka; Sudan; Surinam; Swaziland; Sweden; Switzerland; Syria; Tajikistan; Tanzania; Togo; Tonga; Trinidad and Tobago; Tunisia; Turkey; Turkmenistan; Tuvalu; Uganda; Ukraine; United Arab Emirates; United Kingdom; United States of America; Uruguay; Uzbekistan; Vanuatu; Venezuela; Vietnam; Yemen; Federal Republic of Yugoslavia; Zambia; Zimbabwe: see the Carriage by Air (Parties to Convention) Order 1999, SI 1999/1313, arts 2, 3, Sch 1.

*Parties to the Warsaw-MP1 Convention.* Argentina; Bahrain; Bosnia and Herzegovina; Brazil; Canada; Chile; Colombia; Croatia; Cuba; Cyprus; Denmark; Egypt; Estonia; Ethiopia; Finland; France; Ghana; Greece; Guatemala; Honduras; Ireland; Israel; Italy; Kuwait; Macedonia; Mexico; Netherlands; Norway; Peru; Portugal; Spain; Sweden; Switzerland; Togo; Tunisia; Uzbekistan; Venezuela; Federal Republic of Yugoslavia; United Kingdom: see arts 2, 3, Sch 1.

*Parties to the Warsaw-Hague Convention.* Afghanistan; Algeria; Angola; Argentina; Australia; Austria; Bahamas; Bahrain; Bangladesh; Belarus; Belgium; Belize; Benin; Bosnia and Herzegovina; Brazil; Bulgaria; Cambodia; Cameroon; Canada; Chad; Chile; China; Colombia; Republic of the Congo (Brazzaville); Costa Rica; Côte d'Ivoire; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Dominican Republic; Ecuador; Egypt; El Salvador; Estonia; Fiji; Finland; France; Gabon; Germany; Ghana; Grenada; Guatemala; Guinea; Greece; Hungary; Iceland; India; Iran; Iraq; Ireland; Israel; Italy; Japan; Jordan; Kiribati; Republic of Korea; Kuwait; Laos; Lebanon; Lesotho; Libya; Liechtenstein; Lithuania; Luxembourg; Macedonia; Madagascar; Malawi; Malaysia; Maldives; Mali; Mauritius; Mexico; Moldova; Monaco; Morocco; Namibia; Nauru; Nepal; Netherlands; New Zealand; Niger; Nigeria; Norway; Oman; Pakistan; Panama; Papua New Guinea; Paraguay; Peru; Philippines; Poland; Portugal; Qatar; Romania; Russia; Rwanda; Samoa; Saudi Arabia; Senegal; Seychelles; Singapore; Slovakia; Solomon Islands; South Africa; Spain; Sri Lanka; Sudan; Surinam; Swaziland; Sweden; Switzerland; Syria; Togo; Tonga; Trinidad and Tobago; Tunisia; Turkey; Tuvalu; Ukraine; United Arab Emirates; United Kingdom; Vanuatu; Venezuela; Vietnam; Yemen; Federal Republic of Yugoslavia; Zambia; Zimbabwe: see arts 2, 3, Sch 1.

*Parties to the Warsaw-Hague-MP4 Convention.* Argentina; Australia; Azerbaijan; Bahrain; Bosnia and Herzegovina; Brazil; Canada; Colombia; Croatia; Denmark; Ecuador; Egypt; Estonia; Ethiopia; Finland; Ghana; Greece; Guatemala; Guinea; Honduras; Hungary; Ireland; Israel; Italy; Japan; Jordan; Kenya; Kuwait; Macedonia; Mauritius; Nauru; Netherlands; Niger; Norway; Oman; Portugal; Singapore; Slovenia; Spain; Sweden; Switzerland; Togo; Turkey; United Arab Emirates; United Kingdom; United States of America; Uzbekistan; and the Federal Republic of Yugoslavia: see the Carriage by Air (Parties to Protocol No 4 of Montreal, 1975) Order 2000, SI 2000/3061, art 2, Schedule.

*Parties to the Montreal Convention.* Although the Montreal Convention has been in force for United Kingdom purposes since 28 June 2004 (see PARA 121 note 5), at the date at which this volume states the law no Order in Council had been made certifying the states parties to the Montreal Convention. However, the International Civil Aviation Organisation, which is generally regarded as providing accurate information in this regard, currently lists the following 86 states as having ratified the Convention: Albania; Austria; Bahamas; Bahrain; Bangladesh; Barbados; Belgium; Belize; Benin; Bolivia; Bosnia and Herzegovina; Botswana; Brazil; Bulgaria; Burkina Faso; Cambodia; Cameroon; Canada; Cape Verde; Central African Republic; Chile; China; Colombia; Cook Islands; Costa Rica; Côte d'Ivoire; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Dominican Republic; Ecuador; Egypt; El Salvador; Estonia; Finland; France; Gabon; Gambia; Germany; Ghana; Greece; Hungary; Iceland; Ireland; Italy; Jamaica; Japan; Jordan; Kenya; Kuwait; Latvia; Lebanon; Lithuania; Luxembourg; Macedonia; Madagascar; Malaysia; Maldives; Mali; Malta; Mauritius; Mexico; Monaco; Mongolia; Mozambique; Namibia; Netherlands; New Zealand; Niger; Nigeria; Norway; Oman; Pakistan; Panama; Paraguay; Peru; Poland; Portugal; Qatar; Republic of Korea; Romania; Saint Vincent and the Grenadines; Saudi Arabia; Senegal; Singapore; Slovakia; Slovenia; South Africa; Spain; Sudan; Swaziland; Sweden; Switzerland; Syrian Arab Republic; Tanzania; Togo; Tonga; Turkey; United Arab Emirates; United Kingdom; United States of America; Uruguay; Vanuatu; Zambia. Also listed, as a Regional Economic Integration Organisation, is the European Community.

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#### **124. Territories in respect of which states are parties to Conventions.**

The Warsaw Convention<sup>1</sup> reserves to each party<sup>2</sup> the right to declare, at time of signature, ratification or accession, that the acceptance it gives to the Convention does not apply to all or any of its colonies, protectorates, territories under mandate or any other territory<sup>3</sup> subject to its sovereignty or authority or any territory under its suzerainty<sup>4</sup>. The Montreal Convention<sup>5</sup> provides that if a state has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in that Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention extends to all of its territorial units or only to one or more of them<sup>6</sup>.

The United Kingdom has declared itself a party to the various versions of the Warsaw Convention in respect of Great Britain and Northern Ireland, the Channel Islands, the Isle of

Man and British overseas territories<sup>7</sup>. No corresponding declaration has been made in respect of the Montreal Convention but it may be presumed that corresponding provision would be made.

1 As to the Warsaw Convention see PARA 121. As to air carrier liability under the Convention see PARA 122.

2 As to the parties to the various versions of the Warsaw Convention see PARA 123.

3 For the purposes of the Warsaw-Hague and Warsaw-Hague-MP4 Conventions (but not earlier versions) 'territory' means not only the metropolitan territory of a state but also all other territories for the foreign relations of which that state is responsible: Warsaw-Hague Convention art 40A.2; Warsaw-Hague-MP4 Convention art 40A.2. This provision must not, however, be read as extending references in the Warsaw-Hague or Warsaw-Hague-MP4 Conventions to the territory of a party to include any territory in respect of which that is not a party: Carriage by Air Act 1961 s 2(2), (2A)(a), (b) (s 2(2) substituted, s 2(2A) added, by SI 2002/263). The question whether a particular territory is a part of the territory in respect of which a state is a party to the Convention is important for the purpose of deciding whether carriage is international or not: see PARA 121.

4 Unamended Warsaw Convention art 40.1; Warsaw-MP1 Convention art 40.1; Warsaw-Hague Convention art 40.1; Warsaw-Hague-MP4 Convention art 40.1. A party may subsequently accede to the Convention in the name of any territory originally excluded and may denounce the Convention separately in respect of all or any of its colonies etc: Unamended Warsaw Convention arts 40.2, 40.3; Warsaw-MP1 Convention arts 40.2, 40.3; Warsaw-Hague Convention arts 40.2, 40.3; Warsaw-Hague-MP4 Convention arts 40.2, 40.3. See also the Additional Protocol to the Convention; and PARA 132.

5 As to the Montreal Convention see PARA 121.

6 Montreal Convention art 56.1. Declarations must state expressly the territorial units to which the Convention applies: art 56.2. This provision must not be read as extending references in the Montreal Convention to the territory of a party to include any territory in respect of which that is not a party: Carriage by Air Act 1961 s 2(2), (2A)(c) (as substituted and added: see note 3).

7 See the Carriage by Air Act 1961 s 2(1) (amended by SI 2002/263); the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, arts 5(2)(a), 6(2)(a); and the Carriage by Air (Parties to Convention) Order 1999, SI 1999/1313, s 2, Sch 1. The British overseas territories are Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn; Henderson and Oeno Islands; St Helena; St Helena Dependencies; South Georgia and the South Sandwich Islands; the Sovereign Base Areas of Akrotiri and Dhekelia; Turks and Caicos Islands: Sch 1.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/125. Meaning of 'international carriage'.

## 125. Meaning of 'international carriage'.

For the purposes of the Montreal and Warsaw Conventions<sup>1</sup> 'international carriage' means any carriage in which, according to the agreement or contract between the parties<sup>2</sup>, the place of departure and the place of destination<sup>3</sup>, whether or not there is a break<sup>4</sup> in the carriage or a transshipment, are situated either within the territories of two parties to the Convention<sup>5</sup>, or within the territory of a single party if there is an agreed stopping place within the territory of another state<sup>6</sup>, even though that state is not a party<sup>7</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 The contract (or series of contracts forming the agreement: see PARA 129) is, so to speak, the unit to which attention is to be paid in considering whether or not the carriage under it is international or not; the fact that there is a break in the carriage is immaterial: see *Grein v Imperial Airways Ltd* [1937] 1 KB 50, [1936] 2 All ER 1258, CA; *Collins v British Airways Board* [1982] QB 734, [1982] 1 All ER 302, 1 S & B Av R VII/155, CA. The passenger or consignor does not have to be a party to the contract or agreement for the carriage to be 'international' for these purposes: see *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] AC 534, [1997] 1 All ER

775, HL; *Block v Cie Nationale Air France* 386 F 2d 323 (5th Cir, 1967), cert denied 392 US 905 (1968) (case of a child or a servant).

3 The use of the singular in this expression indicates that in the minds of the parties to the Convention every contract of carriage has one place of departure and one place of destination; an intermediate place at which the carriage may be broken is not regarded as a place of destination, and in the case of a return ticket the only place of destination is that of departure: see *Grein v Imperial Airways Ltd* [1937] 1 KB 50, [1936] 2 All ER 1258, CA; *Qureshi v KLM Royal Dutch Airlines* (1979) 102 DLR (3d) 205 (NS SC); and cf PARA 162.

4 See *Grein v Imperial Airways Ltd* [1937] 1 KB 50, [1936] 2 All ER 1258, CA; *Egan v Kollsman Instrument Corp* 234 NE 2d 199 (NY, 1967).

5 As to the parties to the Conventions see PARA 123.

6 Where the Unamended Warsaw Convention or the Warsaw-MP1 Convention applies this refers to 'an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another state': see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 2 Pt I para 3(2), Sch 3 Pt 1 para 3(2). For all present purposes an 'agreed stopping place' is a place where, according to the contract, the aircraft by which the contract is to be performed will stop in the course of performing the contractual carriage, whatever the purpose of the descent may be, and whatever rights the passenger may have to break his journey at that place: see *Grein v Imperial Airways Ltd* [1937] 1 KB 50, [1936] 2 All ER 1258, CA.

7 Unamended Warsaw Convention art 1.2; Warsaw-Hague Convention art 1.2; Warsaw-MP1 Convention art 1.2; Warsaw-Hague-MP4 Convention art 1.2; Montreal Convention art 1.2. Carriage between two points within the territory of a single party without an agreed stopping place within the territory of another state is not 'international carriage' for the purposes of the Warsaw-Hague, Warsaw-Hague-MP4 or Montreal Conventions: Warsaw-Hague Convention art 1.2; Warsaw-Hague-MP4 Convention art 1.2; Montreal Convention art 1.2. For obvious reasons this definition does not apply in relation to carriage by air within the United Kingdom, the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (3).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/126. The Conventions as part of English law.

## 126. The Conventions as part of English law.

The applicable provisions of the Warsaw-Hague, Warsaw-Hague-MP4 and Montreal Conventions<sup>1</sup>, so far as they relate to the rights and liabilities of carriers, their servants and agents, passengers, consignors, consignees and other persons, have the force of law in the United Kingdom<sup>2</sup> in relation to any carriage by air to which they apply and irrespective of the nationality of the aircraft performing the carriage<sup>3</sup>. The Unamended Warsaw Convention and the Warsaw-MP1 Convention have effect as part of the law of the United Kingdom in relation to any carriage by air to which they respectively apply<sup>4</sup>. In all cases, the Convention in question applies notwithstanding any attempt by the parties to the contract of carriage to exclude its operation or to substitute some other law as the law applicable to the contract<sup>5</sup>. A deviation from the carriage contracted for does not remove the carriage from the ambit of the Convention or disentitle the carrier from relying upon its provisions<sup>6</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. The 'applicable provisions' for these purposes are those set out in the Carriage by Air Act 1961 Schs 1, 1A, 1B and the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt II: see PARA 121.

2 As to the United Kingdom see PARA 96 note 1.

3 Carriage by Air Act 1961 s 1(1), (5)-(8) (s 1 substituted by SI 2002/263). Note, however, that the Conventions have the force of law in the United Kingdom only in so far as EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, does not: see the Carriage by Air Act 1961 s 1(2) (as so substituted); and PARA 122. As to the carriage to which the Conventions apply see PARA 127. If more than one of the Conventions applies to a carriage by air, the

applicable provisions that have the force of law in the United Kingdom are those of whichever is the most recent applicable Convention in force: Carriage by Air Act 1961 s 1(4) (as so substituted). As to the entering into force of the Conventions see PARA 121; as to ratification see PARA 123.

The Conventions, being in the nature of multilateral agreements between states, form part of United Kingdom law only in so far as they are incorporated by domestic legislation (see note 1) (see *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL), and are to be applied by the courts of all parties without reference to the rules of their own domestic law (*Sidhu v British Airways plc* [1997] AC 430, [1997] 1 All ER 193, HL). As international conventions they must be construed purposively, according to broad principles of general acceptance and consistently with the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) art 31.1: see *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279, 281-282, [1980] 2 All ER 696 at 704, 706, HL, per Lord Diplock; *Sidhu v British Airways plc* at 442 and 202 per Lord Hope of Craighead; *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, [2002] 2 AC 628, [2002] 2 All ER 565 at [75]-[82] per Lord Hope of Craighead, and at [146]-[151] per Lord Hobhouse of Woodborough; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 71 et seq. Moreover, the Conventions as enacted by the Carriage by Air Act 1961 and the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899 (see note 1) are 'primary legislation' within the meaning of the Human Rights Act 1998 s 3(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) and so must be read and given effect in a way which is compatible with the rights provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), so far as it is possible to do so, although their exclusivity is not incompatible with arts 6(1) and 8 (right to a fair trial; right to respect for private and family life: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 134 et seq, 150 et seq): *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2002] EWHC 2825 (QB), [2003] 1 All ER 935, [2003] 1 All ER (Comm) 418 (affd on other grounds [2003] EWCA Civ 1005, [2004] QB 234, [2004] 1 All ER 445; [2005] UKHL 72, [2006] 1 AC 495, [2006] 1 All ER 786).

4 See the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, arts 3(1), 5(1), 6(1). Note, however, that the Conventions have the force of law in the United Kingdom only in so far as EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, does not: see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 3(2); and PARA 122.

5 See PARAS 133, 161. See also *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 74-75, [1936] 2 All ER 1258 at 1277-1278, CA, per Greene LJ.

6 See *Rotterdamsche Bank NV v British Overseas Airways Corp* [1953] 1 All ER 675, [1953] 1 WLR 493.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/127. Carriage to which the Conventions apply.

## 127. Carriage to which the Conventions apply.

The Montreal and Warsaw Conventions<sup>1</sup> apply, subject to a very few exceptions<sup>2</sup>, to all international and non-international carriage<sup>3</sup> of persons, baggage or cargo performed by aircraft<sup>4</sup> for reward<sup>5</sup>, and apply equally to gratuitous carriage by aircraft performed by an air transport undertaking<sup>6</sup>. The Conventions also apply to such carriage where it is performed by the state<sup>7</sup> or by legally constituted public bodies provided it falls within the conditions for international or (as the case may be) non-international carriage<sup>8</sup>, although states may specifically exclude such carriage<sup>9</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 For special categories of carriage to which the Conventions do not apply see PARA 128.

3 As to the meaning of 'international carriage' see PARA 125. The implementation of the Montreal Convention throughout the European Community and within each member state of the Community (see PARA 122) has rendered the distinction between international and non-international carriage redundant for those purposes, although it will still be of relevance in certain Warsaw Convention cases.

4 As to the meaning of 'aircraft' for this purpose see *Laroche v Spirit of Adventure (UK) Ltd* [2008] EWHC 788 (QB), [2008] 2 Lloyd's Rep 34, [2008] All ER (D) 238 (Apr), where a hot-air balloon was held to be an aircraft for the purposes of the Warsaw Convention, and *Disley v Levine* [2001] EWCA Civ 1087, [2002] 1 WLR 785, [2001] All ER (D) 129 (Jul), where a tandem paraglider was held not to be.

5 Carriage for 'reward' does not require the person to be carried under a contract to which he is a party, or under a contract of any particular type: *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] AC 534, [1997] 1 All ER 775, HL. It includes carriage where reward is promised and expected by the carrier (*Gurtner v Beaton* (1990) 1 S & B Av R VII/499; affirmed on other grounds [1993] 2 Lloyd's Rep 369, (1992) 1 S & B Av R VII/723, CA), although the 'reward' must be for the carriage, reward for flying instruction being insufficient (see *Disley v Levine* [2001] EWCA Civ 1087, [2002] 1 WLR 785, [2001] All ER (D) 129 (Jul)).

In respect of the carriage of passengers, it has been held that the Warsaw Convention (and, by inference, the Montreal Convention) applies as soon as the passenger has presented a valid ticket for travel, the ticket has been accepted and a boarding pass issued, and that carriage begins when the passenger has successfully completed the check-in procedure: see *Phillips v Air New Zealand Ltd* [2002] EWHC 800 (Comm), [2002] 1 All ER (Comm) 801, [2002] 2 Lloyd's Rep 408.

6 Unamended Warsaw Convention art 1.1; Warsaw-MP1 Convention art 1.1; Warsaw-Hague Convention art 1.1; Warsaw-Hague-MP4 Convention art 1.1; Montreal Convention art 1.1. See also, in connection with carriage within the United Kingdom, the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (2). A business is an 'air transport undertaking' if there has previously been one flight by it for reward and such flights are available in the future: *Gurtner v Beaton* (1990) 1 S & B Av R VII/499; affirmed on other grounds [1993] 2 Lloyd's Rep 369, (1992) 1 S & B Av R VII/723, CA. As to the law governing gratuitous carriage by aircraft performed other than by an air transport undertaking see PARA 135.

7 In the case of carriage governed by the Unamended Warsaw Convention or the Warsaw-MP1 Convention it is specifically provided that the state in question must not be a state which has excluded such carriage (see PARA 132): Unamended Warsaw Convention art 2.1; Warsaw-Hague Convention art 2.1.

8 Unamended Warsaw Convention art 2.1; Warsaw-MP1 Convention art 2.1; Warsaw-Hague Convention art 2.1; Warsaw-Hague-MP4 Convention art 2.1; Montreal Convention art 2.1. The conditions referred to are those set out in art 1 of each of the Conventions, setting out the parameters of the Conventions (see the text and notes 1-6), defining international carriage (see PARA 125) and making provision for carriage by successive carriers (see PARA 129).

9 See PARA 132.

## UPDATE

### 127 Carriage to which the Conventions apply

NOTE 4--*Laroche*, cited, affirmed: [2009] EWCA Civ 12, [2009] QB 778, [2009] 2 All ER 175.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/128. Carriage to which the Conventions do not apply.

### 128. Carriage to which the Conventions do not apply.

The Montreal and Warsaw Conventions<sup>1</sup> do not apply to carriage by aircraft performed by a person or body which is not an air transport undertaking<sup>2</sup>.

Provision made by Order in Council may disapply the Warsaw-Hague, Warsaw-Hague-MP4 and Montreal Conventions in relation to the carriage of persons, baggage or cargo for the military authorities of the United Kingdom or of any other specified state if the whole capacity of the aircraft has been reserved by or on behalf of those authorities<sup>3</sup>. Similar, though not identical, provision is made in relation to the Unamended Warsaw Convention and the Warsaw-MP1 Convention<sup>4</sup>, which also do not apply to carriage performed by way of experimental trial by air

navigation undertakings with the view to the establishment of a regular line of air navigation, or to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business<sup>5</sup>.

The Warsaw-Hague-MP4 and Montreal Conventions apply to the carriage of postal items only to the extent that the carrier is liable to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations<sup>6</sup>. Earlier versions of the Warsaw Convention contain absolute exclusions relating to either the carriage of mail and postal packets<sup>7</sup> or carriage performed under the terms of international postal conventions<sup>8</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 Unamended Warsaw Convention art 1.1; Warsaw-MP1 Convention art 1.1; Warsaw-Hague Convention art 1.1; Warsaw-Hague-MP4 Convention art 1.1; Montreal Convention art 1.1. As to the meaning of 'air transport undertaking' see PARA 127 note 6.

3 Carriage by Air Act 1961 s 7 (amended by SI 2002/263). At the date at which this volume states the law no such Order in Council had been made. For the position in respect of carriage by state or public bodies themselves see PARA 132.

4 See the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 8(2), which provides that the Unamended Warsaw Convention and the Warsaw-MP1 Convention do not apply to gratuitous carriage by the Crown where that carriage is of members of Her Majesty's naval, military or air forces undertaken during a time of actual or imminent hostilities or of severe international tension or of great national emergency. The Conventions (including the Guadalajara Convention, where applicable (see PARA 121 note 4)) do, however, apply to carriage by the Crown in other circumstances: see the Carriage by Air (Supplementary Provisions) Act 1962 s 6(1); the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 8(1); and PARA 132.

5 Unamended Warsaw Convention art 34; Warsaw-MP1 Convention art 34.

6 Warsaw-Hague-MP4 Convention arts 2.2, 2.3; Montreal Convention arts 2.2, 2.3.

7 See the Warsaw-Hague Convention art 2.2.

8 See the Unamended Warsaw Convention art 2.2 and the Warsaw-MP1 Convention art 2.2.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/129. Carriage by successive air carriers.

## **129. Carriage by successive air carriers.**

Carriage to be performed by successive air carriers is deemed for the purposes of the Montreal and Warsaw Conventions<sup>1</sup> to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character (where such is relevant<sup>2</sup>) merely because one contract or a series of contracts is to be performed entirely within the territory of the same state<sup>3</sup>. In any case of successive carriage each carrier who accepts passengers, baggage or cargo is subject to the rules of the applicable Convention and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision<sup>4</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 As to the meaning of 'international carriage' see PARA 125. The implementation of the Montreal Convention throughout the European Community and within each member state of the Community (see PARA 122) has rendered the distinction between international and non-international carriage redundant for those purposes, although it will still be of relevance in certain Warsaw Convention cases.

3 Unamended Warsaw Convention art 1.3; Warsaw-MP1 Convention art 1.3; Warsaw-Hague Convention art 1.3; Warsaw-Hague-MP4 Convention art 1.3; Montreal Convention art 1.3. For obvious reasons this provision does not apply in respect of carriage within the United Kingdom: Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (3). Where the Unamended Warsaw Convention or the Warsaw-MP1 Convention applies the reference to a contract or series of contracts being performed entirely within the territory of the same state is cast as a reference to a contract or series of contracts being performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting party: see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 2 Pt I para 3(3), Sch 3 Pt 1 para 3(3). For cases involving successive carriage see *Rotterdamsche Bank NV v British Overseas Airways Corp* [1953] 1 All ER 675, [1953] 1 WLR 493, and *Collins v British Airways Board* [1982] QB 734, [1982] 1 All ER 302, 1 S & B Av R VII/155, CA; and see also *Stratton v Trans Canada Air Lines* (1961) 27 DLR (2d) 670; affd (1962) 32 DLR (2d) 736 (BC CA). It is important that both parties should regard the carriage as a single operation: see eg *Lemly v Trans World Airlines Inc* 807 F 2d 26 (2nd Cir, 1986).

4 Unamended Warsaw Convention art 30.1; Warsaw-MP1 Convention art 30.1; Warsaw-Hague Convention art 30.1; Warsaw-Hague-MP4 Convention art 30.1; Montreal Convention art 36.1 (as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (13)). As to which carrier a passenger, consignor or consignee is permitted to sue see PARA 167.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/130. Carriage performed partly by air, partly otherwise.

### **130. Carriage performed partly by air, partly otherwise.**

In the case of combined carriage performed partly by air and partly by any other mode of carriage<sup>1</sup>, the Montreal and Warsaw Conventions<sup>2</sup> apply only to the carriage by air, and then only if the carriage by air falls within the terms of those Conventions<sup>3</sup>. However, where carriage of goods is partly by road and partly by air, and the vehicle carrying the goods is carried by air, without the goods being unloaded from the vehicle<sup>4</sup>, the whole of the carriage will be governed by the Carriage of Goods by Road Act 1965<sup>5</sup>.

Nothing in the Montreal and Warsaw Conventions prevents the parties, in the case of combined carriage, from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of the relevant convention are observed as regards the carriage by air<sup>6</sup>.

1 For an example of combined carriage see *Arctic Electronics (UK) Ltd v McGregor Sea & Air Services Ltd* [1985] 2 Lloyd's Rep 510. As to the interaction between the Warsaw and Montreal Conventions (see note 2) and the Convention on the Contract for the International Carriage of Goods by Road (the 'CMR Convention') (Geneva, 19 May 1956; TS 90 (1967); Cmd 3455) see *Quantum Corp Ltd v Plane Trucking Ltd* [2002] EWCA Civ 350, [2002] 2 All ER (Comm) 392, [2002] 1 WLR 2678; and PARAS 652, 655.

2 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

3 Unamended Warsaw Convention art 31.1; Warsaw-MP1 Convention art 31.1; Warsaw-Hague Convention art 31.1; Warsaw-Hague-MP4 Convention art 31.1; Montreal Convention art 38.1. In the case of carriage governed by the Montreal Convention this is subject to the provisions of art 18.4 (extent of carrier's liability): see art 38.1; and PARA 152. As to the carriage which falls within the terms of those Conventions see PARA 127; see also PARA 129 (carriage by successive air carriers).

4 Ie except in emergency cases falling within the CMR Convention art 14 (see PARA 668).

5 See the CMR Convention art 2.1; and PARA 655. Nevertheless, to the extent that any loss, damage or delay in the delivery of the goods which occurs during the carriage by air is proved not to have been caused by any act or omission by the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by air, the liability of the carrier by road is determined as if the contract were wholly one for carriage by air: art 2.1.

6 Unamended Warsaw Convention art 31.2; Warsaw-MP1 Convention art 31.2; Warsaw-Hague Convention art 31.2; Warsaw-Hague-MP4 Convention art 31.2; Montreal Convention art 38.2.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/131. Carriage by a person other than the contracting carrier.

### **131. Carriage by a person other than the contracting carrier.**

If an actual carrier<sup>1</sup> performs the whole or part of carriage which according to the contract<sup>2</sup> made by the contracting carrier is governed by the Montreal or Warsaw Conventions, both the contracting carrier and the actual carrier will be subject to the rules of the Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs<sup>3</sup>. The acts and omissions of the actual carrier and of its servants or agents acting within the scope of their employment are, in relation to carriage performed by the actual carrier, deemed also to be those of the contracting carrier<sup>4</sup>, and the acts and omissions of the contracting carrier and of its servants or agents acting within the scope of their employment are, in relation to the carriage performed by the actual carrier, deemed to be also those of the actual carrier<sup>5</sup>.

Nothing in the provisions relating to actual and contracting carriers<sup>6</sup> affects the rights and obligations of the carriers between themselves, including any right of recourse or indemnification<sup>7</sup>.

1 Two carriers are contemplated by the provisions governing carriage by a person other than the contracting carrier (see the text and notes 2-7), a 'contracting carrier', ie a person who as a principal makes a contract or agreement governed by the Montreal or Warsaw Convention (as the case may be) with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and an 'actual carrier', who is a person other than the contracting carrier who performs, by virtue of authority from the contracting carrier (which is presumed in the absence of proof to the contrary), the whole or part of the carriage but is not with respect of such part a successive carrier within the meaning of the convention: Guadalajara Convention art I(b), (c); Montreal Convention art 39. As to successive carriage and successive carriers see PARA 129. As to the Montreal and Warsaw Conventions and the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 Ie the contract referred to in the Guadalajara Convention art I(b) or, as the case may be, the Montreal Convention art 39: see note 1.

3 Guadalajara Convention art II; Montreal Convention arts 1.4, 40.

4 Guadalajara Convention art III.1; Montreal Convention art 41.1.

5 Guadalajara Convention art III.2; Montreal Convention art 41.2. However, no such act or omission will subject the actual carrier to liability exceeding the limits of liability contained in the Warsaw or (as the case may be) Montreal Convention, and any special agreement under which the contracting carrier assumes obligations not imposed by the relevant Convention or any waiver of rights or defences conferred by that Convention or any special declaration of interest in delivery at destination does not affect the actual carrier unless agreed to by it. As to the limits of liability see the Warsaw Convention (in whichever version) art 22; the Montreal Convention arts 21-24; and PARAS 154-157. As to special declarations of interest in delivery at destination see the Warsaw Convention (in whichever version) art 22; the Montreal Convention art 22; and PARA 154.

6 Ie the Guadalajara Convention and the Montreal Convention arts 39-48.

7 Guadalajara Convention art X; Montreal Convention art 48. Guadalajara Convention art VII and Montreal Convention art 45 (see PARAS 166, 187) are excluded: Guadalajara Convention art X; Montreal Convention art 48.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/132. Carriage by state or by public bodies.

### 132. Carriage by state or by public bodies.

The Montreal and Warsaw Conventions<sup>1</sup> apply to carriage performed by the state<sup>2</sup> or by legally constituted public bodies, provided such carriage falls within the applicable conditions for carriage<sup>3</sup>. The Conventions also apply to carriage by the Crown, whether the carriage is gratuitous or for reward<sup>4</sup>. The parties to both the Warsaw and Montreal Conventions, however, reserved the right to declare, at the time of their ratification or accession, that the Conventions would not apply to international carriage by air performed or operated directly by the state<sup>5</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 In the case of carriage governed by the Unamended Warsaw Convention or the Warsaw-MP1 Convention it is specifically provided that the state in question must not be a state which has excluded such carriage: Unamended Warsaw Convention art 2.1; Warsaw-Hague Convention art 2.1.

3 Unamended Warsaw Convention art 2.1; Warsaw-MP1 Convention art 2.1; Warsaw-Hague Convention art 2.1; Warsaw-Hague-MP4 Convention art 2.1; Montreal Convention art 2.1. The conditions referred to are those set out in art 1 of each of the Conventions, setting out the parameters of the Conventions (see PARA 127), defining international carriage (see PARA 125) and making provision for carriage by successive carriers (see PARA 129). The implementation of the Montreal Convention throughout the European Community and within each member state of the Community (see PARA 122) has rendered the distinction between international and non-international carriage redundant for those purposes, although it will still be of relevance in certain Warsaw Convention cases.

It is submitted that whether carriage performed by an agency associated with a particular state is carriage performed directly by that state depends on whether the agency is regarded as a department of state or an alter ego of the government of that state: see *Krajina v Tass Agency* [1949] 2 All ER 274, CA; *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438, [1956] 3 All ER 715, CA; *Mellenger v New Brunswick Development Corp* [1971] 2 All ER 593, [1971] 1 WLR 604, CA; *Swiss Israel Trade Bank v Government of Salta and Banco Provincial de Salta* [1972] 1 Lloyd's Rep 497; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881, CA; *I Congreso del Partido* [1983] 1 AC 244, [1981] 2 All ER 1064; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARAS 16, 243. As to claims against parties to the Conventions, and as to their submission to the jurisdiction, see PARA 165.

4 Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 8(1). By virtue of the Carriage by Air (Supplementary Provisions) Act 1962 s 6(1) the Guadalajara Convention, where applicable (see PARA 121 note 4) also binds the Crown. For specified exceptions see PARA 128.

5 See the Additional Protocol to the Warsaw Convention (providing that the parties to the Warsaw Convention in all its versions reserved the right to declare, at the time of their ratification or accession, that art 2.1 (see the text and notes 1-3) does not apply to international carriage by air performed directly by the state, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority) and the Montreal Convention art 57 (providing that a party to the Montreal Convention may declare, at any time, that the Convention does not apply to international carriage by air performed and operated directly by that state party for non-commercial purposes in respect of its functions and duties as a sovereign state and/or the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that state party, the whole capacity of which has been reserved by or on behalf of such authorities).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(1) THE APPLICABLE LAW/133. Prohibition on contracting out.

### 133. Prohibition on contracting out.

Where a contract is entered into for carriage to which the Montreal or Warsaw Convention<sup>1</sup> applies, any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction<sup>2</sup>, are null and void<sup>3</sup>. Provisions tending to relieve the carrier of liability or to fix a lower limit of liability than that which is laid down in the relevant Convention are also null and void<sup>4</sup>. Arbitration clauses are allowed--although where the carriage is governed by the Warsaw Convention, only in relation to the carriage of cargo--provided that the arbitration is to take place within one of the jurisdictions in which an action must be brought<sup>5</sup>. Notwithstanding these provisions, however, nothing in any of Conventions prevents the carrier from refusing to enter into any contract of carriage or from making regulations (Warsaw) or laying down conditions (Montreal) which do not conflict with the provisions of the relevant Convention or version thereof; and nothing in the Montreal Convention prevents the carrier from waiving any defences available under the Convention<sup>6</sup>.

It is only where the Conventions do not apply<sup>7</sup> that the carrier is able, by special contract, to limit or exclude his liability, but in that limited number of cases the carrier, even though he may be a common carrier<sup>8</sup>, whether of passengers or cargo, may validly limit<sup>9</sup> or completely exclude his liability<sup>10</sup>. The usefulness of exclusion clauses is, however, greatly reduced by the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999<sup>11</sup> and by common law principles as to the interpretation of such clauses and as to the effect of deviation or of fundamental breach of contract<sup>12</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 This stipulation is not made in respect of liability under the Montreal Convention so far as it applies to carriage within the United Kingdom: see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (17). As to carriage within the United Kingdom see PARA 173 et seq. For the rules as to jurisdiction see PARA 162.

3 Unamended Warsaw Convention art 32; Warsaw-MP1 Convention art 32; Warsaw-Hague Convention art 32; Warsaw-Hague-MP4 Convention art 32; Guadalajara Convention art IX.3; Montreal Convention art 49. As to the Guadalajara Convention, which supplements all versions of the Warsaw Convention in respect of carriage performed by a person other than the contracting carrier, see PARA 121.

4 Unamended Warsaw Convention art 23; Warsaw-MP1 Convention art 23; Warsaw-Hague Convention art 23.1; Warsaw-Hague-MP4 Convention art 23.1; Guadalajara Convention art IX.1; Montreal Convention arts 26, 47. The nullity of any such provision does not involve the nullity of the whole contract or agreement, which remains subject to the provisions of the applicable Convention: Unamended Warsaw Convention art 23; Warsaw-MP1 Convention art 23; Warsaw-Hague Convention art 23.1; Warsaw-Hague-MP4 Convention art 23.1; Guadalajara Convention art IX.1; Montreal Convention arts 26, 47. Where the Warsaw-Hague, Warsaw-Hague-MP4 or Guadalajara Convention applies, contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried are not nullified by these provisions: Warsaw-Hague Convention art 23.2; Warsaw-Hague-MP4 Convention art 23.2; Guadalajara Convention art IX.2; and see *Albacora SRL v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep 53, 110 Sol Jo 525, HL (carriage by sea); *A-G of Canada v Flying Tiger Line Inc* (1987) 61 OR (2d) 673. As to the limits of liability under the Conventions see PARAS 154-157, 180-183.

5 Unamended Warsaw Convention art 32; Warsaw-MP1 Convention art 32; Warsaw-Hague Convention art 32; Warsaw-Hague-MP4 Convention art 32; Guadalajara Convention art IX.3; Montreal Convention arts 34.1, 34.2. The allowance of such clauses is subject to the provisions of the applicable Convention: Unamended Warsaw Convention art 32; Warsaw-MP1 Convention art 32; Warsaw-Hague Convention art 32; Warsaw-Hague-MP4 Convention art 32; Montreal Convention art 34.3. Where the Montreal Convention applies, the provisos contained in arts 34.2, 34.3 are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent with them is null and void (art 34.4), and the arbitration agreement must be in writing (art 34.1). The requirement that the arbitration is to take place within one of the jurisdictions in which an action must be brought is not applicable in respect of liability under the Montreal

Convention so far as it applies to United-Kingdom only carriage within the European Community: see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (12). As to the jurisdictions in which claims must be brought see PARA 162.

6 Unamended Warsaw Convention art 33; Warsaw-MP1 Convention art 33; Warsaw-Hague Convention art 33; Warsaw-Hague-MP4 Convention art 33; Montreal Convention art 27. In connection with the imposition of conditions or regulations which do not conflict with the Conventions see *Rotterdamsche Bank NV v British Overseas Airways Corp* [1953] 1 All ER 675, [1953] 1 WLR 493.

7 See PARA 128.

8 As to common carriers see PARA 3 et seq. See also *Aslan v Imperial Airways Ltd* (1933) 149 LT 276 at 278 per Mackinnon J (possibility of air carriers being common carriers); *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] All ER 328, PC.

9 A limitation, as opposed to an exclusion, of liability will not normally affect the right of dependants to claim full damages under the Fatal Accidents Act 1976: see *Nunan v Southern Ry Co* [1923] 2 KB 703 (affd [1924] 1 KB 233, CA); and *Heatley v Steel Co of Wales Ltd* [1953] 1 All ER 489, [1953] 1 WLR 405, CA; but see *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 87, [1936] 2 All ER 1258 at 1286, CA, per Greene LJ (effect of contract which excludes all duties in negligence and substitutes 'a modified system of insurance'). As to the Fatal Accidents Act 1976 see **NEGLIGENCE** vol 78 (2010) PARA 24 et seq.

10 *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC; *Aslan v Imperial Airways Ltd* (1933) 149 LT 276.

11 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083. See generally **CONTRACT; SALE OF GOODS AND SUPPLY OF SERVICES**.

12 See generally **CONTRACT**.

## UPDATE

### 133 Prohibition on contracting out

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 134. Obligation to maintain insurance cover.

Other than in respect of United Kingdom-only carriage, parties to the Montreal Convention (but not the Warsaw Convention) must require their carriers to maintain adequate insurance covering their liability under the Convention, and a carrier may be required by the party into which it operates to furnish evidence that it maintains adequate insurance covering such liability<sup>1</sup>.

A Community air carrier<sup>2</sup>, pursuant to the requirement that an air carrier within the European Community must be insured to cover liability in case of accidents in respect of passengers<sup>3</sup>, must be insured up to a level that is adequate to ensure that all persons entitled to compensation<sup>4</sup> receive the full amount to which they are entitled<sup>5</sup>.

1 Montreal Convention art 50. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. The Montreal Convention art 50 does not apply in connection with carriage within the United Kingdom: see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (18).

2 As to the meanings of 'air carrier' and 'Community air carrier' see PARA 122 note 1.

3 See EC Council Regulation 2407/92 (OJ L240, 24.8.92, p 1) on licensing of air carriers, art 7 (providing that an air carrier must be insured to cover liability in case of accidents, in particular in respect of passengers, luggage, cargo, mail and third parties).

4 'Person entitled to compensation' means a passenger or any person entitled to claim in respect of that passenger, in accordance with applicable law: EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 2.1(c) (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)).

5 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 3.2 (as substituted: see note 4).

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### 135. Gratuitous carriage.

The liabilities arising from the gratuitous carriage<sup>1</sup> of passengers or cargo not performed by an air transport undertaking<sup>2</sup> or by the Crown, are governed by the ordinary law of negligence<sup>3</sup>, which imposes upon the owner or operator<sup>4</sup> of the aircraft performing the carriage separate responsibilities in relation to the actual performance of the carriage and in relation to the condition and operation of the aircraft<sup>5</sup>. He is under a duty to use reasonable care and skill in performing the carriage and, if the fault is his own or that of some person for whose actions he is vicariously responsible, he is liable for damage caused by any breach of this duty<sup>6</sup>.

1 Gratuitous carriage is carriage not performed 'for reward': see PARA 127.

2 As to the meaning of 'air transport undertaking' see PARA 127 note 6.

3 See generally **NEGLIGENCE** vol 78 (2010) PARA 1 et seq. The doctrine of *res ipsa loquitur* (see **NEGLIGENCE** vol 78 (2010) PARA 64 et seq) may be relied on in appropriate cases: see *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108; *Grein v Imperial Airways Ltd* [1937] 1 KB 50, [1936] 2 All ER 1258, CA. See also the Canadian cases of *McInnery v McDougall* [1938] 1 DLR 22, [1937] 3 WWR 625 (Man); *Nysted and Anson v Wings Ltd* [1942] 3 WWR 39, [1942] 3 DLR 336 (Man); and *Malone and Moss v Trans-Canada Airlines* [1942] 3 DLR 369, [1942] OR 453 (Ont CA). The doctrine has been applied in a large number of United States cases: see *Higginbotham v Mobil Oil Corp* 545 F 2d 422 (5th Cir, 1977), *revsd* on other grounds 436 US 618 (1978).

4 Liability falls upon the person actually responsible for the damage, ie in normal cases the pilot, who may be the owner or operator (having perhaps chartered the aircraft), and also upon any person, such as the owner or operator, if not the pilot, who is vicariously responsible for the pilot's actions: see *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108. Cf also *Samson v Aitchison* [1912] AC 844, PC; and *Pratt v Patrick* [1924] 1 KB 488.

5 There are few English or Commonwealth cases in which the application of the common law rules to aircraft operation has been discussed, but it seems likely that the courts will proceed by analogy from cases relating to the operation of the various forms of land and water transport: see eg *Aslan v Imperial Airways Ltd* (1933) 149 LT 276; *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108; *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233, [1947] 1 All ER 328, PC. For a case on the duty of care owed by a learner-driver which could, by analogy, be applied to a student pilot see *Nettleship v Weston* [1971] 2 QB 691, [1971] 3 All ER 581, CA (the duty of care is the same as that owed by every driver to a passenger, and is not affected by the instructor's knowledge of the learner's lack of skill and experience); but cf *Cook v Cook* (1986) 68 ALR 353 at 357, Aust HC ('It would . . . affront the standards of the reasonable man . . . to define the duty of care which a mentally retarded and completely unqualified and inexperienced person owed to a professional pilot who had persuaded him or her to attempt to pilot an aircraft in which they were both travelling as being the skill and care that are reasonably to be expected of a qualified and experienced pilot'). In practical terms no difficulty seems to arise in the application of common law rules, eg in collision cases (see **AIR LAW** vol 2 (2008) PARA 648) or in cases of accidents on aerodromes (see **AIR LAW** vol 2 (2008) PARA 649). Where the law differs as between land and sea transport, there are some indications that the analogy of land transport will be preferred: see eg *Aslan v Imperial Airways Ltd*.

6 See *McInnery v McDougall* [1938] 1 DLR 22, [1937] 3 WWR 625 (Man); and cf *Harris v Perry & Co* [1903] 2 KB 219, CA; and *Pratt v Patrick* [1924] 1 KB 488. The duty may include giving warning to passengers of dangers inherent in the journey of which the owner or operator is aware: cf *Lewys v Burnett and Dunbar* [1945] 2 All ER 555.

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## **(2) INTERNATIONAL CARRIAGE**

### **(i) Documents of Carriage**

#### **A. CARRIAGE OF PASSENGERS**

##### **136. Contents of passenger tickets.**

In respect of the carriage of passengers governed by the Warsaw-Hague, Warsaw-Hague-MP4 or Montreal Conventions<sup>1</sup>, a ticket<sup>2</sup> must be delivered containing:

- 54 (1) an indication of the places of departure and destination<sup>3</sup>; and
- 55 (2) if the places of departure and destination are within the territory of a single party<sup>4</sup>, one or more agreed stopping places<sup>5</sup> being within the territory of another state, an indication of at least one such stopping place<sup>6</sup>.

In respect of the carriage of passengers governed by the Unamended Warsaw Convention or the Warsaw-MP1 Convention, the carrier<sup>7</sup> must deliver a passenger ticket containing:

- 56 (a) the place and date of issue<sup>8</sup>;
- 57 (b) the place of departure and of destination<sup>9</sup>;
- 58 (c) the agreed stopping places (provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration will not have the effect of depriving the carriage of its international character)<sup>10</sup>; and
- 59 (d) the name and address of the carrier or carriers<sup>11</sup>.

In all cases the passenger must also be notified that the relevant Convention applies and regulates the carrier's liability<sup>12</sup>.

Non-compliance with these provisions does not affect the existence or validity of the contract of carriage<sup>13</sup>, and none of the provisions relating to documents of carriage apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business<sup>14</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 The Montreal Convention refers to 'an individual or collective document of travel': art 3.1. In Montreal Convention cases any other means which preserves the information referred to under heads (1) and (2) in the text may be substituted for the delivery of such a document of carriage; if another means is used, the carrier must offer to deliver to the passenger a written statement of the information so preserved: art 3.2. As to defective passenger tickets see PARA 138. Where the Warsaw-Hague or Warsaw-Hague-MP 4 Convention applies,

the passenger ticket constitutes prima facie evidence of the conclusion and conditions of the contract of carriage: Warsaw-Hague Convention art 3.2; Warsaw-Hague-MP4 Convention art 3.2.

3 Warsaw-Hague Convention art 3.1(a); Warsaw-Hague-MP4 Convention art 3.1(a); Montreal Convention art 3.1(a).

4 As to the parties to the Warsaw and Montreal Conventions see PARA 123; and as to the territories in respect of which states are parties to Conventions see PARA 124.

5 As to an 'agreed stopping place' see PARA 125 note 6. As to the incorporation of the stopping place by reference see PARA 144 note 5.

6 Warsaw-Hague Convention art 3.1(b); Warsaw-Hague-MP4 Convention art 3.1(b); Montreal Convention art 3.1(b).

7 'Carrier' is not defined for the purposes of the Warsaw Convention in any of its forms, although 'contracting carrier' and 'actual carrier' are defined for the purposes of the Guadalajara Convention: see PARA 131 note 1. As to charter flights see **AIR LAW** vol 2 (2008) PARA 433 et seq.

8 Unamended Warsaw Convention art 3.1(a); Warsaw-MP1 Convention art 3.1(a).

9 Unamended Warsaw Convention art 3.1(b); Warsaw-MP1 Convention art 3.1(b).

10 Unamended Warsaw Convention art 3.1(c); Warsaw-MP1 Convention art 3.1(c). As to the meaning of 'international carriage' see PARA 125.

11 Unamended Warsaw Convention art 3.1(d); Warsaw-MP1 Convention art 3.1(d).

12 See the Unamended Warsaw Convention art 3.1(e) and the Warsaw-MP1 Convention art 3.1(e) (statement that the carriage is subject to the rules relating to liability established by the Convention); the Warsaw-Hague Convention art 3.1(c) and the Warsaw-Hague-MP4 Convention art 3.1(c) (a notice to the effect that if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Convention may be applicable and that it governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage); and the Montreal Convention art 3.4 (written notice to the effect that where that Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage and for delay). In cases governed by the Warsaw Convention in any of its forms, this notification or statement must be contained in the ticket (Unamended Warsaw Convention art 3.1(e); Warsaw-MP1 Convention art 3.1(e); Warsaw-Hague Convention art 3.1(c); Warsaw-Hague-MP4 Convention art 3.1(c)). The Montreal Convention simply requires that the passenger be given written notice of these matters: art 3.4.

13 See PARA 138.

14 Unamended Warsaw Convention art 34; Warsaw-MP1 Convention art 34; Warsaw-Hague Convention art 34; Warsaw-Hague-MP4 Convention art 34; Montreal Convention art 51.

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### **137. Legibility of passenger ticket.**

There are no reported English cases on the standard of legibility of a passenger ticket, or the adequacy of notice of conditions or the terms of the contract of carriage contained in an airline ticket, as factors relevant to the carrier's right to limit his liability to pay damages in respect of the death of or personal injury to a passenger caused during the performance of a contract of international carriage governed by the Montreal or Warsaw Conventions<sup>1</sup>. The issue has, however, been tested extensively in the courts of the United States and Canada<sup>2</sup>. If the issue were to be tested in the English courts it would be decided upon a purposive interpretation of the relevant provisions<sup>3</sup>. Passenger tickets printed to the current IATA standard<sup>4</sup> ought to meet any reasonable standard of legibility. To measure the legibility of tickets printed to the IATA

standard by reference to the different standard required for the formal 'Advice to International Passengers on Limitation of Liability' given in compliance with the Montreal Agreement to passengers travelling on a contract of international carriage on a journey to, from or with an agreed stopping place in the United States<sup>5</sup>, is not an appropriate test<sup>6</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 In *Lisi v Alitalia-Linee Aeree Italiane SpA* 370 F 2d 508 (2d Cir, 1966), [1967] 1 Lloyd's Rep 140, affd by an equally divided court 390 US 455 (1968), it was held that as the diminutive size of the type used by the defendants on their tickets did not adequately bring the notice to the passenger's attention, the requirements of the Warsaw Convention had not been complied with. This decision, and the many decisions of courts in the United States influenced by it, lost much of their authority as a result of *Chan v Korean Air Lines Ltd* 109 S Ct 1676 (1989), 1 S & B Av R VII/383. Both were decided by reference to the text of the unamended Warsaw Convention. As to Canada see *Montreal Trust Co v Canadian Pacific Airlines Ltd* (1976) 72 DLR (3d) 257, [1977] 2 Lloyd's Rep 80, Can SC.

3 See PARA 126 note 3.

4 Ie IATA Resolution 724.

5 Ie Agreement CAB 18900, approved by the United States of America's Civil Aeronautics Board on 13 May 1966.

6 See *Chan v Korean Air Lines Ltd* 109 S Ct 1676 (1989), 1 S & B Av R VII/383.

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### **138. Absence, irregularity or loss of passenger ticket.**

The existence or the validity of the contract of carriage is unaffected by the absence, irregularity or loss of the passenger ticket (in cases where the Warsaw Convention applies) or by non-compliance with the ticketing requirements (in cases where the Montreal Convention applies)<sup>1</sup>, and the carriage is accordingly subject to the rules of the relevant Convention<sup>2</sup>.

The Conventions disagree over the extent to which a carrier may nonetheless limit his liability in the event of ticketing irregularities. The Montreal Convention specifies that the rules relating to the limitation of liability<sup>3</sup> apply notwithstanding non-compliance with the ticketing requirements<sup>4</sup>, while the various versions of the Warsaw Convention exclude their rules relating to the limitation or exclusion of liability<sup>5</sup> if the carrier accepts a passenger without a passenger ticket having been delivered<sup>6</sup> or if the ticket does not include the required notice as to the application of the Convention<sup>7</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 Unamended Warsaw Convention art 3.2; Warsaw-MP1 Convention art 3.2; Warsaw-Hague Convention art 3.2; Warsaw-Hague-MP4 Convention art 3.2; Montreal Convention art 3.5. See *Preston v Hunting Air Transport Ltd* [1956] 1 QB 454, [1956] 1 All ER 443, decided under the Carriage by Air Act 1932 (repealed). An actual carrier is not obliged to deliver a ticket if the contracting carrier has done so, as the acts and omissions of either the contracting carrier or of the actual carrier are deemed to be acts and omissions of the other: Guadalajara Convention art III.2; Montreal Convention art 41.2; and see PARA 131. As to the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121.

3 See PARAS 154-157.

4 Montreal Convention art 3.5. The limit cannot be relied upon by a Community air carrier in respect of death, wounding or other bodily injury suffered by a passenger: see PARAS 155, 181. As to the meanings of 'air carrier' and 'Community air carrier' see PARA 122 note 1.

5 le Unamended Warsaw Convention art 22; the Warsaw-MP1 Convention art 22; Warsaw-Hague Convention art 22; and the Warsaw-Hague-MP4 Convention art 22 (see PARAS 154-156).

6 Unamended Warsaw Convention art 3.2; Warsaw-MP1 Convention art 3.2; Warsaw-Hague Convention art 3.2; Warsaw-Hague-MP4 Convention art 3.2. See *Mertens v Flying Tiger Line Inc* 341 F 2d 851 (2d Cir, 1965); cert denied 382 US 816 (1965) (delivery of ticket to a passenger once on board the aircraft is insufficient compliance). To similar effect is the non-international case of *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108.

7 Warsaw-Hague Convention art 3.2; Warsaw-Hague-MP4 Convention art 3.2. The 'required notice' is the notice referred to in the Warsaw-Hague Convention art 3.1(c) or the Warsaw-Hague-MP4 Convention art 3.1(c) (as to which see PARA 136).

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### **139. Additional information to be given relating to EC flights.**

All air carriers<sup>1</sup> selling carriage by air in the European Community must ensure that a summary of the main provisions governing liability for passengers and their baggage<sup>2</sup>, including deadlines for filing an action for compensation<sup>3</sup> and the possibility of making a special declaration for baggage<sup>4</sup>, is made available to passengers at all points of sale, including sale by telephone and via the Internet<sup>5</sup>. In addition, all air carriers must in respect of carriage by air provided or purchased in the Community provide each passenger with a written indication of:

- 60 (1) the applicable limit for that flight on the carrier's liability in respect of death or injury, if such a limit exists<sup>6</sup>;
- 61 (2) the applicable limit for that flight on the carrier's liability in respect of destruction, loss of or damage to baggage and a warning that baggage greater in value than this figure should be brought to the airline's attention at check-in or fully insured by the passenger prior to travel<sup>7</sup>; and
- 62 (3) the applicable limit for that flight on the carrier's liability for damage occasioned by delay<sup>8</sup>.

In the case of all carriage performed by Community air carriers, the limits indicated in accordance with these provisions must be those established under the Montreal Convention<sup>9</sup> unless the Community air carrier applies higher limits by way of voluntary undertaking<sup>10</sup>. In the case of all carriage performed by non-Community air carriers, these provisions apply only in relation to carriage to, from or within the Community<sup>11</sup>.

An air carrier that fails to comply with any of these requirements is guilty of an offence unless he proves that the failure to do so occurred without his consent or connivance and that he exercised all due diligence to prevent the failure<sup>12</sup>.

1 As to the meaning of 'air carrier' see PARA 122 note 1.

2 As to these see PARA 136 et seq. In the Montreal Convention and in EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, unless otherwise specified 'baggage' means both checked baggage and unchecked baggage: Montreal Convention art 17.4; EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 2.1(d) (substituted by EC

Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)). As to the Montreal Convention see PARA 121; as to air carrier liability under the Convention see PARA 122.

3 As to the applicable deadlines see PARAS 163, 185.

4 As to the making of a special declaration for baggage see PARA 156.

5 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, art 6.1 (as substituted: see note 2). In order to comply with this requirement, Community air carriers must use the notice contained in EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1), Annex (as so substituted): art 6.1 (as so substituted). Such summary or notice cannot be used as a basis for a claim for compensation, nor to interpret the provisions of EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) or the Montreal Convention: EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.1 (as so substituted). As to the meaning of 'Community air carrier' see PARA 122 note 1.

6 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.2(a) (as substituted: see note 2). As to the applicable limit on the carrier's liability in respect of death or injury see PARAS 154-155.

7 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.2(b) (as substituted: see note 2). As to the applicable limit on the carrier's liability in respect of destruction, loss of or damage to baggage see PARAS 154, 156.

8 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.2(c) (as substituted: see note 2). As to the applicable limit for delay see PARAS 154-156.

9 In accordance with the application of the Montreal Convention to all Community air carriers under EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 3.1: see PARA 122.

10 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.3 (as substituted: see note 2).

11 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.3 (as substituted: see note 2).

12 Air Carrier Liability Regulations 2004, SI 2004/1418, reg 3(2). A person guilty of an offence under the Air Carrier Liability Regulations 2004, SI 2004/1418, is liable on summary conviction to a fine not exceeding the statutory maximum and on conviction on indictment to a fine: reg 4(1) (amended by SI 2004/1974). Where such an offence has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any such person who was purporting to act in such capacity, he, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished accordingly: Air Carrier Liability Regulations 2004, SI 2004/1418, reg 4(2). Where the affairs of a body corporate are managed by its members, reg 4(2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 4(3). As to the statutory maximum see PARA 97 note 3.

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#### **140. Baggage checks and identification tags.**

Where the Montreal Convention applies<sup>1</sup>, the carrier<sup>2</sup> must deliver to the passenger a baggage identification tag for each piece of checked baggage<sup>3</sup>.

More detailed provision is made in cases where the various versions of the Warsaw Convention apply. In respect of the carriage of registered baggage to which the Warsaw-Hague or Warsaw-Hague-MP4 Convention applies<sup>4</sup>, a baggage check must be delivered which, unless combined with or incorporated in a passenger ticket which complies with the ticketing provisions<sup>5</sup>, must contain:

63 (1) an indication of the places of departure and destination<sup>6</sup>; and

- 64 (2) if those places are within the territory of a single party<sup>7</sup>, one or more agreed stopping places<sup>8</sup> being within the territory of another state, an indication of at least one such stopping place<sup>9</sup>.

In respect of the carriage of baggage governed by the Unamended Warsaw Convention or the Warsaw-MP 1 Convention, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check, which must be made out in duplicate, one part for the passenger and the other part for the carrier<sup>10</sup>, containing:

- 65 (a) the place and date of issue<sup>11</sup>;
- 66 (b) the place of departure and of destination<sup>12</sup>;
- 67 (c) the name and address of the carrier or carriers<sup>13</sup>;
- 68 (d) the number of the passenger ticket<sup>14</sup>;
- 69 (e) a statement that delivery of the baggage will be made to the bearer of the baggage check<sup>15</sup>;
- 70 (f) the number and weight of the packages<sup>16</sup>;
- 71 (g) the amount of the declared value<sup>17</sup> of the baggage at delivery<sup>18</sup>.

In all cases the passenger must also be notified that the relevant Convention applies and regulates the carrier's liability<sup>19</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. As to defective baggage checks see PARA 141.

2 As to the construction of references to carriers see PARA 136 note 7.

3 Montreal Convention art 3.3.

4 For a discussion of the meaning of the term 'registered baggage' see *Collins v British Airways Board* [1982] QB 734, [1982] 1 All ER 302, 1 S & B Av R VII/155, CA. Where the Warsaw-Hague or Warsaw-Hague-MP4 Conventions apply the baggage check does not need to be filled in with the number of pieces, or weight, of the baggage being carried; if it is not this is merely an irregularity: *Collins v British Airways Board* [1982] QB 734, [1982] 1 All ER 302, 1 S & B Av R VII/155, CA.

5 As to these see PARA 136. In practice, the baggage check and passenger ticket are almost always combined. See *Collins v British Airways Board* [1982] QB 734, [1982] 1 All ER 302, 1 S & B Av R VII/55, CA. Where the Warsaw-Hague or Warsaw-Hague-MP 4 Convention applies, the baggage check constitutes prima facie evidence of the conclusion and conditions of the contract of carriage: Warsaw-Hague Convention art 4.2; Warsaw-Hague-MP4 Convention art 4.2.

6 Warsaw-Hague Convention art 3.1(a); Warsaw-Hague-MP4 Convention art 4.1(a).

7 As to the parties to the Warsaw Convention in its various forms see PARA 123; and as to the territories in respect of which states are parties to Conventions see PARA 124.

8 As to an 'agreed stopping place' see PARA 125 note 6. As to the incorporation of the stopping place by reference see PARA 144 note 5.

9 Warsaw-Hague Convention art 3.1(b); Warsaw-Hague-MP4 Convention art 4.1(b).

10 Unamended Warsaw Convention arts 4.1, 4.2; Warsaw-MP1 Convention arts 4.1, 4.2.

11 Unamended Warsaw Convention art 4.3(a); Warsaw-MP1 Convention art 4.3(a).

12 Unamended Warsaw Convention art 4.3(b); Warsaw-MP1 Convention art 4.3(b).

13 Unamended Warsaw Convention art 4.3(c); Warsaw-MP1 Convention art 4.3(c).

14 Unamended Warsaw Convention art 4.3(d); Warsaw-MP1 Convention art 4.3(d).

15 Unamended Warsaw Convention art 4.3(e); Warsaw-MP1 Convention art 4.3(e).

16 Unamended Warsaw Convention art 4.3(f); Warsaw-MP1 Convention art 4.3(f).

17 Is the value declared in accordance with the Unamended Warsaw Convention art 22.2 or the Warsaw-MP1 Convention art 22.2: see PARA 156.

18 Unamended Warsaw Convention art 4.3(g); Warsaw-MP1 Convention art 4.3(g).

19 See the Unamended Warsaw Convention art 4.3(h) and the Warsaw-MP1 Convention art 4.3(h) (statement that the carriage is subject to the rules relating to liability established by the Convention); the Warsaw-Hague Convention art 4.1(c) and the Warsaw-Hague-MP4 Convention art 4.1(c) (a notice to the effect that if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Convention may be applicable and that it governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage); and the Montreal Convention art 3.4 (written notice to the effect that where that Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage and for delay). In cases governed by the Warsaw Convention, this notification or statement must be contained in the baggage check (Unamended Warsaw Convention art 4.1(h); Warsaw-MP1 Convention art 4.1(h); Warsaw-Hague Convention art 4.1(c); Warsaw-Hague-MP4 Convention art 4.1(c)). The Montreal Convention simply requires that the passenger be given written notice of these matters: art 3.4. As to this statement or notice see *Westminster Bank Ltd v Imperial Airways Ltd* [1936] 2 All ER 890 (a broad statement is insufficient compliance); and see also *Philippon v Imperial Airways Ltd* [1939] AC 332, [1939] 1 All ER 761, HL; *Seth v British Overseas Airways Corp* 329 F 2d 302 (1st Cir, 1961); cert denied [1964] 1 Lloyd's Rep 268, 379 US 858 (1964).

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#### **141. Absence, irregularity or loss of baggage check.**

The existence or the validity of the contract of carriage is unaffected by the absence, irregularity or loss of the baggage check (in cases where the Warsaw Convention applies) or by non-compliance with the checking requirements (in cases where the Montreal Convention applies)<sup>1</sup>, and the carriage is accordingly subject to the rules of the relevant Convention<sup>2</sup>.

The Conventions disagree over the extent to which a carrier may nonetheless limit his liability in the event of baggage check irregularities. The Montreal Convention specifies that the rules relating to the limitation of liability<sup>3</sup> apply notwithstanding non-compliance with the baggage check requirements<sup>4</sup>. The Warsaw Convention excludes its rules relating to the limitation or exclusion of liability<sup>5</sup> if the carrier accepts baggage without a baggage check having been delivered or if the check does not include the required notice as to the application of the Convention<sup>6</sup>; the Unamended Warsaw Convention and the Warsaw-MP1 Convention also exclude those rules if the baggage check does not contain the particulars relating to the number of the passenger ticket or the number and weight of the packages<sup>7</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 Unamended Warsaw Convention art 4.2; Warsaw-MP1 Convention art 4.2; Warsaw-Hague Convention art 4.2; Warsaw-Hague-MP4 Convention art 4.2; Montreal Convention art 3.5. See *Preston v Hunting Air Transport Ltd* [1956] 1 QB 454, [1956] 1 All ER 443, decided under the Carriage by Air Act 1932 (repealed). An actual carrier is not obliged to deliver a baggage check if the contracting carrier has done so, as the acts and omissions of either the contracting carrier or of the actual carrier are deemed to be acts and omissions of the other: Guadalajara Convention art III.2; Montreal Convention art 41.2; and see PARA 131. As to the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121.

3 See PARAS 154-157.

4 Montreal Convention art 3.5.

5   le the Unamended Warsaw Convention art 22; the Warsaw-MP1 Convention art 22; Warsaw-Hague Convention art 22; and the Warsaw-Hague-MP4 Convention art 22 (see PARAS 154-157).

6   Unamended Warsaw Convention art 4.2; Warsaw-MP1 Convention art 4.2; Warsaw-Hague Convention art 4.2; Warsaw-Hague-MP4 Convention art 4.2. The 'required notice' is the notice referred to in the Unamended Warsaw Convention art 4.1(h); the Warsaw-MP1 Convention art 4.1(h); the Warsaw-Hague Convention art 4.1(c) or the Warsaw-Hague-MP4 Convention art 4.1(c) (as to which see PARA 140). There is an exclusion in the case of carriage governed by the Warsaw-Hague or Warsaw-Hague-MP4 Convention if the baggage check is combined with or incorporated in a passenger ticket complying with the provisions of the Warsaw-Hague Convention art 3.1(c) or the Warsaw-Hague-MP4 Convention art 3.1(c) (see PARA 136); Warsaw-Hague Convention art 4.2; Warsaw-Hague-MP4 Convention art 4.2.

7   Unamended Warsaw Convention art 4.2; Warsaw-MP1 Convention art 4.2.

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## ***B. CARRIAGE OF CARGO***

### **142. Air waybills and cargo receipts.**

The Warsaw-Hague-MP4 Convention and the Montreal Convention<sup>1</sup> require the delivery of an air waybill in respect of the carriage of cargo<sup>2</sup>, although any other means which would preserve a record of the carriage to be performed may be substituted for the delivery of an air waybill<sup>3</sup>. If such other means are used, the carrier must, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to information contained in the record preserved by those other means<sup>4</sup>.

The other versions of the Warsaw Convention<sup>5</sup> provide that every carrier of cargo has the right to require the consignor to make out and hand over to him an air waybill<sup>6</sup>; that every such consignor has the right to require the carrier to accept this document<sup>7</sup>; and that the carrier has the right to require the consignor to make out separate waybills when there is more than one package<sup>8</sup>.

1   As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. As to the carrier's right to refuse to carry see PARA 133.

2   Warsaw-Hague-MP4 Convention art 5.1; Montreal Convention art 4.1. As to the contents of an air waybill see PARA 144. As to the failure to comply with this requirement see PARA 145.

3   Warsaw-Hague-MP4 Convention art 5.2; Montreal Convention art 4.2. Where the Warsaw-Hague-MP4 Convention applies the consent of the consignor is required: art 5.2.

4   Warsaw-Hague-MP4 Convention art 5.2; Montreal Convention art 4.2. The Warsaw-Hague-MP4 Convention provides that the impossibility of using such other means at points of transit and destination does not entitle the carrier to refuse to accept the cargo for carriage (art 5.3); this stipulation is not reproduced in the Montreal Convention.

5   le the Unamended Warsaw Convention, the Warsaw-MP 1 Convention and the Warsaw-Hague Convention: see PARA 121.

6   Unamended Warsaw Convention art 5.1; Warsaw-MP1 Convention art 5.1; Warsaw-Hague Convention art 5.1. Nothing in the Warsaw-Hague Convention (the only version of the Warsaw Convention to contain this provision) prevents the issue of a negotiable air waybill (art 15.3). In practice, having regard to the speed of air transport, negotiability of air waybills is not so much required as in the case of shipping documents.

7 Unamended Warsaw Convention art 5.1; Warsaw-MP1 Convention art 5.1; Warsaw-Hague Convention art 5.1.

8 Unamended Warsaw Convention art 7; Warsaw-MP1 Convention art 7; Warsaw-Hague Convention art 7.

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### **143. Making out of air waybill.**

The air waybill<sup>1</sup> must be made out by the consignor in three original parts<sup>2</sup>. The first part must be marked 'for the carrier' and must be signed<sup>3</sup> by the consignor; the second part must be marked 'for the consignee' and must be signed by the consignor and by the carrier<sup>4</sup>; and the third part must be signed by the carrier and handed by him to the consignor after the cargo has been accepted<sup>5</sup>.

If, at the consignor's request, the carrier makes out the air waybill, he is deemed, subject to proof to the contrary, to have done so on behalf of the consignor<sup>6</sup>. Under the Warsaw-Hague-MP4 and Montreal Conventions, where there is more than one package the carrier has the right to require the consignor to make out separate air waybills for each<sup>7</sup> and the consignor has the right to require the carrier to deliver separate receipts when means other than an air waybill are used to preserve the record of carriage<sup>8</sup>.

1 As to the requirement for air waybills and cargo receipts see PARA 142.

2 Unamended Warsaw Convention art 6.1; Warsaw-MP1 Convention art 6.1; Warsaw-Hague Convention art 6.1; Warsaw-Hague-MP4 Convention art 6.1; Montreal Convention art 7.1. Where the Unamended Warsaw Convention, the Warsaw-MP1 Convention or the Warsaw-Hague Convention applies, the air waybill must be handed over with the cargo: Unamended Warsaw Convention art 6.1; Warsaw-MP1 Convention art 6.1; Warsaw-Hague Convention art 6.1. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

3 Where the Unamended Warsaw Convention, the Warsaw-MP1 Convention or the Warsaw-Hague Convention applies, the carrier's signature may be stamped and the consignor's signature may be printed or stamped: Unamended Warsaw Convention art 6.4; Warsaw-MP1 Convention art 6.4; Warsaw-Hague Convention art 6.4. Where the Warsaw-Hague-MP4 Convention or the Montreal Convention applies, either signature may be printed or stamped: Warsaw-Hague-MP4 Convention art 6.3; Montreal Convention art 7.3.

4 Where the Unamended Warsaw Convention or the Warsaw-MP1 Convention applies, the carrier must sign on acceptance of the cargo; where the Warsaw-Hague Convention applies, the carrier must sign prior to the loading of the cargo on board the aircraft: Unamended Warsaw Convention art 6.3; Warsaw-MP1 Convention art 6.3; Warsaw-Hague Convention art 6.3.

5 Unamended Warsaw Convention art 6.2; Warsaw-MP1 Convention art 6.2; Warsaw-Hague Convention art 6.2; Warsaw-Hague-MP4 Convention art 6.2; Montreal Convention art 7.2. Where the Unamended Warsaw Convention, the Warsaw-MP1 Convention or the Warsaw-Hague Convention applies, the second part must accompany the cargo: Unamended Warsaw Convention art 6.2; Warsaw-MP1 Convention art 6.2; Warsaw-Hague Convention art 6.2.

6 Unamended Warsaw Convention art 6.5; Warsaw-MP1 Convention art 6.5; Warsaw-Hague Convention art 6.5; Warsaw-Hague-MP4 Convention art 6.4; Montreal Convention art 7.4. As to the responsibility for the correctness of particulars and statements see PARA 146.

7 Warsaw-Hague-MP4 Convention art 7(a); Montreal Convention art 8(a).

8 Warsaw-Hague-MP4 Convention art 7(b); Montreal Convention art 8(b). As to such receipts see the Warsaw-Hague-MP4 Convention art 5.2; the Montreal Convention art 4.2; and PARA 142.

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#### 144. Contents of air waybills and cargo receipts.

Where the carriage is governed by the Warsaw-Hague-MP4 Convention or the Montreal Convention<sup>1</sup>, the air waybill or cargo receipt<sup>2</sup> must contain:

- 72 (1) an indication of the places of departure and destination<sup>3</sup>;
- 73 (2) if these places are within the territory of a single party to the Convention<sup>4</sup>, one or more agreed stopping places<sup>5</sup> being within the territory of another state, an indication of at least one such stopping place<sup>6</sup>; and
- 74 (3) an indication of the weight of the consignment<sup>7</sup>.

Where the carriage is governed by the Warsaw-Hague Convention, the air waybill must contain:

- 75 (a) an indication of the places of departure and destination<sup>8</sup>;
- 76 (b) if these places are within the territory of a single party to the Convention, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place<sup>9</sup>; and
- 77 (c) a notice<sup>10</sup> to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that it governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo<sup>11</sup>.

Where the carriage is governed by the Unamended Warsaw Convention or the Warsaw-MP1 Convention, the air waybill must contain:

- 78 (i) the place and date of its execution<sup>12</sup>;
- 79 (ii) the place of departure and of destination<sup>13</sup>;
- 80 (iii) the agreed stopping places (provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration will not have the effect of depriving the carriage of its international character)<sup>14</sup>;
- 81 (iv) the name and address of the consignor<sup>15</sup>;
- 82 (v) the name and address of the first carrier<sup>16</sup>;
- 83 (vi) the name and address of the consignee if the case so requires<sup>17</sup>;
- 84 (vii) the nature of the cargo<sup>18</sup>;
- 85 (viii) the number of the packages, the method of packing and the particular marks or numbers upon them<sup>19</sup>;
- 86 (ix) the weight, the quantity and the volume or dimensions of the cargo<sup>20</sup>;
- 87 (x) the apparent condition of the cargo and of the packing<sup>21</sup>;
- 88 (xi) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it<sup>22</sup>;
- 89 (xii) if the cargo is sent for payment on delivery, the price of the cargo, and if the case so requires, the amount of the expenses incurred<sup>23</sup>;
- 90 (xiii) the amount of the declared value<sup>24</sup> at delivery<sup>25</sup>;
- 91 (xiv) the number of parts of the air waybill<sup>26</sup>;
- 92 (xv) the documents handed to the carrier to accompany the air waybill<sup>27</sup>;

- 93 (xvi) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters are agreed upon<sup>28</sup>; and
- 94 (xvii) a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention<sup>29</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 As to the requirement for air waybills and cargo receipts see PARA 142; as to the making out of the air waybill see PARA 143.

3 Warsaw-Hague-MP4 Convention art 8(a); Montreal Convention art 5(a). As to the failure to comply with these requirements see PARA 145.

4 As to the parties to the Conventions and the territories in respect of which they are parties see PARAS 123-124.

5 As to an 'agreed stopping place' see PARA 125 note 6. In *Kraus v Koninklijke Luchtvaart Maatschappij NV (Royal Dutch Airlines)* 92 NYS 2d 315 (1949); affd 105 NYS 2d 351 (1951), it was held that this requirement was satisfied by a reference in the air consignment note (the document under the Unamended Warsaw Convention which corresponds to the air waybill) to the carrier's timetable for the stopping places. As to the incorporation of the stopping place by reference see PARA 144 note 5.

6 Warsaw-Hague-MP4 Convention art 8(b); Montreal Convention art 5(b).

7 Warsaw-Hague-MP4 Convention art 8(c); Montreal Convention art 5(c).

8 Warsaw-Hague Convention art 8(a).

9 Warsaw-Hague Convention art 8(b). See note 5.

10 The use of the expression 'notice' requires something more defined than, for example, a statement, indication or notification; it requires there to be what was recognisable as 'a notice', ie a discrete form of words warning the reader of the potential applicability of the Convention and its effect, namely to govern and limit liability: see *Fujitsu Computer Products Corp v Bax Global Inc* [2005] EWHC 2289 (Comm), [2006] 1 All ER (Comm) 211, [2006] 1 Lloyd's Rep 367.

11 Warsaw-Hague Convention art 8(c).

12 Unamended Warsaw Convention art 8(a); Warsaw-MP1 Convention art 8(a).

13 Unamended Warsaw Convention art 8(b); Warsaw-MP1 Convention art 8(b).

14 Unamended Warsaw Convention art 8(c); Warsaw-MP1 Convention art 8(c). See note 5.

15 Unamended Warsaw Convention art 8(d); Warsaw-MP1 Convention art 8(d).

16 Unamended Warsaw Convention art 8(e); Warsaw-MP1 Convention art 8(e).

17 Unamended Warsaw Convention art 8(f); Warsaw-MP1 Convention art 8(f).

18 Unamended Warsaw Convention art 8(g); Warsaw-MP1 Convention art 8(g).

19 Unamended Warsaw Convention art 8(h); Warsaw-MP1 Convention art 8(h).

20 Unamended Warsaw Convention art 8(i); Warsaw-MP1 Convention art 8(i).

21 Unamended Warsaw Convention art 8(j); Warsaw-MP1 Convention art 8(j).

22 Unamended Warsaw Convention art 8(k); Warsaw-MP1 Convention art 8(k).

23 Unamended Warsaw Convention art 8(l); Warsaw-MP1 Convention art 8(l).

24 Ie the value declared in accordance with the Unamended Warsaw Convention art 22.2 or the Warsaw-MP1 Convention art 22.2: see PARA 156.

- 25 Unamended Warsaw Convention art 8(m); Warsaw-MP1 Convention art 8(m).
- 26 Unamended Warsaw Convention art 8(n); Warsaw-MP1 Convention art 8(n).
- 27 Unamended Warsaw Convention art 8(o); Warsaw-MP1 Convention art 8(o).
- 28 Unamended Warsaw Convention art 8(p); Warsaw-MP1 Convention art 8(p).
- 29 Unamended Warsaw Convention art 8(q); Warsaw-MP1 Convention art 8(q). As to this statement see *Westminster Bank Ltd v Imperial Airways Ltd* [1936] 2 All ER 890 (a broad statement is insufficient compliance); but see *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306, [1966] 1 All ER 814, CA (the air waybill is not required to contain the words of the convention verbatim); see also *Philippson v Imperial Airways Ltd* [1939] AC 332, [1939] 1 All ER 761, HL; *Seth v British Overseas Airways Corp* 329 F 2d 302 (1st Cir, 1961); cert denied [1964] 1 Lloyd's Rep 268, 379 US 858 (1964).

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#### **145. Absence, irregularity or loss of air waybill or cargo receipt.**

The existence or the validity of the contract of carriage is unaffected by the absence, irregularity or loss of the air waybill (in cases where the Unamended Warsaw Convention, the Warsaw-MP1 Convention or the Warsaw-Hague Convention applies) or by non-compliance with the requirements relating to the delivery, making out and content of air waybills (in cases where the Warsaw-Hague-MP4 Convention or the Montreal Convention applies)<sup>1</sup>, and the carriage is accordingly subject to the rules of the relevant Convention<sup>2</sup>.

The Conventions disagree over the extent to which a carrier may nonetheless limit his liability. The Montreal Convention and the Warsaw-Hague-MP4 Convention specify that the rules relating to the limitation of liability<sup>3</sup> apply notwithstanding non-compliance with the requirements relating to the delivery, making out and content of air waybills<sup>4</sup>, while the other versions of the Warsaw Convention exclude their rules relating to the limitation or exclusion of liability if the carrier accepts cargo without an air waybill having been made out<sup>5</sup> or if the air waybill does not include the required notice as to the application of the Convention<sup>6</sup>. The Unamended Warsaw Convention and the Warsaw-MP1 Convention additionally exclude their rules relating to the limitation or exclusion of liability if the air waybill does not include specified particulars about the places of departure, stopping and destination, the identities of the consignor, consignee and carrier, and the nature, quantity, weight etc of the cargo<sup>7</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 Unamended Warsaw Convention art 5.2; Warsaw-MP1 Convention art 5.2; Warsaw-Hague Convention art 5.2; Warsaw-Hague-MP4 Convention art 9; Montreal Convention art 8.

3 See PARAS 154-157.

4 Warsaw-Hague-MP4 Convention art 9; Montreal Convention art 8.

5 Unamended Warsaw Convention art 9; Warsaw-MP1 Convention art 9; Warsaw-Hague Convention art 9. The Warsaw-Hague Convention specifies that the carrier's consent to the loading of the cargo must have been given: art 9.

6 Unamended Warsaw Convention art 9; Warsaw-MP1 Convention art 9; Warsaw-Hague Convention art 9. The 'required notice' is the notice referred to in the Unamended Warsaw Convention art 8(q), the Warsaw-MP1 Convention art 8(q) or the Warsaw-Hague Convention art 8(c) (as to which see PARA 144).

7 Unamended Warsaw Convention art 9; Warsaw-MP1 Convention art 9; Warsaw-Hague Convention art 9. The particulars referred to are those set out in the Unamended Warsaw Convention art 8(a)-(i) and the Warsaw-MP1 Convention art 8(a)-(i) (as to which see PARA 144).

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#### **146. Correctness of air waybill, cargo receipt or other record.**

The consignor of cargo is responsible for the correctness of the particulars and statements relating to the cargo contained in an air waybill or cargo receipt<sup>1</sup>. In all cases this responsibility covers all such particulars or statements as the consignor inserts in the air waybill; and where the Warsaw-Hague-MP4 or the Montreal Convention applies it also includes particulars and statements inserted into the waybill on the consignor's behalf and particulars and statements furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or the record preserved by other means<sup>2</sup>. The consignor is also liable<sup>3</sup> for all damage suffered by the carrier, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of such particulars and statements<sup>4</sup>, and where the Warsaw-Hague-MP4 or Montreal Convention applies a corresponding liability exists as between the carrier and the consignor<sup>5</sup>.

1 Unamended Warsaw Convention art 10.1; Warsaw-MP1 Convention art 10.1; Warsaw-Hague Convention art 10.1; Warsaw-Hague-MP4 Convention art 10.1; Montreal Convention art 10.1. Where the Montreal Convention applies these requirements also apply where the person acting on behalf of the consignor is also the agent of the carrier: art 10.1. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. As to the requirement for air waybills and cargo receipts see PARA 142; as to the making out of the air waybill see PARA 143; as to irregularities see PARA 145.

2 Unamended Warsaw Convention art 10.1; Warsaw-MP1 Convention art 10.1; Warsaw-Hague Convention art 10.1; Warsaw-Hague-MP4 Convention art 10.1; Montreal Convention art 10.1.

3 In Unamended Warsaw and Warsaw-MP1 cases the consignor's responsibility takes the form of liability; in Warsaw-Hague, Warsaw-Hague-MP4 and Montreal cases the consignor's responsibility is expressed as an indemnification of the carrier: Unamended Warsaw Convention art 10.2; Warsaw-MP1 Convention art 10.2; Warsaw-Hague Convention art 10.2; Warsaw-Hague-MP4 Convention art 10.2; Montreal Convention art 10.2.

4 Unamended Warsaw Convention art 10.2; Warsaw-MP1 Convention art 10.2; Warsaw-Hague Convention art 10.2; Warsaw-Hague-MP4 Convention art 10.2; Montreal Convention art 10.2.

5 See the Warsaw-Hague-MP4 Convention art 10.3 and the Montreal Convention art 10.3 (providing, subject to the text and notes 1-4, that the carrier must indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the cargo receipt or in the record preserved by the other means referred to in the Warsaw-Hague-MP4 Convention art 5.2 or the Montreal Convention art 4.2, as the case may be (see PARA 142)).

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#### **147. Air waybill as evidence of contract.**

The air waybill or cargo receipt<sup>1</sup> is prima facie evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage<sup>2</sup>. Further, the statements in it relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated, although those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or cargo receipt to have been, checked by him in the consignor's presence, or relate to the apparent condition of the cargo<sup>3</sup>.

1 As to the requirement for air waybills and cargo receipts see PARA 142; as to the making out of the air waybill see PARA 143; as to irregularities see PARA 145.

2 Unamended Warsaw Convention art 11.1; Warsaw-MP1 Convention art 11.1; Warsaw-Hague Convention art 11.1; Warsaw-Hague-MP4 Convention art 11.1; Montreal Convention art 11.1. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

3 Unamended Warsaw Convention art 11.2; Warsaw-MP1 Convention art 11.2; Warsaw-Hague Convention art 11.2; Warsaw-Hague-MP4 Convention art 11.2; Montreal Convention art 11.2.

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#### **148. Information and documents accompanying air waybill or cargo receipt.**

The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi<sup>1</sup> or police before the cargo can be delivered to the consignee, and is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his servants or agents<sup>2</sup>. The carrier is under no obligation to inquire into the correctness or sufficiency of such information or documents<sup>3</sup>.

1 Octroi is a duty levied in some continental countries on goods entering a town: Oxford English Dictionary.

2 Unamended Warsaw Convention art 16.1; Warsaw-MP1 Convention art 16.1; Warsaw-Hague Convention art 16.1; Warsaw-Hague-MP4 Convention art 16.1; Montreal Convention art 16.1. The Unamended Warsaw Convention, the Warsaw-MP1 Convention and the Warsaw-Hague Convention require the documents referred to be attached to the air waybill: Unamended Warsaw Convention art 16.1; Warsaw-MP1 Convention art 16.1; Warsaw-Hague Convention art 16.1. The Montreal Convention provides that if the consignor is required, where necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo, such provision does not create any duty, obligation or liability resulting therefrom on the part of the carrier: art 6. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

3 Unamended Warsaw Convention art 16.2; Warsaw-MP1 Convention art 16.2; Warsaw-Hague Convention art 16.2; Warsaw-Hague-MP4 Convention art 16.2; Montreal Convention art 16.2.

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#### **149. The Uniform Customs and Practice for Documentary Credits.**

Commercial letters of credit (that is, bank undertakings to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit) generally incorporate the Uniform Customs and Practice for Documentary Credits<sup>1</sup>, which make specific provision in connection with the content of air transport documents. Such a document, however named, must appear to:

- 95 (1) indicate the name of the carrier<sup>2</sup>;
- 96 (2) indicate that the goods have been accepted for carriage<sup>3</sup>;
- 97 (3) indicate the date of issuance<sup>4</sup>;
- 98 (4) indicate the airport of departure and the airport of destination stated in the credit<sup>5</sup>;
- 99 (5) be the original for the consignor or shipper, even if the credit stipulates a full set of originals<sup>6</sup>;
- 100 (6) contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage<sup>7</sup>; and
- 101 (7) be signed by the carrier or a named agent for or on behalf of the carrier<sup>8</sup>.

Where a transport document covers two or more different modes of transport (a 'multimodal or combined transport document'), the requirements relating to that document are virtually identical to those which apply in connection with the content of bills of lading and sea waybills<sup>9</sup>. Provision is also made in connection with transshipments<sup>10</sup>.

1 See the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600), as drafted and published by the International Chamber of Commerce: see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 925. As to the nature and operation of credits generally and under the Uniform Customs and Practice for Documentary Credits see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 923-966.

2 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(a)(i).

3 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(a)(ii).

4 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(a)(iii). This date will be deemed to be the date of shipment unless the air transport document contains a specific notation of the actual date of shipment, in which case the date stated in the notation will be deemed to be the date of shipment: art 23(a)(iii). Any other information appearing on the air transport document relative to the flight number and date will not be considered in determining the date of shipment: art 23(a)(iii).

5 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(a)(iv).

6 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(a)(v).

7 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(a)(vi).

8 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(a)(i). Any signature by the carrier or agent must be identified as that of the carrier or agent, and any signature by an agent must indicate that the agent has signed for or on behalf of the carrier: art 23(a)(i).

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 19; PARA 366; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 925.

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23(b), (c).

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## (ii) Carriers' Liability

## **A. LIABILITY FOR DEATH, INJURY, LOSS, DAMAGE OR DELAY**

### **150. Liability for death of or injury to passengers.**

The carrier<sup>1</sup> is liable<sup>2</sup> for damage<sup>3</sup> sustained in the event of the death or wounding of a passenger or any other bodily injury<sup>4</sup> suffered by a passenger<sup>5</sup> if the accident<sup>6</sup> which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking<sup>7</sup>. Any such occurrence which leads to a passenger's death and gives rise to a claim is treated as a wrongful act, neglect or default within the meaning of the Fatal Accidents Act 1976<sup>8</sup>, and is governed by the system of that Act<sup>9</sup>. Damages in excess of the statutory limit may not be recovered<sup>10</sup>.

1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; as to carriage by successive carriers see PARA 129; and as to who should be sued see PARAS 165-167.

2 For defences available to the carrier, and exoneration, see PARAS 169, 171; for limitations on the damages which may be payable see PARA 155.

3 'Damage' means legally cognisable harm: *Zicherman v Korean Air Lines Co Ltd* 516 US 217, 133 L Ed 2d 596, 116 S Ct 629 (1996), which was cited with approval in *Morris v KLM Royal Dutch Airlines* [2001] EWCA Civ 790, [2002] QB 100, [2001] 3 All ER 126 (affd on other grounds [2002] UKHL 7, [2002] 2 AC 628, [2002] 2 All ER 565).

4 A mental injury is not in itself a 'bodily injury', but if it is proved (by expert medical evidence), to be attributable to a physical injury to part of the body (eg to the brain), there is a 'bodily injury'; furthermore, a physical symptom caused by a mental injury can qualify as a 'bodily injury': *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, [2002] 2 AC 628, [2002] 2 All ER 565. The travaux préparatoire to the Montreal Convention state that the expression 'bodily injury' is included on the basis of the fact that in some states damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air.

5 As to the meaning of 'passenger' see *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] AC 534, [1997] 1 All ER 775, HL; and *Disley v Levine* [2001] EWCA Civ 1087, [2002] 1 WLR 785.

6 An 'accident' is an unexpected or unusual event or happening that is external to the passenger; it does not include a passenger's own internal reaction to the usual, normal and expected operation of the aircraft: *Chaudhari v British Airways plc* (1997) Times, 7 May, CA, adopting *Air France v Saks* 470 US 392, 84 L Ed 2d 289, 105 S Ct 1338, 1 S & B Av R VII/165 (1985). *Air France v Saks* was also applied in *Morris v KLM Royal Dutch Airlines* [2001] EWCA Civ 790, [2002] QB 100, [2001] 3 All ER 126 (affd on other grounds [2002] UKHL 7, [2002] 2 AC 628, [2002] 2 All ER 565 (see however, Lord Hope of Craighead at [71])), where an indecent assault by a fellow passenger was held to be an 'accident'; and in *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2002] EWHC 2825 (QB), [2003] 1 All ER 935, [2003] 1 All ER (Comm) 418 (affd on other grounds [2003] EWCA Civ 1005, [2004] QB 234, [2004] 1 All ER 445; [2005] UKHL 72, [2006] 1 AC 495, [2006] 1 All ER 786), where there was held to be no 'accident' in respect of a deep vein thrombosis sustained as a result of an unremarkable flight. The Warsaw Convention art 17, and by extension the Montreal Convention art 17, do not provide a fault based theory of liability and do not apportion risk on the basis of a modern risk allocation theory; a culpable act or omission by itself which does not amount to an unusual or unexpected event or happening external to the passenger does not come within the definition of 'accident' and does not give rise to liability: *Re Deep Vein Thrombosis and Air Travel Group Litigation*. This interpretation of 'accident' is not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) arts 6(1), 8 (right to a fair trial; right to respect for private and family life: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 134 et seq, 150 et seq): *Re Deep Vein Thrombosis and Air Travel Group Litigation*. Compensation may be awarded under the Warsaw Convention art 17 (and by extension the Montreal Convention art 17) for the physical manifestations of a mental injury and may take account of developments in medical and scientific knowledge acquired since 1929 (ie the year of the original Warsaw Convention: see PARA 121); see *King v Bristow Helicopters* [2002] UKHL 7, [2002] 1 Lloyd's Rep 745; and see further PARA 126 note 3. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

7 Unamended Warsaw Convention art 17; Warsaw-MP1 Convention art 17; Warsaw-Hague Convention art 17; Warsaw-Hague-MP4 Convention art 17; Montreal Convention art 17.1. This is an exclusive cause of action: see PARA 161. In determining whether a passenger is 'in the course of any of the operations of embarking or disembarking' the ultimate question is whether his movements through the airport procedures, including his physical location, indicate that he was at the relevant time engaged upon the operation of embarking upon, or disembarking from, the particular flight in question: *Adatia v Air Canada* (1992) 2 S & B Av R VII/63, [1992] PIQR P238, CA. See also *Phillips v Air New Zealand Ltd* [2002] EWHC 800 (Comm), [2002] 1 All ER (Comm) 801, [2002] 2 Lloyd's Rep 408; *Day v Trans World Airlines Inc* 528 F 2d 31 (2nd Cir, 1975), cert denied 429 US 890 (1976); and *MacDonald v Air Canada* 439 F 2d 1402 (1st Cir, 1971).

8 See the Fatal Accidents Act 1976 s 1; and **NEGLIGENCE** vol 78 (2010) PARAS 25-27.

9 Carriage by Air Act 1961 s 3 (s 3 amended, s 4(1) added, s 4(1A) substituted, by SI 2002/263); Fatal Accidents Act 1976 Sch 1 para 2; Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2). See also the Law Reform (Miscellaneous Provisions) Act 1934; and **NEGLIGENCE** vol 78 (2010) PARA 24.

10 See the Unamended Warsaw Convention art 22; the Warsaw-MP1 Convention art 22; the Warsaw-Hague Convention art 22; the Warsaw-Hague-MP4 Convention art 22; Montreal Convention arts 21, 22; and PARA 155.

## UPDATE

### 150 Liability for death of or injury to passengers

NOTE 6--See *Barclay v British Airways plc* [2008] EWCA Civ 1419, [2009] 1 All ER 871 (accident caused by passenger's particular, personal or peculiar reaction to normal operation of aircraft).

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### 151. Liability for loss of or damage to baggage.

A carrier<sup>1</sup> is liable for damage sustained in the event of the destruction or loss of, or of damage to, baggage<sup>2</sup> that occurs in the course of the carriage by air<sup>3</sup>. For the purposes of the Warsaw Convention the carrier's liability extends to all destruction, damage or loss occurring in the period during which the baggage is in his charge<sup>4</sup>, whether in an airport or aerodrome<sup>5</sup> or on board an aircraft or, in the case of a landing outside an airport or aerodrome, in any place whatsoever<sup>6</sup>, but does not extend to any carriage by land, by sea or by river performed outside an airport or aerodrome, although if such a carriage takes place in the performance of a contract for carriage by air for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air<sup>7</sup>. The carrier's liability for checked baggage under the Montreal Convention is triggered if the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the carrier's charge, and extends to unchecked baggage, including personal items, if the damage resulted from the carrier's fault or that of his servants or agents<sup>8</sup>. That Convention also contains an exclusion of the carrier's liability in respect of defective baggage which does not appear in any version of the Warsaw Convention<sup>9</sup>, and also makes provision clarifying the passenger's enforcement rights as against the carrier<sup>10</sup>.

Receipt by the person entitled to delivery of baggage<sup>11</sup> without complaint<sup>12</sup> is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or (in Montreal Convention cases) the record preserved by other means<sup>13</sup>.

1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; as to carriage by successive carriers see PARA 129; and as to who should be sued see PARAS 165-167.

2 I.e. 'registered baggage' in the case of carriage governed by the Warsaw Convention, or 'checked baggage' in the case of carriage governed by the Montreal Convention: Unamended Warsaw Convention art 18.1; Warsaw-MP1 Convention art 18.1; Warsaw-Hague Convention art 18.1; Warsaw-Hague-MP4 Convention art 18.1; Montreal Convention art 17.2. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. As to the meaning of 'registered baggage' under the Warsaw Convention see *Collins v British Airways Board* [1982] QB 734, [1982] 1 All ER 302, 1 S & B Av R VII/155, CA.

3 Unamended Warsaw Convention art 18.1; Warsaw-MP1 Convention art 18.1; Warsaw-Hague Convention art 18.1; Warsaw-Hague-MP4 Convention art 18.1; Montreal Convention art 17.2. This is an exclusive cause of action: see PARA 161. As to who may bring such an action see *Western Digital Corp v British Airways plc* [2001] QB 733, [2001] 1 All ER 109, CA. 'Occurrence' is to be contrasted with 'accident' (see PARA 150 note 6); although see *Winchester Fruit Ltd v American Airlines Inc* [2002] 2 Lloyd's Rep 265. For requirements as to notice of complaint see PARA 163; for defences available to the carrier, and exoneration, see PARAS 169, 171; for limitations on the damages which may be payable see PARAS 154, 156.

4 Whether something is 'in the charge of the carrier' is to be determined by (physical) events on the ground, not by reference to paperwork: *Rolls-Royce plc v Heavylift-Volga Dnepr Ltd* [2000] 1 All ER (Comm) 796, [2000] 1 Lloyd's Rep 653 (where the cargo was in the charge of the carrier as soon as the carrier's forklift truck lifted it clear from the lorry which had delivered it).

5 'Aerodrome' is simply an old fashioned word for 'airport' and is not restricted to the area within an airside perimeter fence: see *Rolls-Royce plc v Heavylift-Volga Dnepr Ltd* [2000] 1 All ER (Comm) 796, [2000] 1 Lloyd's Rep 653; and note that the terms are used interchangeably in the versions of the Warsaw Convention cited in note 6.

6 Unamended Warsaw Convention art 18.2; Warsaw-MP1 Convention art 18.2; Warsaw-Hague Convention art 18.2; Warsaw-Hague-MP4 Convention art 18.4.

7 Unamended Warsaw Convention art 18.3; Warsaw-MP1 Convention art 18.3; Warsaw-Hague Convention art 18.3; Warsaw-Hague-MP4 Convention art 18.5.

8 Montreal Convention art 17.2.

9 See the Montreal Convention art 17.2, which provides that the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage.

10 See the Montreal Convention art 17.3, which provides that if the carrier admits the loss of checked baggage, or if the checked baggage has not arrived at the expiration of 21 days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage. For the purposes of the Montreal and Warsaw Conventions 'days' means current or calendar days, not working days: Unamended Warsaw Convention art 35; Warsaw-MP1 Convention art 35; Warsaw-Hague Convention art 35; Warsaw-Hague-MP4 Convention art 35; Montreal Convention art 52.

11 In Montreal Convention cases, checked baggage: see art 31.1.

12 I.e. where relevant, without complaint to either the actual carrier or the contracting carrier: see PARA 131. As to the time within which complaints must be made see PARA 163.

13 Unamended Warsaw Convention art 26.1; Warsaw-MP1 Convention art 26.1; Warsaw-Hague Convention art 26.1; Warsaw-Hague-MP4 Convention art 31.1; Montreal Convention art 31.1. As to the record preserved by other means in Montreal Convention cases see art 4.2; and PARA 142.

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## **152. Liability for loss of or damage to cargo.**

A carrier<sup>1</sup> is liable for damage sustained in the event of the destruction or loss of, or of damage to, cargo that occurs in the course of the carriage by air<sup>2</sup>. The carrier's liability extends to all destruction, damage or loss occurring in the period during which the cargo is in his charge<sup>3</sup>, but does not extend to any carriage by land, by sea or by river or inland waterway performed outside an airport or aerodrome, although if such a carriage takes place in the performance of a contract for carriage by air for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air<sup>4</sup>. If, however, the carriage is governed by the Warsaw-Hague-MP4 or Montreal Conventions<sup>5</sup>, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of:

- 102 (1) inherent defect, quality, or vice of that cargo<sup>6</sup>;
- 103 (2) defective packing of that cargo performed by a person other than the carrier or his servants or agents<sup>7</sup>;
- 104 (3) an act of war or an armed conflict<sup>8</sup>; or
- 105 (4) an act of a public authority carried out in connection with the entry, exit or transit of the cargo<sup>9</sup>.

Receipt by the person entitled to delivery of cargo without complaint<sup>10</sup> is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or (in Montreal Convention cases) the record preserved by other means<sup>11</sup>.

1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; as to carriage by successive carriers see PARA 129; and as to who should be sued see PARAS 165-167.

2 Unamended Warsaw Convention art 18.1; Warsaw-MP1 Convention art 18.1; Warsaw-Hague Convention art 18.1; Warsaw-Hague-MP4 Convention art 18.2; Montreal Convention art 18.1. This is an exclusive cause of action: see PARA 161. An action may be brought by the consignor or consignee named in the air waybill, their principals, the owner of the cargo in question, or a person having an immediate right to possession of it: *Western Digital Corp v British Airways plc* [2001] QB 733, [2001] 1 All ER 109, CA; see also *Gatewhite Ltd v Iberia Lineas Aereas de España SA* [1990] 1 QB 326, [1989] 1 All ER 944, 1 S & B Av R VII/305. 'Occurrence' is to be contrasted with 'accident' (see PARA 150 note 6); although see *Winchester Fruit Ltd v American Airlines Inc* [2002] 2 Lloyd's Rep 265. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. For requirements as to notice of complaint see PARA 163; for defences available to the carrier, and exoneration, see PARAS 169, 171; for limitations on the damages which may be payable see PARAS 154, 156.

3 Unamended Warsaw Convention art 18.2; Warsaw-MP1 Convention art 18.2; Warsaw-Hague Convention art 18.2; Warsaw-Hague-MP4 Convention art 18.4; Montreal Convention art 18.3. As to whether something is 'in the charge of the carrier' see PARA 151 note 4; note that all versions of the Warsaw Convention specify that the carrier is liable whether the destruction, damage or loss occurs in an airport or aerodrome or on board an aircraft or, in the case of a landing outside an airport or aerodrome, in any place whatsoever: Unamended Warsaw Convention art 18.2; Warsaw-MP1 Convention art 18.2; Warsaw-Hague Convention art 18.2; Warsaw-Hague-MP4 Convention art 18.4. As to airports and aerodromes see PARA 151 note 5.

4 Unamended Warsaw Convention art 18.3; Warsaw-MP1 Convention art 18.3; Warsaw-Hague Convention art 18.3; Warsaw-Hague-MP4 Convention art 18.5; Montreal Convention art 18.4. Under the Montreal Convention, if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air: art 18.4.

5 See note 2. There is no corresponding exclusion in respect of carriage governed by any of the other versions of the Warsaw Convention.

6 Warsaw-Hague-MP4 Convention art 18.3(a); Montreal Convention art 18.2(a).

7 Warsaw-Hague-MP4 Convention art 18.3(b); Montreal Convention art 18.2(b).

8 Warsaw-Hague-MP4 Convention art 18.3(c); Montreal Convention art 18.2(c).

9 Warsaw-Hague-MP4 Convention art 18.3(d); Montreal Convention art 18.2(d).

10 le, where relevant, without complaint to either the actual carrier or the contracting carrier: see PARA 131. As to the time within which complaints must be made see PARA 163.

11 Unamended Warsaw Convention art 26.1; Warsaw-MP1 Convention art 26.1; Warsaw-Hague Convention art 26.1; Warsaw-Hague-MP4 Convention art 31.1; Montreal Convention art 31.1. As to the record preserved by other means in Montreal Convention cases see art 4.2; and PARA 142.

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### 153. Liability for delay.

The carrier<sup>1</sup> is liable for damage occasioned by delay<sup>2</sup> in the carriage by air<sup>3</sup> of passengers, baggage<sup>4</sup> or cargo<sup>5</sup>. Where, however, the carriage is governed by the Montreal Convention, the carrier is not liable for damage occasioned by delay if he proves that he and his servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for him or them to take such measures<sup>6</sup>.

1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; as to carriage by successive carriers see PARA 129; and as to who should be sued see PARAS 165-167.

2 Except where the carrier has contracted to perform the carriage within an agreed time, his obligation is to perform it within a reasonable time: no liability for delay arises until the agreed time or a reasonable time, as the case may be, has passed: *Panalpina International Transport Ltd v Densil Underwear Ltd* [1981] 1 Lloyd's Rep 187.

3 As to the meaning of 'carriage by air' in this context see *Bart v British West Indian Airways Ltd* [1967] 1 Lloyd's Rep 239, Guyana CA; *Nowell v Qantas Airways Ltd* 22 Avi Cas 18,071. A passenger who is denied boarding through overbooking by the carrier appears not to suffer delay in the carriage by air; any remedy, subject to the terms of the contract, will be for non-performance. As to compensation where boarding is denied see EC Council Regulation 261/2004 (OJ L46, 17.2.2004, p 1) establishing common rules on compensation and assistance for passengers in the event of denied-boarding and of cancellation or long delay of flights and (as to the territorial reach of the regulation) Case C-173/07 *Emirates Airlines--Direktion für Deutschland v Schenkel* [2008] 3 CMLR 633, ECJ.

4 As to the meaning of 'baggage' see PARA 139 note 2.

5 Unamended Warsaw Convention art 19; Warsaw-MP1 Convention art 19; Warsaw-Hague Convention art 19; Warsaw-Hague-MP4 Convention art 19; Montreal Convention art 19. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. For requirements as to notice of complaint see PARA 163; for defences available to the carrier, and exoneration, see PARAS 169, 171; for limitations on the carrier's liability see PARAS 154-157.

6 Montreal Convention art 19. As to the meaning of this defence see *Grein v Imperial Airways Ltd* [1937] 1 KB 50, [1936] 2 All ER 1258, CA; *Chisholm v British European Airways* [1963] 1 Lloyd's Rep 626; *Goldman v Thai Airways International Ltd* (1981) 125 Sol Jo 413 (revsd on other grounds [1983] 3 All ER 693, [1983] 1 WLR 1186, 1 S & B Av R VII/101, CA); *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

## UPDATE

### 153 Liability for delay

NOTE 3--See also Case C-549/07 *Wallentin-Hermann v Alitalia--Linee Aeree Italiane SpA* [2009] 1 Lloyd's Rep 406, [2009] All ER (D) 108 (Jan), ECJ (relief from liability to pay compensation under Regulation 261/2004; compliance with minimum legal

requirements on maintenance in itself could not establish technical defect was caused by unavoidable extraordinary circumstances).

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## **B. LIMITATION OF LIABILITY**

### **154. Limitation of liability generally.**

The maximum liabilities of a carrier in respect of death or injury to passengers, loss of or damage to baggage and cargo, and delay are specified in the Montreal and Warsaw Conventions<sup>1</sup>. The specified limits apply to liability incurred whatever the nature of the proceedings by which liability may be enforced<sup>2</sup>. Pursuant to the establishment of the limits, punitive, exemplary or any other non-compensatory damages are not recoverable under the Montreal Convention<sup>3</sup>, while the Warsaw-Hague-MP4 Convention provides that the limits of liability set out therein constitute maximum limits which may not be exceeded whatever the circumstances giving rise to the liability<sup>4</sup>; however the Warsaw-Hague, Warsaw-Hague-MP4 and Montreal Conventions do not prevent the court<sup>5</sup> from awarding, in accordance with its own law and in addition to the established limits, the whole or part of the court costs and of the other expenses of the litigation incurred by the claimant<sup>6</sup>. Where the carriage is governed by the Montreal Convention the carrier may stipulate that the contract of carriage is to be subject to higher limits of liability than those provided for in the Convention or to no limits of liability whatsoever<sup>7</sup>.

In relation to carriage performed by a person other than the contracting carrier<sup>8</sup>, no act or omission of the contracting carrier will subject the actual carrier to liability exceeding the limits laid down in the applicable Convention, and no special agreement or waiver of rights by the contracting carrier, or special declaration, will affect the actual carrier unless agreed by him<sup>9</sup>. If a claim is brought against an actual or contracting carrier's servant or agent the servant or agent is entitled, if he proves that he was acting within the scope of his employment, to invoke the provisions of the applicable Convention limiting the carrier's liability applicable to the carrier whose servant he is, and in these circumstances the aggregate of the amounts recoverable from the carrier and his servants and agents, may not exceed the limits provided for by the applicable Convention<sup>10</sup>.

1 See the Unamended Warsaw Convention art 22; the Warsaw-MP1 Convention art 22; the Warsaw-Hague Convention art 22; the Warsaw-Hague-MP4 Convention art 22; the Montreal Convention arts 21-23; and PARAS 155-156. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. The limits of liability provided for by the Montreal Convention are reviewed at five-year intervals by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision: see art 24.1. This is expressed to be without prejudice to the provisions of art 25, as to which see the text and note 7. The measure of the rate of inflation to be used in determining the inflation factor is the weighted average of the annual rates of increase or decrease in the consumer price indices of the states whose currencies comprise the special drawing rights mentioned in art 23.1: art 24.1. As to special drawing rights see PARA 155 note 4. If such a review concludes that the inflation factor has exceeded 10%, the depositary will notify parties to the Convention of a revision of the limits of liability; any such revision will become effective six months after its notification to the parties, and if within three months after its notification to the parties a majority of them register their disapproval, the revision will not become effective and the depositary will refer the matter to a meeting of the parties: art 24.2. The reference to 'a majority of parties' in this provision does not apply to a Regional Economic Integration Organisation: art 53. As to the meaning of 'Regional Economic Integration Organisation' see PARA 122 note 4. The depositary must immediately notify all parties of the coming into force of any revision: art 24.2. Additionally, this procedure will be applied at any time provided that one-third of the parties express a desire to that effect and upon condition that the inflation factor

referred to above has exceeded 30% since the previous revision or since the date of entry into force of the Convention if there has been no previous revision: art 24.3. The reference to 'one-third of the parties' does not apply to a Regional Economic Integration Organisation: art 53. Any revision of the limits of liability so established may be certified by an Order in Council: Carriage by Air Act 1961 s 2(1A) (added by SI 2002/263). At the date at which this volume states the law no such Order in Council had been made.

2 See the Carriage by Air Act 1961 s 4(1), (1A); and PARA 155.

3 See the Montreal Convention art 29; and PARA 161.

4 See the Warsaw-Hague-MP4 Convention art 24.2; and PARA 161.

5 'Court' includes (in an arbitration allowed by the applicable Convention) an arbitrator: Carriage by Air Act 1961 s 14(2) (substituted by SI 2002/263).

6 Warsaw-Hague Convention art 22.4; Warsaw-Hague-MP4 Convention art 22.4; Montreal Convention art 22.6. These provisions enable the awarding of costs and expenses only if the amount of the damages awarded, excluding court costs and other expenses of the litigation, exceeds the sum which the carrier has offered in writing to the claimant within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later: Warsaw-Hague Convention art 22.4; Warsaw-Hague-MP4 Convention art 22.4; Montreal Convention art 22.6. Interest is included in Warsaw-Hague-MP4 and Montreal Convention cases: *Warsaw-Hague-MP4 Convention art 22.4; Montreal Convention art 22.6*. As to the application of these provisions see *GKN Westland Helicopters Ltd v Korean Air* [2003] EWHC 1120 (Comm), [2003] 2 All ER (Comm) 578, [2003] 2 Lloyd's Rep 629.

7 Montreal Convention art 25.

8 As to carriage performed by a person other than the contracting carrier see PARA 131.

9 Guadalajara Convention art III.2; Montreal Convention art 41.2. As to the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121.

10 Guadalajara Convention arts V, VI; Warsaw-Hague Convention arts 25A.1, 25A.2; Warsaw-Hague-MP4 Convention arts 25A.1, 25A.2; Montreal Convention arts 30.1, 30.2, 43, 44. The limit of liability under the applicable Convention may not be invoked if it is proved that the servant or agent acted in a manner which, under that Convention, excludes the limitation of liability by the carrier: see the Guadalajara Convention art V; the Warsaw-Hague Convention art 25A.3; the Warsaw-Hague-MP4 Convention art 25A.3; the Montreal Convention arts 30.3, 43.

A court before which proceedings are brought to enforce a liability limited by the Guadalajara Convention art VI or the Montreal Convention art 44 may, at any stage of the proceedings and of any other proceedings, make any such order as appears to it to be just and equitable in view of the relevant Convention and of any other proceedings which have been, or are likely to be, commenced to enforce the liability in whole or in part: Carriage by Air Act 1961 s 4(2), (3A) (s 4(3A) as so added); Carriage by Air (Supplementary Provisions) Act 1962 s 3(1) (amended by the Civil Liability (Contribution) Act 1978 Sch 2; SI 1999/1312; and SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2), (3). Without prejudice to this, when liability is, or may be, enforceable in other proceedings in the United Kingdom or elsewhere, the court may award an amount less than the amount which it would have awarded if the limitation applied solely to the proceedings before it, or make any part of its award conditional on the result of any other proceedings: Carriage by Air Act 1961 s 4(3), (3A) (as so amended and added); Carriage by Air (Supplementary Provisions) Act 1962 s 3(1) (as so amended); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2). As to the United Kingdom see PARA 96 note 1.

## UPDATE

### 154 Limitation of liability generally

NOTE 1--In exercise of the power conferred by Air Act 1961 s 2(1A) Her Majesty in Council has made the Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2009, SI 2009/3018.

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### **155. Limitation of liability in respect of passengers.**

Where carriage is governed by the Montreal Convention<sup>1</sup> the carrier cannot exclude or limit his liability in respect of the death or bodily injury<sup>2</sup> of a passenger<sup>3</sup> where the damages so arising do not exceed 100,000 special drawing rights<sup>4</sup>. However, the carrier is not liable for damages exceeding this sum if he proves that such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents or that it was solely due to the negligence or other wrongful act or omission of a third party<sup>5</sup>. In the case of delay in the carriage of persons<sup>6</sup>, the liability of the carrier under the Montreal Convention is limited to 4,150 special drawing rights for each passenger<sup>7</sup>. Where carriage is governed by the Warsaw Convention in any of its versions<sup>8</sup>, the carrier's liability for each passenger is limited to the sum applicable for the purposes of that version of the Convention<sup>9</sup>.

The limitations on liability described above apply whatever the nature of the proceedings by which liability may be enforced; in particular they apply to the carrier's aggregate liability in all proceedings brought against him under the law of any part of the United Kingdom together with any proceedings brought against him elsewhere<sup>10</sup>. However, in Montreal Convention cases the carrier may stipulate that the contract of carriage is to be subject to higher limits of liability or to no limits of liability whatsoever<sup>11</sup>, while in Warsaw Convention cases the carrier and the passenger may by special contract agree to a higher limit of liability<sup>12</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 As to 'bodily injury' see PARA 150 note 4.

3 I.e. liability arising under the Montreal Convention art 17.1: see PARA 150. As to a 'passenger' see PARA 150 note 5.

4 Montreal Convention art 21.1. As to the limitation of a carrier's liability generally, including provision as to costs and other expenses of litigation, see PARA 154 (noting in particular the provisions for review). A 'special drawing right' is that unit of account as defined by the International Monetary Fund; conversion into national currencies must, in the case of judicial proceedings, be made according to the value of such currencies in terms of the special drawing right at the date of judgment: Warsaw-MP1 Convention art 22.4; Warsaw-Hague Convention art 22.5; Warsaw-Hague-MP4 Convention art 22.5; Montreal Convention art 23.1. Further provisions concerning the value of national currencies and conversion of monetary units are set out in the Warsaw-MP1 Convention art 22.4; the Warsaw-Hague-MP4 Convention art 22.6; and the Montreal Convention arts 23.2. 23.3.

5 Montreal Convention art 21.2.

6 I.e. under the Montreal Convention art 19: see PARA 153.

7 Montreal Convention art 22.1.

8 See note 1.

9 Unamended Warsaw Convention art 22.1; Warsaw-MP1 Convention art 22.1; Warsaw-Hague Convention art 22.1; Warsaw-Hague-MP4 Convention art 22.1. The applicable sum under the Warsaw-Hague and Warsaw-Hague-MP4 Conventions is 16,600 special drawing rights; under the Warsaw-MP1 Convention it is 8,300 special drawing rights; and under the Unamended Warsaw Convention it is stated to be 125,000 francs: Unamended Warsaw Convention art 22.1; Warsaw-MP1 Convention art 22.1; Warsaw-Hague Convention art 22.1; Warsaw-Hague-MP4 Convention art 22.1. As to special drawing rights see note 4. The specified limit prevents an additional award of interest: *Swiss Bank Corp'n v Brink's-MAT Ltd* [1986] QB 853, [1986] 2 All ER 188, 1 S & B Av R VII/195. For cases where a carrier loses his right to limit his liability see PARA 157.

The sums in francs mentioned in the Unamended Warsaw Convention are deemed to refer to French 'Poincaré' francs consisting of 65½ milligrammes of gold of millesimal fineness 900; they may be converted into any

national currency in round figures: art 22.4. For United Kingdom purposes an order has been made specifying the amounts to be taken as the sterling equivalents of such sums: see the Carriage by Air (Sterling Equivalents) Order 1999, SI 1999/2881 (made under the Carriage by Air Act 1961 s 4(4)).

10 Carriage by Air Act 1961 s 4(1), (1A) (s 4(1) substituted, s 4(1A), (1B), (3A) added, s 4(3) amended, by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2), (3). See further PARA 154 note 10.

11 Montreal Convention art 25.

12 Unamended Warsaw Convention art 22.1; Warsaw-MP1 Convention art 22.1; Warsaw-Hague Convention art 22.1; Warsaw-Hague-MP4 Convention art 22.1. This provision operates by way of an exception to the general requirement that where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of such payments must not exceed the specified limit: Unamended Warsaw Convention art 22.1; Warsaw-MP1 Convention art 22.1; Warsaw-Hague Convention art 22.1; Warsaw-Hague-MP4 Convention art 22.1.

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### **156. Limitation of liability for baggage and cargo.**

Where carriage is governed by the Montreal Convention<sup>1</sup>, the liability of the carrier in the case of destruction, loss, damage or delay to baggage<sup>2</sup> is limited to 1,000 special drawing rights<sup>3</sup> for each passenger<sup>4</sup> and the liability of the carrier in the case of destruction, loss, damage or delay to cargo is limited to 17 special drawing rights per kilogram<sup>5</sup>; where carriage is governed by the Warsaw Convention<sup>6</sup> the carrier's liability in respect of registered baggage<sup>7</sup> and cargo is limited to the sum applicable for the purposes of the applicable version of the Convention<sup>8</sup>. These limitations will, however, be displaced if the passenger or consignor has made, at the time when the baggage or cargo was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires<sup>9</sup>, in which case the carrier will be liable to pay a sum not exceeding the declared sum unless it proves that that sum is greater than the passenger or consignor's actual interest in delivery at destination<sup>10</sup>.

The limitations on liability described above apply whatever the nature of the proceedings by which liability may be enforced; in particular they apply to the carrier's aggregate liability in all proceedings brought against him under the law of any part of the United Kingdom together with any proceedings brought against him elsewhere<sup>11</sup>. However, in Montreal Convention cases the carrier may stipulate that the contract of carriage is to be subject to higher limits of liability or to no limits of liability whatsoever<sup>12</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 As to the meaning of 'baggage' see PARA 139 note 2.

3 As to special drawing rights see PARA 155 note 4.

4 Montreal Convention art 22.2. For the loss of the carrier's right to limit liability see PARA 157 (and note 8).

5 Montreal Convention art 22.3. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into account in determining the amount to which the carrier's liability is limited is only the total weight of the package or packages concerned; nevertheless, when the destruction, loss, damage or delay of part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the record preserved by other means, the total weight of such package or packages will also be taken into

consideration in determining the limit of liability: Montreal Convention art 22.4. See also the Warsaw Convention cases cited in note 8.

6 See note 1.

7 As to 'registered baggage' see PARA 140 note 4.

8 Unamended Warsaw Convention art 22.2; Warsaw-MP1 Convention art 22.2; Warsaw-Hague Convention art 22.2(a); Warsaw-Hague-MP4 Convention art 22.2(a), (b). The applicable sum is 17 special drawing rights per kilogram, except under the Unamended Warsaw Convention where it is stated to be 250 francs per kilogram; as regards objects of which the passenger takes charge himself the applicable sum is 332 special drawing rights per passenger or (under the Unamended Warsaw Convention) 5,000 francs per passenger: Unamended Warsaw Convention arts 22.2, 22.3; Warsaw-MP1 Convention arts 22.2, 22.3; Warsaw-Hague Convention arts 22.2(a), 22.3; Warsaw-Hague-MP4 Convention arts 22.2(a), (b), 22.3. As to the conversion of sums in francs see PARA 155 note 9. In the case of loss, damage or delay of part of registered baggage, or cargo, or of any object contained in registered baggage or cargo, under the Warsaw-Hague Convention or the Warsaw-Hague-MP4 Convention, the weight to be taken into consideration in determining the limit on the carrier's liability is only the total weight of the package or packages concerned; nevertheless, when such a loss affects the value of other packages covered by the same baggage check or air waybill, the total weight of such package or packages must also be taken into consideration: see the Warsaw-Hague Convention art 22.2(b); the Warsaw-Hague-MP4 Convention art 22.2(c); and *Data Card Corp v Air Express International Corp* [1983] 2 All ER 639, [1984] 1 WLR 198, 1 S & B Av R VII/95. However, this has to be assessed by reference to the state of affairs as at the end of the carriage by air in which the damage was sustained; if at that stage the value of the remaining packages was affected then their weight must also be taken into consideration when determining the relevant limit: *Applied Implants Technology Ltd v Lufthansa Cargo AG* [2000] 1 All ER (Comm) 958, [2000] 2 Lloyd's Rep 46. As to the calculation of the weight where this is not clearly recorded see *Bland v British Airways Board* [1981] 1 Lloyd's Rep 289, CA; and *Collins v British Airways Board* [1982] QB 734, [1982] 1 All ER 302, 1 S & B Av R VII/155, CA.

9 The supplementary sum which in accordance with the Montreal Convention art 22.2 may be demanded by a Community air carrier when a passenger makes a special declaration of interest in delivery of their baggage at destination, must be based on a tariff which is related to the additional costs involved in transporting and insuring the baggage concerned over and above those for baggage valued at or below the liability limit: EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, art 3a (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)). The tariff must be made available to passengers on request (EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 3a (as so substituted)), and a Community air carrier that fails to make the tariff available is guilty of an offence unless he proves that the failure to do so occurred without his consent or connivance and that he exercised all due diligence to prevent the failure (Air Carrier Liability Regulations 2004, SI 2004/1418, reg 3(1)). As to the punishment of offences see PARA 139 note 12. As to the meanings of 'air carrier' and 'Community air carrier' see PARA 122 note 1. As to the meanings of 'special declaration' and 'supplementary' see *Westminster Bank Ltd v Imperial Airways Ltd* [1936] 2 All ER 890; and see *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616 at 641, [1969] 1 All ER 82, CA. The 'special declaration of interest' is to be regarded as imposing a limit of liability of the type which may be disappplied by the intentional or reckless acts of the carrier or his servants or agents: see *Antwerp United Diamond BVBA v Air Europe* [1996] QB 317, [1995] 3 All ER 424, CA; and PARA 157.

10 Unamended Warsaw Convention art 22.2; Warsaw-MP1 Convention art 22.2; Warsaw-Hague Convention art 22.2(a); Warsaw-Hague-MP4 Convention art 22.2(a), (b); Montreal Convention arts 22.2, 22.3.

11 Carriage by Air Act 1961 s 4(1), (1A) (s 4(1) substituted, s 4(1A), (1B), (3A) added, s 4(3) amended, by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2), (3). See further PARA 154 note 10.

12 Montreal Convention art 25.

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### **157. Loss of carrier's right to limit liability.**

The general rule with regard to the circumstances in which the carrier will lose his right to limit his liability is that the specified limits<sup>1</sup> will not apply if it is proved that the damage resulted from an act or omission of the carrier<sup>2</sup>, his servants or agents<sup>3</sup>, done with intent to cause damage<sup>4</sup> or recklessly and with knowledge<sup>5</sup> that damage would probably result<sup>6</sup>. However the extent of this rule varies depending on which Convention applies: where carriage is governed by the Montreal Convention the rule applies only in respect of the limits on liability for damage caused by delay to passengers<sup>7</sup> and the destruction, loss, damage or delay of baggage<sup>8</sup>, while under the various versions of the Warsaw Convention it applies to all the limitations specified therein<sup>9</sup>.

Under the Warsaw Convention the right to exclude or limit liability is also lost if:

- 106 (1) with the carrier's consent, the passenger embarks without a passenger ticket having been delivered to him<sup>10</sup> or, in certain circumstances, where such a ticket is insufficient<sup>11</sup>;
- 107 (2) the carrier accepts or takes charge of baggage without a baggage check having been delivered<sup>12</sup> or where the baggage check is insufficient<sup>13</sup>; or
- 108 (3) under earlier versions of the Convention<sup>14</sup>, the carrier accepts cargo without an air waybill having been made out<sup>15</sup> or if the air waybill does not contain prescribed particulars<sup>16</sup>;

No corresponding provision is made under the Montreal Convention.

1 See PARAS 154-156.

2 In relation to carriage by an actual carrier, the carrier may be the actual carrier or the contracting carrier, but no act or omission of the contracting carrier, his servants or agents, may subject the actual carrier to liability exceeding the specified limits: see the Guadalajara Convention art III; the Montreal Convention art 41; and PARA 131. As to the Montreal and Warsaw Conventions and the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

3 In the case of a servant or agent it must also be proved that the servant or agent was acting within the scope of his employment: Unamended Warsaw Convention art 25.2; Warsaw-MP1 Convention art 25.2; Warsaw-Hague Convention art 25; Warsaw-Hague-MP4 Convention art 25; Montreal Convention art 22.5. As to course of employment see *Rustenberg Platinum Mines Ltd v South African Airways* [1979] 1 Lloyd's Rep 19, CA.

4 Not necessarily the precise damage which actually occurred, but it must be of the same kind: *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693, [1983] 1 WLR 1186, 1 S & B Av R VII/101, CA.

5 This phrase carries a subjective meaning; it requires actual knowledge on the part of the relevant person at the moment at which the relevant act or omission occurs: *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693, [1983] 1 WLR 1186, 1 S & B Av R VII/101, CA; and see *Qantas Airways Ltd v SS Pharmaceutical Co Ltd* [1991] Lloyd's Rep 288, NSW SC, CA. It is not sufficient if the relevant person is aware that if a certain risk materialises damage would probably result: *Gurtner v Beaton* [1993] 2 Lloyd's Rep 369, (1992) 1 S & B Av R VII/723, CA. The phrase requires an appreciation or awareness, at the time of the conduct in question, that such conduct will probably result in the type of damage that it caused: *Nugent v Michael Goss Aviation Ltd* [2000] 2 Lloyd's Rep 222, CA.

6 Unamended Warsaw Convention art 25.1; Warsaw-MP1 Convention art 25.1; Warsaw-Hague Convention art 25; Warsaw-Hague-MP4 Convention art 25; Montreal Convention art 22.5. Although the Unamended Warsaw Convention art 25.1 and the Warsaw-MP1 Convention art 25.1 are expressed differently to the other cited provisions (stating that the provisions of those versions of the Convention which exclude or limit the carrier's liability do not apply if the damage is caused by the wilful misconduct, or such default as in accordance with the law of the court seised of the case is considered to be equivalent to wilful misconduct), when read with the decision in *Horabin v British Overseas Airways Corp*n [1952] 2 All ER 1016 (that 'wilful misconduct' goes beyond negligence and involves knowledge that injury or damage will probably result and an intentional or reckless act or omission), their effect is as stated in the text. See also *Rustenberg Platinum Mines Ltd v South African Airways* [1977] 1 Lloyd's Rep 564 (affd [1979] 1 Lloyd's Rep 19, CA); and *Thomas Cook Group Ltd v Air Malta Co Ltd* [1997] 2 Lloyd's Rep 399.

7 See the Montreal Convention art 22.1; and PARA 155.

8 See the Montreal Convention art 22.2; and PARA 156. In respect of cargo the limitation of liability under the Montreal Convention cannot be broken.

9 Unamended Warsaw Convention art 25.1; Warsaw-MP1 Convention art 25.1; Warsaw-Hague Convention art 25; Warsaw-Hague-MP4 Convention art 25.

10 Unamended Warsaw Convention art 3.2; Warsaw-MP1 Convention art 3.2; Warsaw-Hague Convention art 3.2; Warsaw-Hague-MP4 Convention art 3.2. See *Preston v Hunting Air Transport Ltd* [1956] 1 QB 454, [1956] 1 All ER 443; *Ludecke v Canadian Pacific Air Lines Ltd* (1979) 98 DLR (3d) 52, [1979] 2 Lloyd's Rep 260, Can SC; and see further PARA 136 et seq.

11 Under the Warsaw-Hague and Warsaw-Hague-MP4 Conventions the right to exclude or limit liability is lost if, with the carrier's consent, the passenger embarks with a ticket which does not include the notice required under the Warsaw-Hague Convention art 3.1(c) or the Warsaw-Hague-MP4 Convention art 3.1(c), as the case may be: see the Warsaw-Hague Convention art 3.2; the Warsaw-Hague-MP4 Convention art 3.2; and PARA 136 et seq.

12 Unamended Warsaw Convention art 4.4; Warsaw-MP1 Convention art 4.4; Warsaw-Hague Convention art 4.2; Warsaw-Hague-MP4 Convention art 4.2. See further PARA 140. However, under the Warsaw-Hague and Warsaw-Hague-MP4 Conventions the carrier's right to exclude or limit his liability will not be lost if the baggage check is combined with or incorporated in a passenger ticket which complies with the ticketing requirements of the Convention: Warsaw-Hague Convention art 4.2; Warsaw-Hague-MP4 Convention art 4.2. As to the ticketing requirements see the Warsaw-Hague Convention art 3.1(c); the Warsaw-Hague-MP4 Convention art 3.1(c); and PARA 136.

13 The right to exclude or limit liability is lost if the baggage check does not contain the particulars set out in the Unamended Warsaw Convention art 4.3(d), (f), (h) or the Warsaw-MP1 Convention art 4.3(d), (f), (h) or the notice required by the Warsaw-Hague Convention art 4.1(c) or the Warsaw-Hague-MP4 Convention art 4.1(c), as the case may be: see the Unamended Warsaw Convention art 4.4; the Warsaw-MP1 Convention art 4.4; the Warsaw-Hague Convention art 4.2; the Warsaw-Hague-MP4 Convention art 4.2.; and PARA 140. For an exclusion see note 12.

14 Ie this provision does not appear in the Warsaw-Hague-MP4 Convention.

15 As to the requirement for an air waybill see PARA 142.

16 Unamended Warsaw Convention art 9; Warsaw-MP1 Convention art 9; Warsaw-Hague Convention art 9. See further PARA 145. The 'prescribed particulars' are, as the case may be, the Unamended Warsaw Convention art 8(a)-(i), (q), the Warsaw-MP1 Convention art 8(a)-(i), (q), and the Warsaw-Hague Convention art 8(c); see the Unamended Warsaw Convention art 9; the Warsaw-MP1 Convention art 9; the Warsaw-Hague Convention art 9; and PARA 144. This provision was described as 'absurd' in *Corocraft v Pan American Airways Inc* [1969] 1 QB 616, [1969] 1 All ER 82, CA.

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### **(iii) Right of Disposal, Stoppage and Delivery**

#### **158. Right of disposal and stoppage of cargo in transit.**

Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport or aerodrome<sup>1</sup> of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air waybill or originally designated, or by requiring the cargo to be returned to the airport or aerodrome of departure<sup>2</sup>. The consignor must not exercise this right of disposal in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of the right<sup>3</sup>. If it is impossible to carry out the consignor's orders or instructions, the carrier must so inform him

forthwith<sup>4</sup>. If the carrier obeys the consignor's orders for the disposal of the cargo without requiring the production of the part of the air waybill or cargo receipt delivered to the consignor<sup>5</sup>, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or cargo receipt<sup>6</sup>.

The right conferred on the consignor ceases at the moment when the rights of the consignee to delivery begin<sup>7</sup>; nevertheless, if the consignee declines to accept the waybill or the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition<sup>8</sup>.

1 As to airports and aerodromes see PARA 151 note 5.

2 Unamended Warsaw Convention art 12.1; Warsaw-MP1 Convention art 12.1; Warsaw-Hague Convention art 12.1; Warsaw-Hague-MP4 Convention art 12.1; Montreal Convention art 12.1. These provisions can be varied only by express provisions in the air waybill or cargo receipt: Unamended Warsaw Convention art 15.2; Warsaw-MP1 Convention art 15.2; Warsaw-Hague Convention art 15.2; Warsaw-Hague-MP4 Convention art 15.2; Montreal Convention art 15.2. As to air waybills and cargo receipts see PARA 142. As to the enforcement of the consignor's and consignee's rights and the effect of these provisions on contractual relations between the parties see PARA 160. In relation to carriage performed by an actual carrier (see PARA 131), orders of the consignor under these provisions are effective only if addressed to the contracting carrier (see PARA 131 note 1); Guadalajara Convention art IV; Montreal Convention art 42. As to the Montreal and Warsaw Conventions and the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. As to stoppage in transit generally see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq.

3 Unamended Warsaw Convention art 12.1; Warsaw-MP1 Convention art 12.1; Warsaw-Hague Convention art 12.1; Warsaw-Hague-MP4 Convention art 12.1; Montreal Convention art 12.1.

4 Unamended Warsaw Convention art 12.2; Warsaw-MP1 Convention art 12.2; Warsaw-Hague Convention art 12.2; Warsaw-Hague-MP4 Convention art 12.2; Montreal Convention art 12.2.

5 See PARA 143 et seq.

6 Unamended Warsaw Convention art 12.3; Warsaw-MP1 Convention art 12.3; Warsaw-Hague Convention art 12.3; Warsaw-Hague-MP4 Convention art 12.3; Montreal Convention art 12.3.

7 In accordance with the Unamended Warsaw Convention art 13, the Warsaw-MP1 Convention art 13, the Warsaw-Hague Convention art 13, the Warsaw-Hague-MP4 Convention art 13 or the Montreal Convention art 13: see PARA 159.

8 Unamended Warsaw Convention art 12.4; Warsaw-MP1 Convention art 12.4; Warsaw-Hague Convention art 12.4; Warsaw-Hague-MP4 Convention art 12.4; Montreal Convention art 12.4.

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### **159. Consignee's rights against the carrier.**

Except where any of the rights of disposal or stoppage in transit have been exercised in accordance with the applicable provisions of the Montreal or Warsaw Conventions<sup>1</sup>, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him (and, in Warsaw Convention cases, to hand over to him the air waybill<sup>2</sup>), on payment of the charges due and on complying with the conditions of carriage<sup>3</sup>. Unless it is otherwise agreed, it is the carrier's duty to give notice to the consignee as soon as the cargo arrives<sup>4</sup>.

If the carrier admits the loss of the cargo, or if it has not arrived at the expiration of seven days<sup>5</sup> after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage<sup>6</sup>.

1 In accordance with the Unamended Warsaw Convention art 12, the Warsaw-MP1 Convention art 12, the Warsaw-Hague Convention art 12, the Warsaw-Hague-MP4 Convention art 12 or the Montreal Convention art 12: see PARA 158. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128. As to stoppage in transit generally see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq.

2 This can only be the second part of the air waybill: see the Unamended Warsaw Convention art 6.2; the Warsaw-MP1 Convention art 6.2; the Warsaw-Hague Convention art 6.2; the Warsaw-Hague-MP4 Convention art 6.2; and PARA 143. As to the documents which must accompany the air waybill see PARA 148.

3 Unamended Warsaw Convention art 13.1; Warsaw-MP1 Convention art 13.1; Warsaw-Hague Convention art 13.1; Warsaw-Hague-MP4 Convention art 13.1; Montreal Convention art 13.1. As to the enforcement of the consignor's and consignee's rights and the effect of these provisions on contractual relations between the parties see PARA 160. These provisions can be varied only by express provisions in the air waybill or cargo receipt: Unamended Warsaw Convention art 15.2; Warsaw-MP1 Convention art 15.2; Warsaw-Hague Convention art 15.2; Warsaw-Hague-MP4 Convention art 15.2; Montreal Convention art 15.2. As to air waybills and cargo receipts see PARA 142.

4 Unamended Warsaw Convention art 13.2; Warsaw-MP1 Convention art 13.2; Warsaw-Hague Convention art 13.2; Warsaw-Hague-MP4 Convention art 13.2; Montreal Convention art 13.2.

5 As to the meaning of 'days' see PARA 151 note 10.

6 Unamended Warsaw Convention art 13.3; Warsaw-MP1 Convention art 13.3; Warsaw-Hague Convention art 13.3; Warsaw-Hague-MP4 Convention art 13.3; Montreal Convention art 13.3. This provision addresses the conditions for a claim for loss: *Western Digital Corp v British Airways plc* [2001] QB 733, [2001] 1 All ER 109, CA.

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### **160. Who has title to sue the carrier?**

The consignor and the consignee can respectively enforce in their own names all the rights given them by the provisions of the Montreal and Warsaw Conventions relating to disposition, stoppage in transit and delivery<sup>1</sup>, whether they are acting in their own interest or in the interest of another, provided that they carry out the obligations imposed by the contract of carriage<sup>2</sup>. Those provisions do not affect either the relations of the consignor and consignee with each other or the mutual relations of third parties whose rights are derived from either the consignor or the consignee<sup>3</sup>, and have nothing to do with any right of action against the carrier for loss of or damage to the goods<sup>4</sup>.

1 In the Unamended Warsaw Convention arts 12, 13, the Warsaw-MP1 Convention arts 12, 13, the Warsaw-Hague Convention arts 12, 13, the Warsaw-Hague-MP4 Convention arts 12, 13 and the Montreal Convention arts 12, 13: see PARAS 158-159. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the forms of carriage to which the Conventions apply and do not apply see PARAS 127-128.

2 Unamended Warsaw Convention art 14; Warsaw-MP1 Convention art 14; Warsaw-Hague Convention art 14; Warsaw-Hague-MP4 Convention art 14; Montreal Convention art 14. These provisions can be varied only by express provisions in the air waybill or cargo receipt: Unamended Warsaw Convention art 15.2; Warsaw-MP1

Convention art 15.2; Warsaw-Hague Convention art 15.2; Warsaw-Hague-MP4 Convention art 15.2; Montreal Convention art 15.2. As to air waybills and cargo receipts see PARA 142.

3 Unamended Warsaw Convention art 15.1; Warsaw-MP1 Convention art 15.1; Warsaw-Hague Convention art 15.1; Warsaw-Hague-MP4 Convention art 15.1; Montreal Convention art 15.1.

4 *Gatewhite Ltd v Iberia Lineas Aereas de España SA* [1990] 1 QB 326, [1989] 1 All ER 944, 1 S & B Av R VII/305; cf *Western Digital Corp v British Airways plc* [2001] QB 733, [2001] 1 All ER 109, CA.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/161. Basis of claims.

## **(iv) Claims and Proceedings**

### **161. Basis of claims.**

In the carriage of passengers, baggage and cargo, any action for damages under the Montreal or Warsaw Convention<sup>1</sup>, however founded<sup>2</sup>, can only be brought subject to the conditions and such limits of liability as are set out in the applicable Convention<sup>3</sup>. This is in general without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights<sup>4</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 The Montreal Convention, and the Warsaw-Hague-MP4 Convention so far as applying to the carriage of cargo, add for clarification, 'whether under this Convention or in contract or in tort or otherwise': Warsaw-Hague-MP4 Convention art 24.2; Montreal Convention art 29. The difference in the wording of the Warsaw-Hague-MP4 Convention art 24 (and, by inference, the Montreal Convention art 29) on the one hand, and the corresponding provision of the Warsaw-Hague Convention (ie art 24) on the other, does not alter the exclusivity of the Warsaw and Montreal Conventions: *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2002] EWHC 2825 (QB) at [127]-[134], [2003] 1 All ER 935 at [127]-[134], [2003] 1 All ER (Comm) 418 at [127]-[134] (affd on other grounds [2003] EWCA Civ 1005, [2004] QB 234, [2004] 1 All ER 445; [2005] UKHL 72, [2006] 1 AC 495, [2006] 1 All ER 786).

3 Unamended Warsaw Convention arts 24.1, 24.2; Warsaw-MP1 Convention arts 24.1, 24.2; Warsaw-Hague Convention arts 24.1, 24.2; Warsaw-Hague-MP4 Convention arts 24.1, 24.2; Montreal Convention art 29. Punitive, exemplary or any other non-compensatory damages are not recoverable under the Montreal Convention: art 29. The Warsaw-Hague-MP4 Convention provides that the limits of liability set out therein constitute maximum limits and may not be exceeded whatever the circumstances giving rise to the liability: art 24.2.

4 Unamended Warsaw Convention art 24.2; Warsaw-MP1 Convention art 24.2; Warsaw-Hague Convention art 24.2; Warsaw-Hague-MP4 Convention arts 24.1, 24.2; Montreal Convention art 29. Where the Unamended Warsaw Convention, the Warsaw-MP1 Convention or the Warsaw-Hague Convention applies, this exclusion has effect only in relation to claims involving the death, wounding or injury of a passenger: Unamended Warsaw Convention art 24.2; Warsaw-MP1 Convention art 24.2; Warsaw-Hague Convention art 24.2. As to who has the right to claim in respect of cargo and baggage see PARA 152. For claims against the carrier's servants or agents see PARA 154.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/162. Jurisdictions in which claims must be brought.

### **162. Jurisdictions in which claims must be brought.**

An action for damages must be brought, at the claimant's option, in the territory of one of the parties to the applicable Convention<sup>1</sup>, either before the court<sup>2</sup> of the domicile<sup>3</sup> of the carrier or his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination<sup>4</sup>. Where the Montreal Convention applies, in respect of damage resulting from the death or injury of a passenger, an action may additionally be brought in the territory of a party in which at the time of the accident the passenger has his or her principal and permanent residence<sup>5</sup> and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement<sup>6</sup>, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement<sup>7</sup>.

In relation to carriage performed by an actual carrier<sup>8</sup>, any action for damages must be brought, at the claimant's option, either as above provided<sup>9</sup> or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business<sup>10</sup>.

Questions of procedure are governed by the law of the court seised of the case<sup>11</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 As to the meaning of 'court' see PARA 154 note 5.

3 As to domicile generally see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq. As to corporate domicile see **COMPANIES** vol 14 (2009) PARA 122. As to the meaning of 'ordinarily resident' (ie the corresponding term used in the Warsaw Convention, as discussed in note 4) cf *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp* [1981] QB 368, [1980] 3 All ER 359, 1 S & B Av R VII/1, CA, where a number of possible interpretations are examined.

4 Unamended Warsaw Convention art 28.1; Warsaw-MP1 Convention art 28.1; Warsaw-Hague Convention art 28.1; Warsaw-Hague-MP4 Convention art 28.1; Montreal Convention art 33.1. The text specifically reflects the wording used in the Montreal Convention; the various versions of the Warsaw Convention are expressed in slightly different terms (eg using 'ordinarily resident' instead of 'domicile' (as to which see note 3) and 'establishment' instead of 'place of business') but are of the same effect.

This provision is strictly applied: *Rotterdamsche Bank NV v British Overseas Airways Corp* [1953] 1 All ER 675, [1953] 1 WLR 493. It contains a self-contained code within which a claimant must found his jurisdiction: *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp* [1981] QB 368, [1980] 3 All ER 359, 1 S & B Av R VII/1, CA. It precludes the operation of the doctrine of forum non conveniens, 'brought' embracing both the initiation and the pursuit of proceedings: *Milor SRL v British Airways plc* [1996] QB 702, [1996] 3 All ER 537, CA. If a claim is brought in an English court which has no jurisdiction by reason of these provisions, the claim form and subsequent proceedings may be set aside: see *Rotterdamsche Bank NV v British Overseas Airways Corp*. However, where an action is brought in a foreign country which does not have jurisdiction by reason of these provisions, and also in an English court which does have such jurisdiction, the English court will not necessarily grant an injunction to restrain the foreign proceedings: see *Deaville v Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep 67.

The 'place of destination' will be the place of destination mentioned in the contract of carriage and, in the case of successive carriage, the ultimate place of destination set out in that contract. In the case of a round trip, the place of destination is the same as that of departure: *Qureshi v KLM Royal Dutch Airlines* (1979) 102 DLR (3d) 205 (NS SC), following *Grein v Imperial Airways Ltd* [1937] 1 KB 50, [1936] 2 All ER 1258, CA; *Petrine v Spantax SA* 756 F 2d 263 (2nd Cir, 1985), 1 S & B Av R VII/161. As to successive carriage see PARA 129.

5 'Principal and permanent residence' means the one fixed and permanent abode of the passenger at the time of the accident: Montreal Convention art 33.3(b). The nationality of the passenger must not be the determining factor in this regard: art 33.3(b).

6 'Commercial agreement' means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air: Montreal Convention art 33.3(a).

7 Montreal Convention art 33.2.

8 As to the meaning of 'actual carrier' see PARA 131 note 1.

9 The court before the court having jurisdiction as regards the contracting carrier: Guadalajara Convention art VIII; Montreal Convention art 46. As to the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121. As to the meaning of 'contracting carrier' see PARA 131 note 1.

10 Guadalajara Convention art VIII; Montreal Convention art 46. As with the relevant provisions of the Warsaw Convention (see the text and notes 1-4), the Guadalajara Convention uses 'ordinarily resident' instead of 'domicile', but the effect is as stated in the text.

11 Unamended Warsaw Convention art 28.2; Warsaw-MP1 Convention art 28.2; Warsaw-Hague Convention art 28.2; Warsaw-Hague-MP4 Convention art 28.2; Montreal Convention art 33.4.

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### **163. Time limits and method for making complaints of damage or delay to baggage or cargo.**

In the case of damage<sup>1</sup> to baggage or cargo, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage and at the latest within seven days<sup>2</sup> from the date of receipt<sup>3</sup> (in the case of baggage) or 14 days from the date of receipt (in the case of cargo)<sup>4</sup>. In the case of delay, the complaint must be made at the latest within 21 days from the date on which the baggage or cargo has been placed at the carrier's disposal<sup>5</sup>. Failing complaint within these time limits, no action lies against the carrier, save in the case of fraud on his part<sup>6</sup>.

Every complaint must be made in writing<sup>7</sup> and dispatched within the times aforesaid<sup>8</sup>.

1 References to 'damage' in these provisions include loss of part of the baggage or cargo in question: Carriage by Air Act 1961 s 4A (added by the Carriage by Air and Road Act 1979 s 2; and amended by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2). See *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, 1 S & B Av R 1/9, HL.

2 As to the meaning of 'days' see PARA 151 note 10.

3 In relation to the loss of part of the baggage or cargo reference to 'receipt' means receipt of the remainder of it: Carriage by Air Act 1961 s 4A (as added and amended: see note 1).

4 Unamended Warsaw Convention art 26.2; Warsaw-MP1 Convention art 26.2; Warsaw-Hague Convention art 26.2; Warsaw-Hague-MP4 Convention art 26.2; Montreal Convention art 31.2. The time limits stated in the text are those which apply for the purposes of the Warsaw-Hague, Warsaw-Hague-MP4 and Montreal Conventions: where the Unamended Warsaw Convention or the Warsaw-MP 1 Convention applies, the applicable time limits are three days for baggage and seven days for cargo: Unamended Warsaw Convention art 26.2; Warsaw-MP 1 Convention art 26.2. As to the meaning of 'baggage' under the Montreal Convention see PARA 139 note 2: article 31 specifically refers to 'checked baggage'. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

5 Unamended Warsaw Convention art 26.2; Warsaw-MP1 Convention art 26.2; Warsaw-Hague Convention art 26.2; Warsaw-Hague-MP4 Convention art 26.2; Montreal Convention art 31.2. The time limits stated in the text are those which apply for the purposes of the Warsaw-Hague, Warsaw-Hague-MP4 and Montreal Conventions: where the Unamended Warsaw Convention or the Warsaw-MP 1 Convention applies, the applicable time limit for delay is 14 days: Unamended Warsaw Convention art 26.2; Warsaw-MP 1 Convention art 26.2.

6 Unamended Warsaw Convention art 26.4; Warsaw-MP1 Convention art 26.4; Warsaw-Hague Convention art 26.4; Warsaw-Hague-MP4 Convention art 26.4; Montreal Convention art 31.4. 'Fraud', it is thought, refers to fraudulent concealment of the damage or of the right of action: cf *Denby v Seaboard World Airlines Inc* 737 F 2d 172 (2nd Cir, 1984).

7 The various versions of the Warsaw Convention specify that the complaint may be written upon the document of carriage or made by separate notice in writing: Unamended Warsaw Convention art 26.3; Warsaw-MP1 Convention 26.3; Warsaw-Hague Convention 26.3; Warsaw-Hague-MP4 Convention 26.3.

8 Unamended Warsaw Convention art 26.3; Warsaw-MP1 Convention art 26.3; Warsaw-Hague Convention art 26.3; Warsaw-Hague-MP4 Convention art 26.3; Montreal Convention art 31.3. The test for the adequacy of a complaint is an objective one: *Western Digital Corp v British Airways plc* [2001] QB 733, [2001] 1 All ER 109, CA. As to the requirements of a notice see also *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, 1 S & B Av R 1/9, HL.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/164. Limitation of actions.

### 164. Limitation of actions.

The right to damages is extinguished<sup>1</sup> if either a claim or arbitral proceedings are not brought within two years<sup>2</sup>, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived or on which the carriage stopped<sup>3</sup>. The same limitation applies to any claim or arbitral proceeding against or involving the servant or agent of a carrier<sup>4</sup> which arises out of damage to which the Montreal or Warsaw Convention relates, provided the servant or agent was acting within the scope of his employment<sup>5</sup>.

The two years' rule must not be read as applying to any proceedings for contribution between persons liable for any damage to which any of the Conventions relate<sup>6</sup>; however, no claim or arbitral proceeding may be brought by a person to obtain contribution from a carrier<sup>7</sup> in respect of a tort to which the above-mentioned rule applies, after the expiration of two years reckoned as set out above<sup>8</sup>.

The method of calculating the limitation period is determined by the law of the court seised of the case<sup>9</sup>.

1 See *Aries Tanker Corp v Total Transport Ltd, The Aries* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; *The Nordglimt* [1988] 1 QB 183, [1988] 2 All ER 531; *Proctor v Jetway Aviation* [1982] 2 NSWLR 264 (revsd on other grounds [1984] 1 NSWLR 166, NSW CA). For an example of a right to damages being extinguished see eg *Phillips v Air New Zealand Ltd* [2002] EWHC 800 (Comm), [2002] 1 All ER (Comm) 801, [2002] 2 Lloyd's Rep 408.

2 This period may not be suspended or extended for any reason, since the provisions of the Limitation Act 1980 are inapplicable by virtue of s 39 (see **LIMITATION PERIODS** vol 68 (2008) PARA 918).

3 Unamended Warsaw Convention art 29.1; Warsaw-MP1 Convention 29.1; Warsaw-Hague Convention 29.1; Warsaw-Hague-MP4 Convention 29.1; Montreal Convention art 35.1; Carriage by Air Act 1961 s 5(3), (4) (s 5(3) amended by the Arbitration Act 1996 Sch 3 para 13(2); and by SI 2002/263; Carriage by Air Act 1961 s 5(4) added by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, arts 5(3), 6(3). The Arbitration Act 1996 s 14 (see **ARBITRATION** vol 2 (2008) PARA 1219) applies to determine when arbitral proceedings are commenced: Carriage by Air Act 1961 s 5(3) (as so amended). As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

4 Ie an actual carrier or a contracting carrier: Carriage by Air Act 1961 s 5(5) (added by SI 2002/263); Carriage by Air (Supplementary Provisions) Act 1962 s 3(2) (amended by SI 2002/263). As to actual and contracting carriers, and liability where carriage is performed by a person other than the contracting carrier, see PARA 131.

5 Carriage by Air Act 1961 s 5(1) (amended by SI 2002/263).

6 Carriage by Air Act 1961 s 5(2) (amended by the Limitation Act 1963 s 4(4); the Civil Liability (Contribution) Act 1978 Sch 1 para 5(2); and SI 2002/263).

7 See note 4.

8 See the Civil Liability (Contribution) Act 1978 s 1(3); and **DAMAGES** vol 12(1) (Reissue) PARA 843.

9 Unamended Warsaw Convention art 29.2; Warsaw-MP1 Convention art 29.2; Warsaw-Hague Convention art 29.2; Warsaw-Hague-MP4 Convention art 29.2; Montreal Convention art 35.2.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/165. Claims against contracting parties.

### **165. Claims against contracting parties.**

Every contracting party to the Warsaw and Montreal Conventions<sup>1</sup> which has not declared that the provisions of those Conventions are not to apply to international carriage by air performed by it<sup>2</sup> is deemed, for the purpose of any action brought in a court in the United Kingdom<sup>3</sup> in accordance with the provisions as to jurisdiction<sup>4</sup> to enforce a claim in respect of carriage undertaken by him, to have submitted to the jurisdiction of that court<sup>5</sup>. Rules of court provide for the procedure on such a claim<sup>6</sup>, but this does not authorise the issue of execution against the property of any contracting party<sup>7</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. As to the parties to the Conventions see PARA 123.

2 Ie which has not availed itself of the Additional Protocol to the Warsaw Convention or the Montreal Convention art 57: see PARA 132.

3 As to the United Kingdom see PARA 96 note 1.

4 Ie the Unamended Warsaw Convention art 28, the Warsaw-MP1 Convention art 28, the Warsaw-Hague Convention art 28, the Warsaw-Hague-MP4 Convention art 28, the Guadalajara Convention art VIII or the Montreal Convention arts 33 and 57: see PARA 162. As to the Guadalajara Convention see PARA 121.

5 Carriage by Air Act 1961 s 8(1), (4)-(6) (s 8 substituted by SI 2002/263); Carriage by Air (Supplementary Provisions) Act 1962 s 3(3) (amended by SI 1999/1312); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, arts 5(4), 6(4).

6 See CPR r 6.27 (made under the Carriage by Air Act 1961 s 8(2) (as substituted: see note 5)); and **CIVIL PROCEDURE**.

7 Carriage by Air Act 1961 s 8(3) (as substituted: see note 5).

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### **166. Claims against actual and contracting carriers.**

In relation to carriage performed by an actual carrier<sup>1</sup>, a claim for damages may be brought, at the claimant's option, against that carrier or against the contracting carrier<sup>2</sup>, or against both together or separately<sup>3</sup>. If the claim is brought against only one of those carriers, that carrier has the right to require the other to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case<sup>4</sup>.

- 1 As to the meaning of 'actual carrier' see PARA 131 note 1.
- 2 As to the meaning of 'contracting carrier' see PARA 131 note 1.
- 3 Guadalajara Convention art VII; Montreal Convention art 45. As to the Montreal and Warsaw Conventions and the Guadalajara Convention (which supplements earlier versions of the Warsaw Convention) see PARA 121; as to air carrier liability under the Conventions see PARA 122. Any complaint to be made or order or instruction to be given under the Montreal and Warsaw Conventions has the same effect whether it is addressed to the actual or contracting carrier: Guadalajara Convention art IV; Montreal Convention art 42.
- 4 Guadalajara Convention art VII; Montreal Convention art 45.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/167. Claims in cases of successive carriage.

### **167. Claims in cases of successive carriage.**

In cases where carriage is to be performed by various successive air carriers<sup>1</sup> a passenger or his representative (or, in Montreal Convention cases, any person entitled to compensation) can take action, in case of injury, death or delay, only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey<sup>2</sup>. As regards baggage or cargo, the passenger or consignor has a right of action against the first carrier, and the passenger or consignee who is entitled to delivery has a right of action against the last carrier and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place, these carriers being jointly and severally liable to the passenger or to the consignor or consignee<sup>3</sup>.

1 le for the purposes of the Warsaw or Montreal Convention: see the Unamended Warsaw Convention arts 1.3, 30.1, the Warsaw-MP1 Convention arts 1.3, 30.1, the Warsaw-Hague Convention arts 1.3, 30.1, the Warsaw-Hague-MP4 Convention arts 1.3, 30.1 and the Montreal Convention arts 1.3, 36.1; and PARA 129. As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 Unamended Warsaw Convention art 30.2; Warsaw-MP1 Convention art 30.2; Warsaw-Hague Convention art 30.2; Warsaw-Hague-MP4 Convention art 30.2; Montreal Convention art 36.2.

3 Unamended Warsaw Convention art 30.3; Warsaw-MP1 Convention art 30.3; Warsaw-Hague Convention art 30.3; Warsaw-Hague-MP4 Convention art 30.3; Montreal Convention art 36.3. As to when the consignee has the right to delivery see PARA 159.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/168. Advance payments under the Montreal Convention.

### **168. Advance payments under the Montreal Convention.**

A Community air carrier<sup>1</sup> under the Montreal Convention<sup>2</sup> must without delay, and in any event not later than 15 days after the identity of the natural person entitled to compensation<sup>3</sup> has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered<sup>4</sup>. In the event of death the advance payment must not be less than the equivalent in euro of 16,000 special drawing rights<sup>5</sup> per passenger<sup>6</sup>. An advance payment does not constitute recognition of liability and may

be offset against any subsequent sums paid on the basis of a Community air carrier being liable<sup>7</sup>: however it is only returnable if the carrier is exonerated wholly or partly from his liability in accordance with applicable law on the basis that the damage was caused, or contributed to, by the negligence of the injured or deceased passenger<sup>8</sup> or if the person who received the advance payment was not the person entitled to the compensation<sup>9</sup>.

There are no corresponding provisions in respect of accidents governed by the Warsaw Convention.

1 As to the meanings of 'air carrier' and 'Community air carrier' see PARA 122 note 1.

2 As to the Montreal Convention see PARA 121; as to air carrier liability under the Convention see PARA 122.

3 As to the meaning of 'person entitled to compensation' see PARA 134 note 4.

4 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, art 5.1 (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)), implementing the Montreal Convention art 28 (which provides that in the case of aircraft accidents governed by the Montreal Convention which result in death of or injury to passengers, the carrier must, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons).

5 As to special drawing rights see PARA 155 note 4.

6 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 5.2 (as substituted: see note 4). As to the meaning of 'passenger' see PARA 150 note 5.

7 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 5.3 (as substituted: see note 4); Montreal Convention art 28.

8 Ie in the cases prescribed by the Montreal Convention art 20 (see PARA 171).

9 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 5.3 (as substituted: see note 4).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/169. Defence of all necessary measures under the Warsaw Convention.

### **169. Defence of all necessary measures under the Warsaw Convention.**

The carrier can escape from the liabilities imposed upon him by the Warsaw Convention, but not the Montreal Convention<sup>1</sup>, if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures<sup>2</sup>. This exclusion is refined by the Warsaw-Hague-MP4 Convention so that it applies only in the case of passengers and baggage and in the case of damage occasioned by delay in the carriage of cargo<sup>3</sup>, while earlier versions of the Convention additionally provide that the carrier is not liable in the carriage of cargo and baggage if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that in all other respects he and his servants and agents have taken all necessary measures to avoid the damage<sup>4</sup>.

1 As to the Warsaw and Montreal Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 Unamended Warsaw Convention art 20.1; Warsaw-MP1 Convention art 20.1; Warsaw-Hague Convention art 20; Warsaw-Hague-MP4 Convention art 20. As to the meaning of these provisions see *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 69-71, [1936] 2 All ER 1258 at 1274-1276, CA, per Greer LJ; *Chisholm v British*

*European Airways* [1963] 1 Lloyd's Rep 626; *Goldman v Thai Airways International Ltd* (1981) 125 Sol Jo 413 (revsd on other grounds [1983] 3 All ER 693, [1983] 1 WLR 1186, 1 S & B Av R VII/101, CA); *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

3 Warsaw-Hague-MP4 Convention art 20.

4 Unamended Warsaw Convention art 20.2; Warsaw-MP1 Convention art 20.2.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/170. Right of recourse of person liable.

### **170. Right of recourse of person liable.**

The Montreal Convention and the Warsaw-Hague-MP 4 Convention (but not earlier versions of the Warsaw Convention)<sup>1</sup> each provide that nothing in those Conventions prejudices the question whether a person liable for damage in accordance with their provisions has a right of recourse against any other person<sup>2</sup>.

1 As to the Montreal and Warsaw Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

2 Warsaw-Hague-MP4 Convention art 30A; Montreal Convention art 37.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/171. Contributory negligence and exoneration.

### **171. Contributory negligence and exoneration.**

Under the Montreal Convention, and under the Warsaw-Hague-MP4 Convention so far as relating to the carriage of cargo<sup>1</sup>, if the carrier proves<sup>2</sup> that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier may be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage<sup>3</sup>. The Montreal Convention further provides that when by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier may likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger<sup>4</sup>.

A more limited version of this exclusion applies for the purposes of the Warsaw-Hague-MP4 Convention so far as relating to the carriage of passengers and baggage and for the general purposes of earlier versions of the Warsaw Convention, under all of which it is provided that if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability<sup>5</sup>.

1 As to the Warsaw and Montreal Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122. The Montreal Convention specifies that the exclusion for contributory negligence (ie the text and notes 2-3) applies to all the liability provisions contained in the Convention, including art 21.1 (as to which see

PARA 155); the Warsaw-Hague-MP4 Convention specifies that the exclusion applies only in the carriage of cargo: Montreal Convention art 20; Warsaw-Hague-MP4 Convention art 21.2,

2 The carrier has the burden of proof: *Rustenburg Platinum Mines Ltd v South African Airways* [1977] 1 Lloyd's Rep 564; affd [1979] 1 Lloyd's Rep 19, CA.

3 Montreal Convention art 20. For these purposes and the purposes of the corresponding provisions of the Warsaw Convention (see the text and note 5), the Law Reform (Contributory Negligence) Act 1945, including that Act as applied to Scotland, and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948 s 2, are provisions of the law of the United Kingdom under which a court may exonerate the carrier wholly or in part from its liability: Carriage by Air Act 1961 s 6 (amended by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2). As to the Law Reform (Contributory Negligence) Act 1945 see **NEGLIGENCE** vol 78 (2010) PARA 75 et seq. See also *Goldman v Thai Airways International Ltd* (1981) 125 Sol Jo 413; revsd on other grounds [1983] 3 All ER 693, [1983] 1 WLR 1186, 1 S & B Av R VII/101, CA.

4 Montreal Convention art 20.

5 Unamended Warsaw Convention art 21; Warsaw-MP1 Convention art 21; Warsaw-Hague Convention art 21; Warsaw-Hague-MP4 Convention art 21.1.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(2) INTERNATIONAL CARRIAGE/(iv) Claims and Proceedings/172. Death of person liable.

## **172. Death of person liable.**

In the case of the death of the person liable<sup>1</sup>, a claim for damages lies in accordance with the terms of the Montreal or Warsaw Convention, as the case may be<sup>2</sup>, against those legally representing his estate<sup>3</sup>.

1 lie under the provisions imposing liability for injury to or death of passengers (see PARA 150), for loss of or damage to baggage or cargo (see PARAS 151-152), and for delay (see PARA 153).

2 As to the Warsaw and Montreal Conventions see PARA 121; as to air carrier liability under the Conventions see PARA 122.

3 Unamended Warsaw Convention art 27; Warsaw-MP1 Convention art 27; Warsaw-Hague Convention art 27; Warsaw-Hague-MP4 Convention art 27; Montreal Convention art 32. See also the Law Reform (Miscellaneous Provisions) Act 1934 s 1(5); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 817.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(i) Documents of Carriage/173. Information to be given relating to EC flights.

## **(3) CARRIAGE WITHIN THE UNITED KINGDOM**

### **(i) Documents of Carriage**

#### **173. Information to be given relating to EC flights.**

All air carriers<sup>1</sup> selling carriage by air in the European Community must ensure that a summary of the main provisions governing liability for passengers and their baggage<sup>2</sup>, including deadlines for filing an action for compensation<sup>3</sup> and the possibility of making a special declaration for baggage<sup>4</sup>, is made available to passengers at all points of sale, including sale by

telephone and via the Internet<sup>5</sup>. In addition, all air carriers must in respect of carriage by air provided or purchased in the Community provide each passenger with a written indication of:

- 109 (1) the applicable limit for that flight on the carrier's liability in respect of death or injury, if such a limit exists<sup>6</sup>;
- 110 (2) the applicable limit for that flight on the carrier's liability in respect of destruction, loss of or damage to baggage and a warning that baggage greater in value than this figure should be brought to the airline's attention at check-in or fully insured by the passenger prior to travel<sup>7</sup>; and
- 111 (3) the applicable limit for that flight on the carrier's liability for damage occasioned by delay<sup>8</sup>.

In the case of all carriage performed by Community air carriers, the limits indicated in accordance with these provisions must be those established under the Montreal Convention<sup>9</sup> unless the Community air carrier applies higher limits by way of voluntary undertaking<sup>10</sup>. In the case of all carriage performed by non-Community air carriers, these provisions apply only in relation to carriage to, from or within the Community<sup>11</sup>.

An air carrier that fails to comply with any of these requirements is guilty of an offence unless he proves that the failure to do so occurred without his consent or connivance and that he exercised all due diligence to prevent the failure<sup>12</sup>.

1 As to the meaning of 'air carrier' see PARA 122 note 1.

2 As to these see PARA 176 et seq. As to the meaning of 'baggage' see PARA 139 note 2.

3 As to the applicable deadlines see PARA 185.

4 As to the making of a special declaration for baggage see PARA 182.

5 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, art 6.1 (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)). In order to comply with this requirement, Community air carriers must use the notice contained in EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1), Annex (as so substituted): art 6.1 (as so substituted). Such summary or notice cannot be used as a basis for a claim for compensation, nor to interpret the provisions of EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) or the Montreal Convention: EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.1 (as so substituted). As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128. As to the meaning of 'Community air carrier' see PARA 122 note 1.

6 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.2(a) (as substituted: see note 5). As to the applicable limit on the carrier's liability in respect of death or injury see PARA 176.

7 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.2(b) (as substituted: see note 5). As to the applicable limit on the carrier's liability in respect of destruction, loss of or damage to baggage see PARA 177.

8 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.2(c) (as substituted: see note 5). As to the applicable limit for delay see PARA 179.

9 In accordance with the application of the Montreal Convention to all Community air carriers under EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 3.1: see PARA 122.

10 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.3 (as substituted: see note 5).

11 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 6.3 (as substituted: see note 5).

12 Air Carrier Liability Regulations 2004, SI 2004/1418, reg 3(2). As to the punishment of offences see PARA 139 note 12.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(i) Documents of Carriage/174. Baggage identification tags.

#### **174. Baggage identification tags.**

The carrier must deliver to the passenger a baggage identification tag for each piece of checked baggage<sup>1</sup>, although non-compliance with this provision does not affect the existence or the validity of the contract of carriage and the carriage is accordingly subject to the rules of the Montreal Convention<sup>2</sup>.

1 Montreal Convention art 3.3. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128. As to the meaning of 'baggage' see PARA 139 note 2.

2 Montreal Convention art 3.5. See *Preston v Hunting Air Transport Ltd* [1956] 1 QB 454, [1956] 1 All ER 443, decided under the Carriage by Air Act 1932 (repealed). An actual carrier is not obliged to deliver a baggage check if the contracting carrier has done so, as the acts and omissions of either the contracting carrier or of the actual carrier are deemed to be acts and omissions of the other: Montreal Convention art 41.2; and see PARA 131.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(i) Documents of Carriage/175. The Uniform Customs and Practice for Documentary Credits.

#### **175. The Uniform Customs and Practice for Documentary Credits.**

Commercial letters of credit (that is, bank undertakings to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit) generally incorporate the Uniform Customs and Practice for Documentary Credits (UCP), which make specific provision in connection with the content of air transport documents<sup>1</sup>. Letters of credit are normally used in international trade but there is nothing in the UCP barring their use in trade transactions within the United Kingdom, in which case the requirements of the UCP regarding air transport documents apply.

1 See the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600) art 23; and PARA 149. As to the nature and operation of credits generally and under the Uniform Customs and Practice for Documentary Credits see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 923-966.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(ii) Carriers' Liability/A. LIABILITY FOR DEATH, INJURY, LOSS, DAMAGE OR DELAY/176. Liability for death of or injury to passengers.

#### **(ii) Carriers' Liability**

##### **A. LIABILITY FOR DEATH, INJURY, LOSS, DAMAGE OR DELAY**

#### **176. Liability for death of or injury to passengers.**

The carrier<sup>1</sup> is liable<sup>2</sup> for damage<sup>3</sup> sustained in the event of the death or wounding of a passenger or any other bodily injury<sup>4</sup> suffered by a passenger<sup>5</sup> if the accident<sup>6</sup> which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking<sup>7</sup>. Any such occurrence which leads to a passenger's death and gives rise to a claim is treated as a wrongful act, neglect or default within the meaning of the Fatal Accidents Act 1976<sup>8</sup>, and is governed by the system of that Act<sup>9</sup>. Damages in excess of the statutory limit may not be recovered<sup>10</sup>.

1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; and as to who should be sued see PARAS 187-188.

2 For exoneration see PARA 191; for limitations on the damages which may be payable see PARAS 180-181.

3 As to the meaning of 'damage' see PARA 150 note 3.

4 As to 'bodily injury' see PARA 150 note 4.

5 As to the meaning of 'passenger' see PARA 150 note 5.

6 As to an 'accident' see PARA 150 note 6.

7 Montreal Convention art 17.1. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128. This is an exclusive cause of action: see PARA 184. As to whether a passenger is 'in the course of any of the operations of embarking or disembarking' see PARA 150 note 7.

8 See the Fatal Accidents Act 1976 s 1; and **NEGLIGENCE** vol 78 (2010) PARAS 25-27.

9 Carriage by Air Act 1961 s 3 (s 3 amended, s 4(1) added, s 4(1A) substituted, by SI 2002/263); Fatal Accidents Act 1976 Sch 1 para 2; Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(2). See also the Law Reform (Miscellaneous Provisions) Act 1934; and **NEGLIGENCE** vol 78 (2010) PARA 24.

10 See the Montreal Convention arts 21, 22; and PARAS 181-183.

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### **177. Liability for loss of or damage to baggage.**

A carrier<sup>1</sup> is liable for damage sustained in the event of the destruction or loss of, or of damage to, checked baggage<sup>2</sup> upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the carrier's charge<sup>3</sup>, and extends to unchecked baggage, including personal items, if the damage resulted from the carrier's fault or that of his servants or agents<sup>4</sup>. The carrier is not, however, liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage<sup>5</sup>. If the carrier admits the loss of checked baggage, or if the checked baggage has not arrived at the expiration of 21 days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage<sup>6</sup>.

Receipt by the person entitled to delivery of checked baggage without complaint is prima facie evidence that the same has been delivered in good condition<sup>7</sup>.

- 1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; as to who should be sued see PARAS 187-188.
- 2 As to the meaning of 'baggage' see PARA 139 note 2.
- 3 As to whether something is 'in the charge of the carrier' see PARA 151 note 4.
- 4 Montreal Convention art 17.2. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128. This is an exclusive cause of action: see PARA 184. As to who may bring such an action see *Western Digital Corp v British Airways plc* [2001] QB 733, [2001] 1 All ER 109, CA. For requirements as to notice of complaint see PARA 185; for defences available to the carrier, and exoneration, see PARA 191; for limitations on the damages which may be payable see PARA 182.
- 5 Montreal Convention art 17.2.
- 6 Montreal Convention art 17.3. As to 'days' see PARA 151 note 10.
- 7 Montreal Convention art 31.1, as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (10).

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### **178. Liability for loss of or damage to cargo.**

A carrier<sup>1</sup> is liable for damage sustained in the event of the destruction or loss of, or of damage to, cargo that occurs in the course of the carriage by air<sup>2</sup>. The carrier's liability extends to all destruction, damage or loss occurring in the period during which the cargo is in his charge<sup>3</sup>, but does not extend to any carriage by land, by sea or by river or inland waterway performed outside an airport, although if such a carriage takes place in the performance of a contract for carriage by air for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air<sup>4</sup>. The carrier is not, however, liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of:

- 112 (1) inherent defect, quality, or vice of that cargo<sup>5</sup>;
- 113 (2) defective packing of that cargo performed by a person other than the carrier or his servants or agents<sup>6</sup>;
- 114 (3) an act of war or an armed conflict<sup>7</sup>; or
- 115 (4) an act of a public authority carried out in connection with the entry, exit or transit of the cargo<sup>8</sup>.

Receipt by the person entitled to delivery of cargo without complaint is prima facie evidence that the same has been delivered in good condition<sup>9</sup>.

- 1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; and as to who should be sued see PARAS 187-188.
- 2 Montreal Convention art 18.1. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128. This is an exclusive cause of action: see PARA 184. For requirements as to notice of complaint see PARA 185; for defences available to the carrier, and exoneration, see PARA 191; for limitations on the damages which may be payable see PARA 182.

3 Montreal Convention art 18.3. As to whether something is 'in the charge of the carrier' see PARA 151 note 4.

4 Montreal Convention art 18.4. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air: art 18.4.

5 Montreal Convention art 18.2(a).

6 Montreal Convention art 18.2(b).

7 Montreal Convention art 18.2(c).

8 Montreal Convention art 18.2(d).

9 Montreal Convention art 31.1; Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (10).

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### **179. Liability for delay.**

The carrier<sup>1</sup> is liable for damage occasioned by delay<sup>2</sup> in the carriage by air<sup>3</sup> of passengers, baggage<sup>4</sup> or cargo unless he proves that he and his servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for him or them to take such measures<sup>5</sup>.

1 As to who is the carrier, and the distinction between the actual and contracting carrier, see PARA 131; and as to who should be sued see PARAS 187-188.

2 As to when liability for delay arises under these provisions see PARA 153 note 2.

3 As to 'carriage by air' in this context see PARA 153 note 3.

4 As to the meaning of 'baggage' see PARA 139 note 2.

5 Montreal Convention art 19. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128. As to the meaning of the defence referred to in art 19 see PARA 153 note 6. For requirements as to notice of complaint see PARA 185; for defences available to the carrier, and exoneration, see PARA 191; for limitations on the damages which may be payable see PARA 182.

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## ***B. LIMITATION OF LIABILITY***

### **180. Limitation of liability generally.**

The maximum liabilities of a carrier in respect of death or injury to passengers, loss or damage to baggage and cargo, and delay are specified in the Montreal Convention<sup>1</sup>. The specified limits

apply to liability incurred whatever the nature of the proceedings by which liability may be enforced<sup>2</sup>. Pursuant to the establishment of the limits, punitive, exemplary or any other non-compensatory damages are not recoverable<sup>3</sup>, although this does not prevent the court<sup>4</sup> from awarding, in accordance with its own law and in addition to the established limits, the whole or part of the court costs and of the other expenses of the litigation incurred by the claimant<sup>5</sup>. The carrier may stipulate that the contract of carriage is to be subject to higher limits of liability than those provided for in the Convention or to no limits of liability whatsoever<sup>6</sup>.

In relation to carriage performed by a person other than the contracting carrier<sup>7</sup>, no act or omission of the contracting carrier will subject the actual carrier to liability exceeding the limits laid down in the Convention, and no special agreement or waiver of rights by the contracting carrier, or special declaration, will affect the actual carrier unless agreed by him<sup>8</sup>. If a claim is brought against an actual or contracting carrier's servant or agent the servant or agent is entitled, if he proves that he was acting within the scope of his employment, to invoke the provisions of the Convention limiting the carrier's liability applicable to the carrier whose servant he is, and in these circumstances the aggregate of the amounts recoverable from the carrier and his servants and agents, may not exceed the limits provided for by the Convention<sup>9</sup>.

1 See the Montreal Convention arts 21-23; and PARAS 181-183. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128.

2 See the Carriage by Air Act 1961 s 4(1), (1A); and PARA 181.

3 See the Montreal Convention art 29; and PARA 184.

4 As to the meaning of 'court' see PARA 154 note 5.

5 Montreal Convention art 22.6. These provisions enable the awarding of costs and expenses only if the amount of the damages awarded, excluding court costs and other expenses of the litigation, exceeds the sum which the carrier has offered in writing to the claimant within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later: art 22.6. Interest is included: art 22.6. As to the application of these provisions see *GKN Westland Helicopters Ltd v Korean Air* [2003] EWHC 1102 (Comm), [2003] 2 All ER (Comm) 578, [2003] 2 Lloyd's Rep 629.

6 Montreal Convention art 25.

7 As to carriage performed by a person other than the contracting carrier see PARA 131.

8 Montreal Convention art 41.2.

9 Montreal Convention arts 30.1, 30.2, 43, 44. The limit of liability under the Convention may not be invoked if it is proved that the servant or agent acted in a manner which, under the Convention, excludes the limitation of liability by the carrier: arts 30.3, 43.

A court before which proceedings are brought to enforce a liability limited by art 44 may, at any stage of the proceedings and of any other proceedings, make any such order as appears to it to be just and equitable in view of the Montreal Convention and of any other proceedings which have been, or are likely to be, commenced to enforce the liability in whole or in part: Carriage by Air Act 1961 s 4(2), (3A) (s 4(3A) as so added); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(1). Without prejudice to this, when liability is, or may be, enforceable in other proceedings in the United Kingdom or elsewhere, the court may award an amount less than the amount which it would have awarded if the limitation applied solely to the proceedings before it, or make any part of its award conditional on the result of any other proceedings: Carriage by Air Act 1961 s 4(3), (3A) (as so amended and added); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(1). As to the United Kingdom see PARA 96 note 1.

### **181. Limitation of liability in respect of passengers.**

The carrier cannot exclude or limit his liability in respect of the death of or bodily injury<sup>1</sup> to a passenger<sup>2</sup> where the damages so arising do not exceed 100,000 special drawing rights<sup>3</sup>. However, the carrier is not liable for damages exceeding this sum if he proves that such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents or that it was solely due to the negligence or other wrongful act or omission of a third party<sup>4</sup>. In the case of delay in the carriage of persons<sup>5</sup>, the liability of the carrier is limited to 4,150 special drawing rights for each passenger<sup>6</sup>.

The limitations on liability described above apply whatever the nature of the proceedings by which liability may be enforced; in particular they apply to the carrier's aggregate liability in all proceedings brought against him under the law of any part of the United Kingdom together with any proceedings brought against him elsewhere<sup>7</sup>. However, the carrier may stipulate that the contract of carriage is to be subject to higher limits of liability or to no limits of liability whatsoever<sup>8</sup>.

1 As to 'bodily injury' see PARA 150 note 4.

2 The liability arising under the Montreal Convention art 17.1: see PARA 176. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128. As to a 'passenger' see PARA 150 note 5.

3 Montreal Convention art 21.1. As to the limitation of a carrier's liability generally, including provision as to costs and other expenses of litigation, see PARA 180. As to 'special drawing rights' in the context of United Kingdom-only flights see the Montreal Convention art 23, as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I paras (6)-(8).

4 Montreal Convention art 21.2.

5 The under the Montreal Convention art 19: see PARA 179.

6 Montreal Convention art 22.1.

7 Carriage by Air Act 1961 s 4(1), (1A) (s 4(1) substituted, s 4(1A), (1B), (3A) added, s 4(3) amended, by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(1). See further PARA 180 note 9.

8 Montreal Convention art 25.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(ii) Carriers' Liability/B. LIMITATION OF LIABILITY/182. Limitation of liability for baggage and cargo.

### **182. Limitation of liability for baggage and cargo.**

The liability of the carrier in the case of destruction, loss, damage or delay to baggage<sup>1</sup> is limited to 1,000 special drawing rights<sup>2</sup> for each passenger<sup>3</sup> and the liability of the carrier in the case of destruction, loss, damage or delay to cargo is limited to 17 special drawing rights per kilogram<sup>4</sup>. These limitations will, however, be displaced if the passenger or consignor has made, at the time when the baggage or cargo was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires<sup>5</sup>, in which case the carrier will be liable to pay a sum not exceeding the declared sum unless it proves that that sum is greater than the passenger or consignor's actual interest in delivery at destination<sup>6</sup>.

The limitations on liability described above apply whatever the nature of the proceedings by which liability may be enforced; in particular they apply to the carrier's aggregate liability in all proceedings brought against him under the law of any part of the United Kingdom together with any proceedings brought against him elsewhere<sup>7</sup>. However, the carrier may stipulate that the contract of carriage is to be subject to higher limits of liability or to no limits of liability whatsoever<sup>8</sup>.

1 As to the meaning of 'baggage' see PARA 139 note 2.

2 As to 'special drawing rights' in the context of United Kingdom-only flights see the Montreal Convention art 23, as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I paras (6)-(8). As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128.

3 Montreal Convention art 22.2. As to a 'passenger' see PARA 150 note 5. For the loss of the carrier's right to limit liability see PARA 183.

4 Montreal Convention art 22.3. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited is only the total weight of the package or packages concerned; nevertheless, when the destruction, loss, damage or delay of part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or any alternative record, the total weight of such package or packages will also be taken into consideration in determining the limit of liability: art 22.4, as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (5). See also the Warsaw Convention cases cited in PARA 156 note 8.

5 The supplementary sum which in accordance with the Montreal Convention art 22.2 may be demanded by a Community air carrier when a passenger makes a special declaration of interest in delivery of their baggage at destination, must be based on a tariff which is related to the additional costs involved in transporting and insuring the baggage concerned over and above those for baggage valued at or below the liability limit: EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, art 3a (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)). The tariff must be made available to passengers on request (EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 3a (as so substituted)), and a Community air carrier that fails to make the tariff available is guilty of an offence unless he proves that the failure to do so occurred without his consent or connivance and that he exercised all due diligence to prevent the failure (Air Carrier Liability Regulations 2004, SI 2004/1418, reg 3(1)). As to the punishment of offences see PARA 139 note 12. As to the meanings of 'air carrier' and 'Community air carrier' see PARA 122 note 1. As to the meanings of 'special declaration' and 'supplementary' see PARA 156 note 9.

6 Montreal Convention arts 22.2, 22.3.

7 Carriage by Air Act 1961 s 4(1), (1A) (s 4(1) substituted, s 4(1A), (1B), (3A) added, s 4(3) amended, by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(1). See further PARA 180 note 9.

8 Montreal Convention art 25.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(ii) Carriers' Liability/B. LIMITATION OF LIABILITY/183. Loss of carrier's right to limit liability.

### **183. Loss of carrier's right to limit liability.**

The carrier will lose his right to limit his liability for damage caused by delay to passengers<sup>1</sup> and the destruction, loss, damage or delay of baggage<sup>2</sup> if it is proved that the damage resulted from an act or omission of the carrier<sup>3</sup>, his servants or agents<sup>4</sup>, done with intent to cause damage<sup>5</sup> or recklessly and with knowledge<sup>6</sup> that damage would probably result<sup>7</sup>.

1 See the Montreal Convention art 22.1; and PARA 181. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the forms of carriage to which the Convention applies and does not apply see PARAS 127-128.

2 See the Montreal Convention art 22.2; and PARA 182. In respect of cargo the limitation of liability under the Montreal Convention cannot be broken.

3 In relation to carriage by an actual carrier, the carrier may be the actual carrier or the contracting carrier, but no act or omission of the contracting carrier, his servants or agents, may subject the actual carrier to liability exceeding the specified limits: see the Montreal Convention art 41; and PARA 131.

4 In the case of a servant or agent it must also be proved that the servant or agent was acting within the scope of his employment: Montreal Convention art 22.5. As to course of employment see *Rustenberg Platinum Mines Ltd v South African Airways* [1979] 1 Lloyd's Rep 19, CA.

5 As to 'damage' see PARAS 150 note 3, 157 note 4.

6 As to 'with knowledge' see PARA 157 note 5.

7 Montreal Convention art 22.5.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/184. Basis of claims.

### **(iii) Claims and Proceedings**

#### **184. Basis of claims.**

In the carriage of passengers, baggage and cargo, any action for damages under the Montreal Convention<sup>1</sup>, however founded (whether under the Convention or in contract or in tort or otherwise), can only be brought subject to the conditions and such limits of liability as are set out in the Convention<sup>2</sup>. This is without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights<sup>3</sup>.

1 As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122.

2 Montreal Convention art 29. Punitive, exemplary or any other non-compensatory damages are not recoverable: art 29.

3 Montreal Convention art 29. As to who has the right to claim in respect of cargo and baggage see PARA 185.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/185. Time limits and method for making complaints of damage or delay to baggage or cargo.

#### **185. Time limits and method for making complaints of damage or delay to baggage or cargo.**

In the case of damage<sup>1</sup> to baggage or cargo, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage and at the latest within seven days<sup>2</sup> from the date of receipt<sup>3</sup> (in the case of baggage) or 14 days from the date of receipt (in the

case of cargo)<sup>4</sup>. In the case of delay, the complaint must be made at the latest within 21 days from the date on which the baggage or cargo has been placed at the carrier's disposal<sup>5</sup>. Failing complaint within these time limits, no action lies against the carrier, save in the case of fraud on his part<sup>6</sup>.

Every complaint must be made in writing and dispatched within the times aforesaid<sup>7</sup>.

1 References to 'damage' in these provisions include loss of part of the baggage or cargo in question: Carriage by Air Act 1961 s 4A (added by the Carriage by Air and Road Act 1979 s 2; and amended by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(1). See *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, 1 S & B Av R 1/9, HL.

2 As to the meaning of 'days' see PARA 151 note 10.

3 In relation to the loss of part of the baggage or cargo reference to 'receipt' means receipt of the remainder of it: Carriage by Air Act 1961 s 4A (as added and amended: see note 1).

4 Montreal Convention art 31.2. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. As to the meaning of 'baggage' under the Montreal Convention see PARA 139 note 2: article 31 specifically refers to 'checked baggage'.

5 Montreal Convention art 31.2.

6 Montreal Convention art 31.4. As to 'fraud' see PARA 163 note 6.

7 Montreal Convention art 31.3. As to the test for the adequacy of a complaint and the requirements of a notice see PARA 163 note 8.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/186. Limitation of actions.

## **186. Limitation of actions.**

The right to damages is extinguished<sup>1</sup> if a claim is not brought within two years<sup>2</sup>, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived or on which the carriage stopped<sup>3</sup>. The method of calculating this period is determined by the law of the court seised of the case<sup>4</sup>.

1 As to the right to damages being extinguished see PARA 164 note 1.

2 This period may not be suspended or extended for any reason, since the provisions of the Limitation Act 1980 are inapplicable by virtue of s 39 (see **LIMITATION PERIODS** vol 68 (2008) PARA 918).

3 Montreal Convention art 35.1. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122.

4 Montreal Convention art 35.2.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/187. Claims against actual and contracting carriers.

## **187. Claims against actual and contracting carriers.**

In relation to carriage performed by an actual carrier<sup>1</sup>, a claim for damages may be brought, at the claimant's option, against that carrier or against the contracting carrier<sup>2</sup>, or against both together or separately<sup>3</sup>.

1 As to the meaning of 'actual carrier' see PARA 131 note 1.

2 As to the meaning of 'contracting carrier' see PARA 131 note 1.

3 Montreal Convention art 45, as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (15). As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. Any complaint to be made or order or instruction to be given under the Montreal Convention has the same effect whether it is addressed to the actual or contracting carrier: art 42, as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I para (14).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/188. Claims in cases of successive carriage.

### **188. Claims in cases of successive carriage.**

In cases where carriage is to be performed by various successive air carriers<sup>1</sup> a passenger or any person entitled to compensation can take action, in case of injury, death or delay, only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey<sup>2</sup>. As regards baggage or cargo, the passenger or consignor has a right of action against the first carrier, and the passenger or consignee who is entitled to delivery has a right of action against the last carrier and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place, these carriers being jointly and severally liable to the passenger or to the consignor or consignee<sup>3</sup>.

1 See the Montreal Convention art 36.1; and PARA 129. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122.

2 Montreal Convention art 36.2.

3 Montreal Convention art 36.3.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/189. Advance payments.

### **189. Advance payments.**

A Community air carrier<sup>1</sup> must without delay, and in any event not later than 15 days after the identity of the natural person entitled to compensation<sup>2</sup> has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered<sup>3</sup>. In the event of death the advance payment must not be less than the equivalent in euro of 16,000 special drawing rights<sup>4</sup> per passenger<sup>5</sup>. An advance payment does not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of a Community air carrier being liable<sup>6</sup>: however it is only returnable if the carrier is exonerated wholly or partly from his liability in accordance with applicable law on

the basis that the damage was caused, or contributed to, by the negligence of the injured or deceased passenger<sup>7</sup> or if the person who received the advance payment was not the person entitled to the compensation<sup>8</sup>.

1 As to the meanings of 'air carrier' and 'Community air carrier' see PARA 122 note 1.

2 As to the meaning of 'person entitled to compensation' see PARA 134 note 4.

3 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) on air carrier liability in respect of the carriage of passengers and their baggage by air, art 5.1 (substituted by EC Council Regulation 889/2002 (OJ L140, 30.5.2002, p 2)), implementing the Montreal Convention art 28 (which provides that in the case of aircraft accidents governed by the Montreal Convention which result in death of or injury to passengers, the carrier must, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons). As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122.

4 As to 'special drawing rights' in the context of United Kingdom-only flights see the Montreal Convention art 23, as applied by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1 Pt I paras (6)-(8).

5 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 5.2 (as substituted: see note 3). As to the meaning of 'passenger' see PARA 150 note 5.

6 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 5.3 (as substituted: see note 3); Montreal Convention art 28.

7 I.e. in the cases prescribed by the Montreal Convention art 20 (see PARA 191).

8 EC Council Regulation 2027/97 (OJ L285, 17.10.97, p 1) art 5.3 (as substituted: see note 3).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/190. Right of recourse of person liable.

### **190. Right of recourse of person liable.**

Nothing in the Montreal Convention<sup>1</sup> prejudices the question whether a person liable for damage in accordance with their provisions has a right of recourse against any other person<sup>2</sup>.

1 As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122.

2 Montreal Convention art 37.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/191. Contributory negligence and exoneration.

### **191. Contributory negligence and exoneration.**

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier may be wholly or partly exonerated from his liability to the

claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage<sup>1</sup>. When by reason of death of or injury to a passenger compensation is claimed by a person other than the passenger, the carrier may likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger<sup>2</sup>.

1 Montreal Convention art 20. As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122. For these purposes the Law Reform (Contributory Negligence) Act 1945, including that Act as applied to Scotland, and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948 s 2, are provisions of the law of the United Kingdom under which a court may exonerate the carrier wholly or in part from its liability: Carriage by Air Act 1961 s 6 (amended by SI 2002/263); Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, art 7(1). As to the Law Reform (Contributory Negligence) Act 1945 see **NEGLIGENCE** vol 78 (2010) PARA 75 et seq. See also *Goldman v Thai Airways International Ltd* (1981) 125 Sol Jo 413; revsd on other grounds [1983] 3 All ER 693, [1983] 1 WLR 1186, 1 S & B Av R VII/101, CA.

2 Montreal Convention art 20.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(3) CARRIAGE WITHIN THE UNITED KINGDOM/(iii) Claims and Proceedings/192. Death of person liable.

## **192. Death of person liable.**

In the case of the death of the person liable<sup>1</sup>, a claim for damages lies in accordance with the terms of the Montreal Convention<sup>2</sup>, against those legally representing his estate<sup>3</sup>.

1 le under the provisions imposing liability for injury to or death of passengers (see PARA 176), for loss of or damage to baggage or cargo (see PARAS 177, 178), and for delay (see PARA 179).

2 As to the Montreal Convention see PARA 121; as to the application of the Convention to flights within the United Kingdom see PARA 122.

3 Montreal Convention art 32. See also the Law Reform (Miscellaneous Provisions) Act 1934 s 1(5); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 817.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/193. Regulation of delivery, loading and carriage.

## **(4) CARRIAGE OF DANGEROUS GOODS**

### **193. Regulation of delivery, loading and carriage.**

An aircraft must not carry or have loaded on to it any dangerous goods<sup>1</sup> unless the operator is approved<sup>2</sup> and the goods are carried or loaded in accordance with any conditions to which the approval is subject and with the Technical Instructions<sup>3</sup>. A person must not deliver or cause to be delivered for carriage in an aircraft, or take or cause to be taken on board an aircraft, any dangerous goods, which he knows or ought to know or suspect to be capable of posing a risk to health, safety, property or the environment when carried by air, unless the Technical Instructions have been complied with and the package<sup>4</sup> of those goods is in a fit condition for carriage by air<sup>5</sup>.

1 'Dangerous goods' means any article or substance which is identified as such in the Technical Instructions: Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1). 'Technical Instructions' means the 2009-2010 English language edition of the Technical Instructions for the Safe Transport of Dangerous Goods by Air, approved and published by decision of the Council of the International Civil Aviation Organisation (ICAO): Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1) (definition substituted by SI 2008/2429). The Regulations do not apply to those dangerous goods specified in the Technical Instructions as being: (1) for the proper navigation or safety of flight (reg 5(2)(a)); (2) to provide, during flight, medical aid to a patient (reg 5(2)(b)); (3) to provide, during flight, veterinary aid or a humane killer for an animal (reg 5(2)(c)); (4) to provide, during flight, aid in connection with search and rescue operations (reg 5(2)(d)); (5) permitted for carriage by passengers or crew members (reg 5(2)(e)); or (6) intended for use or sale during the flight in question (reg 5(2)(f)). The carriage of these excluded goods must, however, comply with specified provisions of the Technical Instructions: reg 5(3). Any reference in the Technical Instructions or the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, to the taking on board, loading onto or carriage of dangerous goods in or on an aircraft is to be interpreted as applying also to the placing, suspending or carriage of such goods beneath an aircraft unless the context makes it otherwise apparent: reg 3(3).

Excepting reg 4(1)(a) (see the text and note 2), these regulations do not apply to any aircraft flying solely for the purpose of dropping articles for the purpose of agriculture, horticulture, forestry or pollution control (reg 20) or to the carriage of dangerous goods by an aircraft flying under and in accordance with the terms of a police air operator's certificate (reg 21). As to police air operator's certificates see **AIR LAW** vol 2 (2008) PARAS 99, 100. The power to make regulations in relation to the carriage of dangerous goods by air is conferred on the Secretary of State by the Air Navigation Order 2005, SI 2005/1970, art 70(1). As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355. Article 70 and the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, are additional to and not in derogation from the provisions relating to weapons and munitions of war (as to which see PARA 204): Air Navigation Order 2005, SI 2005/1970, art 70(3). As to the ICAO see **AIR LAW** vol 2 (2008) PARA 20 et seq.

2 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 4(1)(a). Approvals are granted by the Civil Aviation Authority (the 'CAA') where it is satisfied that the operator is competent to carry dangerous goods safely, and must be in writing: Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 4(2)(a), (b). The approval may be subject to such conditions as the CAA thinks fit: reg 4(2)(c). As to the constitution of the Civil Aviation Authority see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq. As to the production of the approval where required see the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 17(1)(a).

3 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 4(1)(b). As to occurrence reporting see PARA 202; as to enforcement and compliance see PARA 203.

4 'Package' means the complete product of the packing operation consisting of the packaging and its contents prepared for carriage; and 'packaging' means the receptacles and any other components or materials necessary for the receptacle to perform its containment function: Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1).

5 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 5(1).

## **UPDATE**

### **193 Regulation of delivery, loading and carriage**

NOTE 1--Definition of 'Technical Instructions' substituted so as to include references to amendments made to the publication: SI 2002/2786 reg 3(1) (amended by SI 2009/1492).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/194. Shipper's responsibilities prior to consignment.

### **194. Shipper's responsibilities prior to consignment.**

Before consigning any dangerous goods<sup>1</sup> for carriage by air the shipper must ensure that:

- 116 (1) the goods are not forbidden for carriage by air<sup>2</sup> in any circumstances<sup>3</sup>;
- 117 (2) if the goods are forbidden for carriage by air without approval, all such approvals have been obtained where the Technical Instructions indicate it is the responsibility of the shipper to so obtain them<sup>4</sup>;
- 118 (3) the goods are correctly<sup>5</sup> classified, packed, marked and labelled<sup>6</sup>;
- 119 (4) the package is in a fit condition for carriage by air<sup>7</sup>;
- 120 (5) a dangerous goods transport document<sup>8</sup> has been completed in English in addition to any other language required<sup>9</sup> by the state of origin and contains a declaration signed by or on behalf of the shipper stating that the Technical Instructions have been complied with in that the dangerous goods are fully and accurately described, are correctly classified, packed, marked and labelled, and are in a proper condition for carriage by air<sup>10</sup>; and
- 121 (6) the operator of the aircraft has been furnished with the dangerous goods transport document and such required<sup>11</sup> documents<sup>12</sup>.

1 As to the meaning of 'dangerous goods' see PARA 193 note 1. As to occurrence reporting see PARA 202; as to enforcement and compliance with these provisions see PARA 203.

2 Ie under specified provisions of the Technical Instructions (see PARA 193 note 1).

3 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 11(a).

4 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 11(b).

5 Ie in accordance with specified provisions of the Technical Instructions.

6 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 11(c)-(e). As to the meanings of 'package' and 'packaging' see PARA 193 note 4. When one or more packages are placed in an overpack, the overpack must only contain packages of goods permitted to be carried under specified provisions of the Technical Instructions and must be marked and labelled appropriately: reg 11(g). 'Overpack' means an enclosure used by a single shipper to contain one or more packages and to form one handling unit for convenience of handling and stowage, but does not include a unit load device; 'unit load device' means any type of container or pallet designed for loading onto an aircraft but does not include a freight container for radioactive materials or an overpack; and 'freight container' means an article of transport equipment for radioactive materials, designed to facilitate the carriage of such materials, either packaged or unpackaged, by one or more modes of transport, but does not include a unit load device: reg 3(1).

7 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 11(f).

8 'Dangerous goods transport document' means a document which is specified by the Technical Instructions and contains information about those dangerous goods: Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1).

9 Ie in accordance with specified provisions of the Technical Instructions.

10 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 11(h).

11 Ie required under specified provisions of the Technical Instructions.

12 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 11(i).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/195. Acceptance and inspection of dangerous goods by carrier.

## **195. Acceptance and inspection of dangerous goods by carrier.**

The operator of an aircraft in which dangerous goods<sup>1</sup> are to be carried must ensure that no package, overpack or freight container<sup>2</sup> which contains dangerous goods is accepted for carriage in an aircraft unless it is accompanied by a dangerous goods transport document<sup>3</sup> and until such package, overpack or freight container has been inspected<sup>4</sup> to determine that:

- 122 (1) in so far as it is reasonable to ascertain, the goods are not forbidden for carriage by air<sup>5</sup> in any circumstances<sup>6</sup> and are correctly<sup>7</sup> classified and packed<sup>8</sup>; and
- 123 (2) the package, overpack or freight container is correctly<sup>9</sup> marked and labelled<sup>10</sup> and is not leaking or damaged so that the contents may escape<sup>11</sup>.

Having accepted dangerous goods for carriage, the operator must ensure that packages, overpacks or freight containers which contain dangerous goods are inspected for evidence of damage or leakage before being loaded on an aircraft or placed in a unit load device<sup>12</sup> and that a unit load device containing dangerous goods is not loaded unless it has been inspected and found free from any evidence of leakage from or damage to the packages, overpacks or freight containers contained in it<sup>13</sup>.

1 As to the meaning of 'dangerous goods' see PARA 193 note 1. As to occurrence reporting see PARA 202; as to enforcement and compliance with these provisions see PARA 203.

2 As to the meanings of 'package' and 'packaging' see PARA 193 note 4; as to the meanings of 'overpack' and 'freight container' see PARA 194 note 6.

3 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 7(2). As to the meaning of 'dangerous goods transport document' see PARA 194 note 8. The carrier must inspect the document to determine that it complies with the provisions of the Technical Instructions: reg 7(2). A dangerous goods transport document is not required where the Technical Instructions (see PARA 193 note 1) indicate that it is not required: reg 7(2). Provision is made for the safe keeping and production of the dangerous goods transport document for a specified period: see regs 16(1), (2)(a), 17(1)(b).

For the purpose of the inspections required by these provisions an acceptance check list must be used and the results of the inspection recorded thereon (reg 7(3)(a)); 'acceptance check list' means a document used to assist in carrying out a check on the external appearance of packages of dangerous goods and their associated documents to determine that all appropriate requirements have been met (reg 3(1)). The acceptance check list must be in such form and must provide for the entry of such details as will enable the relevant inspection to be fully and accurately made by reference to the completion of that list: reg 7(3)(b). Provision is made for the safe keeping and production of the acceptance check list for a specified period: see regs 16(2)(b), (3), 17(1)(c).

4 As to inspections see note 3.

5 I.e. under specified provisions of the Technical Instructions.

6 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 7(1)(a).

7 I.e. in accordance with specified provisions of the Technical Instructions.

8 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 7(1)(b), (c).

9 I.e. in accordance with specified provisions of the Technical Instructions.

10 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 7(1)(d).

11 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 7(1)(e). Any contamination found as a result of leaking or damaged packages, overpacks or freight containers must be removed without delay: see reg 10(1); and PARA 197.

12 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 9(1). As to the meaning of 'unit load device' see PARA 194 note 6.

13 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 9(2).

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## 196. Loading.

The operator of an aircraft in which dangerous goods<sup>1</sup> are to be carried must ensure that:

- 124 (1) except in circumstances permitted by specified provisions of the Technical Instructions<sup>2</sup>, dangerous goods are not carried as cargo in any compartment occupied by passengers<sup>3</sup> or on the flight deck<sup>4</sup>;
- 125 (2) any package, overpack or freight container<sup>5</sup> which contains dangerous goods as cargo is appropriately<sup>6</sup> loaded, segregated, stowed and secured<sup>7</sup>;
- 126 (3) packages, overpacks or freight containers bearing an indication that they can only be carried on a cargo aircraft<sup>8</sup> are appropriately loaded and stowed<sup>9</sup> and are not loaded on an aircraft carrying passengers<sup>10</sup>;
- 127 (4) any package, overpack or freight container which contains dangerous goods which appears to be leaking or damaged is not loaded<sup>11</sup>; and
- 128 (5) any package, overpack or freight container which contains dangerous goods which is found to be leaking or damaged is removed and that other loaded cargo or baggage is in a fit state for carriage by air and has not been contaminated<sup>12</sup>.

1 As to the meaning of 'dangerous goods' see PARA 193 note 1. As to occurrence reporting see PARA 202; as to enforcement and compliance with these provisions see PARA 203.

2 As to the Technical Instructions see PARA 193 note 1.

3 A crew member, an operator's employee permitted to be carried by, and carried in accordance with, the instructions contained in the Operations Manual, an authorised representative of a competent national aviation authority and a person with duties in respect of a particular shipment on board are not considered to be 'passengers' for the purposes of the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786: reg 3(1).

4 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 8(1).

5 As to the meanings of 'package' and 'packaging' see PARA 193 note 4; as to the meanings of 'overpack' and 'freight container' see PARA 194 note 6.

6 Ie in accordance with specified provisions of the Technical Instructions.

7 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 8(2).

8 'Cargo aircraft' means any aircraft which is carrying goods or property but not passengers: Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1).

9 Ie in accordance with specified provisions of the Technical Instructions.

10 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 8(3).

11 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 9(3).

12 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 9(4). Any contamination found as a result of leaking or damaged packages, overpacks or freight containers must be removed without delay: see reg 10(1); and PARA 197.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/197. Dealing with contamination.

## 197. Dealing with contamination.

The operator of an aircraft in which dangerous goods<sup>1</sup> are to be carried must ensure that any contamination found as a result of leaking or damaged packages, overpacks or freight containers<sup>2</sup> is removed without delay<sup>3</sup>, and the operator of an aircraft in which dangerous goods have been carried must ensure after unloading that all packages, overpacks or freight containers which contain dangerous goods are inspected for signs of damage or leakage and if there is such evidence must ensure that any part of the aircraft where the package, overpack or freight container was stowed, or any sling or other apparatus which has been used to suspend goods beneath the aircraft is inspected for damage or contamination<sup>4</sup>. An operator must also ensure that an aircraft is not permitted to fly for the purpose of carrying passengers<sup>5</sup> or cargo if it is known or suspected that radioactive materials have leaked in or contaminated the aircraft and the resulting radiation levels exceed specified values<sup>6</sup>.

1 As to the meaning of 'dangerous goods' see PARA 193 note 1. As to occurrence reporting see PARA 202; as to enforcement and compliance with these provisions see PARA 203.

2 As to the meanings of 'package' and 'packaging' see PARA 193 note 4; as to the meanings of 'overpack' and 'freight container' see PARA 194 note 6.

3 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 10(1).

4 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 9(5).

5 As to the meaning of 'passenger' see PARA 196 note 3.

6 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 10(2). The values are specified in the Technical Instructions (see PARA 193 note 1).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/198. Provision of staff training.

## 198. Provision of staff training.

An obligation to ensure the provision of appropriate levels of training in connection with the carriage of dangerous goods<sup>1</sup> by air is imposed on:

- 129 (1) shippers and their agents<sup>2</sup>;
- 130 (2) aircraft operators holding air operator's certificates issued by the Civil Aviation Authority (the 'CAA')<sup>3</sup>, and their agents<sup>4</sup>;
- 131 (3) agents for aircraft operators holding air operator's certificates issued otherwise than by the CAA<sup>5</sup>; and
- 132 (4) aircraft operators, in respect of the staff of their handling agents<sup>6</sup>.

The nature and content of such training is in general specified in the Technical Regulations and subject to the approval of the CAA<sup>7</sup>.

1 As to the meaning of 'dangerous goods' see PARA 193 note 1. As to enforcement and compliance with these provisions see PARA 203.

2 See the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 13(1).

3 le 'United Kingdom operators': Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1). As to air operator's certificates see **AIR LAW** vol 2 (2008) PARA 99 et seq. As to the constitution of the Civil Aviation Authority see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq.

4 See the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 13(2)(a).

5 See the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 13(3). These operators are referred to as 'non-United Kingdom operators': reg 3(1).

6 See the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 13(2)(b). 'Handling agent' means an agent who performs on behalf of the operator some or all of the functions of the latter including receiving, loading, unloading, transferring or other processing of passengers or cargo: reg 3(1).

7 See the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 13(1), (2)(c), (d), (3)(b), (c), (4)-(9). As to the Technical Regulations see PARA 193 note 1.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/199. Provision of information to commander, crews and ground staff.

### **199. Provision of information to commander, crews and ground staff.**

The operator of an aircraft in which dangerous goods<sup>1</sup> are to be carried as cargo must ensure that, before the flight begins, the commander of the aircraft is provided with written information about the dangerous goods and information for use in responding to an in-flight emergency<sup>2</sup>.

The operator of an aircraft flying for the purposes of public transport must ensure that all appropriate manuals, including the Operations Manual, contain information about dangerous goods so that ground staff and crew members can carry out their responsibilities in regard to the carriage of dangerous goods, including the actions to be taken in the event of emergencies involving dangerous goods<sup>3</sup>. Where applicable, the operator must ensure such information is also provided to his handling agent<sup>4</sup>.

The operator of an aircraft in which cargo is to be carried and any agent thereof must ensure that notices giving information about the carriage of dangerous goods are displayed in sufficient number and prominence for this purpose at those places where cargo is accepted for carriage<sup>5</sup>.

1 As to the meaning of 'dangerous goods' see PARA 193 note 1. As to enforcement and compliance with these provisions see PARA 203.

2 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 6(2). The nature of the information to be provided is specified in the Technical Instructions (see PARA 193 note 1). Provision is made for the safe keeping of the written information about dangerous goods for a specified period, and the production thereof where required: see regs 16(1), (2)(c), 17(1)(c).

3 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 6(1)(a).

4 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 6(1)(b). As to the meaning of 'handling agent' see PARA 198 note 6.

5 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 15.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/200. Provision of information to passengers.

## **200. Provision of information to passengers.**

An airport operator and the operator of an aircraft flying for the purpose of public transport of passengers<sup>1</sup> or his agent must ensure that persons who are or may become passengers on an aircraft flying for the purposes of public transport are warned as to the types of dangerous goods<sup>2</sup> which they are forbidden from carrying on an aircraft as checked baggage or with them by displaying notices sufficient in number and prominence for this purpose:

- 133 (1) at each of the places at an airport where tickets are issued<sup>3</sup>;
- 134 (2) at each of the areas at an airport maintained to assemble passengers to board an aircraft<sup>4</sup>; and
- 135 (3) at any location where a passenger may be checked in<sup>5</sup>.

Passengers on aircraft flying for the purpose of the public transport of passengers and persons who are or may become passengers on an aircraft flying for the purposes of public transport must be warned as to the type of dangerous goods which they are forbidden from carrying on an aircraft as checked baggage or with them<sup>6</sup>. Operators of such aircraft, and their agents, may discharge this responsibility either by providing information with each passenger ticket, sufficient in prominence for this purpose, or by some other appropriate means such that passengers receive a warning in addition to that required by the provisions set out above<sup>7</sup>, while persons who make available flight accommodation in the United Kingdom<sup>8</sup> may discharge this responsibility by displaying notices sufficient in number and prominence for this purpose at any place where flight accommodation is offered for sale<sup>9</sup>.

1 As to the meaning of 'passenger' see PARA 196 note 3. As to enforcement and compliance with these provisions see PARA 203.

2 As to the meaning of 'dangerous goods' see PARA 193 note 1.

3 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 14(1)(a).

4 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 14(1)(b).

5 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 14(1)(c).

6 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 14(2), (3).

7 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 14(2).

8 As to the United Kingdom see PARA 96 note 1.

9 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 14(3).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/201. Notification of accidents, incidents and emergencies.

## **201. Notification of accidents, incidents and emergencies.**

The operator of an aircraft which is involved in an aircraft accident or an aircraft incident in the United Kingdom<sup>1</sup> must notify the Civil Aviation Authority (the 'CAA')<sup>2</sup> without delay of any dangerous goods<sup>3</sup> carried as cargo on the aircraft<sup>4</sup>, and the commander of an aircraft carrying dangerous goods as cargo must, in the event of an in-flight emergency and as soon as the situation permits, inform the appropriate air traffic services unit of those dangerous goods in detail or as a summary or by reference to the location from where the detailed information can be obtained immediately<sup>5</sup>.

1 As to the United Kingdom see PARA 96 note 1.

2 As to the CAA see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq.

3 As to the meaning of 'dangerous goods' see PARA 193 note 1.

4 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 6(3). As to occurrence reporting see PARA 202; as to enforcement and compliance with these provisions see PARA 203.

5 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 12.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/202. Occurrence reporting.

## **202. Occurrence reporting.**

A United Kingdom operator<sup>1</sup> must ensure that any dangerous goods accident<sup>2</sup>, dangerous goods incident<sup>3</sup> or the finding of undeclared or misdeclared dangerous goods in cargo or passenger's<sup>4</sup> baggage, wherever it occurs, is reported to the Civil Aviation Authority (the 'CAA')<sup>5</sup>; a non-United Kingdom operator<sup>6</sup> must report to the CAA any such accident, incident or finding which occurs in the United Kingdom<sup>7</sup>. Provision is made as to the content and means of despatch of such reports<sup>8</sup>. These provisions do not require a person to report any occurrence which he has reported under the mandatory reporting provisions of the Air Navigation Order<sup>9</sup> or which he has reason to believe has been or will be reported by another person to the CAA in accordance with those provisions<sup>10</sup>.

1 As to the meaning of 'United Kingdom operator' see PARA 198.

2 'Dangerous goods accident' means an occurrence associated with and related to the carriage of dangerous goods by air which results in fatal or serious injury to a person or major property damage: Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1). As to the meaning of 'dangerous goods' see PARA 193 note 1.

3 'Dangerous goods incident' means an occurrence, other than a dangerous goods accident, which is associated with and related to the carriage of dangerous goods by air, not necessarily occurring on board an aircraft, which results in injury to a person, property damage, fire, breakage, spillage, leakage of fluid or radiation or other evidence that the integrity of the packaging has not been maintained, or relates to the carriage of dangerous goods and which seriously jeopardises the aircraft or its occupants: Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 3(1).

4 As to the meaning of 'passenger' see PARA 196 note 3.

5 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 19(1). As to the CAA see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq. As to enforcement and compliance with these provisions see PARA 203.

6 As to the meaning of 'non-United Kingdom operator' see PARA 198.

7 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 19(2). As to the United Kingdom see PARA 96 note 1.

8 See the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 19(3), (4).

9 le under the Air Navigation Order 2005, SI 2005/1970, art 142 (see **AIR LAW** vol 2 (2008) PARAS 582-584).

10 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 19(5).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/203. Enforcement and compliance.

### **203. Enforcement and compliance.**

An authorised person who has reasonable grounds to suspect that any goods, baggage or package<sup>1</sup> may be or may contain dangerous goods<sup>2</sup> in respect of which the provisions relating to the carriage of dangerous goods<sup>3</sup> have not been complied with may examine, take samples of and seize any such goods and may open or require to be opened any such baggage or package<sup>4</sup>. Samples taken and goods seized may be retained or detained respectively for use as evidence at a trial for an offence or for forensic examination or for investigation in connection with an offence<sup>5</sup>.

The aircraft operator, shipper and any agent of either of them must, within a reasonable time after being requested so to do by an authorised person, cause to be produced to that person any document which relates to goods which the authorised person has reasonable grounds to suspect may be dangerous goods in respect of which these provisions<sup>6</sup> have not been complied with<sup>7</sup>.

1 As to the meanings of 'package' and 'packaging' see PARA 193 note 4.

2 As to the meaning of 'dangerous goods' see PARA 193 note 1.

3 le the Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786 (see PARAS 193-202).

4 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 18(1), (2). Provision is made for the retention, detention and disposal of samples taken and goods seized: see reg 18(3)(a).

5 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 18(3)(b). Otherwise, responsibility for the retention, detention and disposal of samples taken and goods seized lies with the Civil Aviation Authority (the 'CAA'): see reg 18(3)(a), (4), (5). As to the CAA see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq.

6 See note 3.

7 Air Navigation (Dangerous Goods) Regulations 2002, SI 2002/2786, reg 17(2).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/2. CARRIAGE BY AIR/(4) CARRIAGE OF DANGEROUS GOODS/204. Carriage of weapons and munitions of war by air.

### **204. Carriage of weapons and munitions of war by air.**

An aircraft must not carry munitions of war<sup>1</sup> unless the written permission of the Civil Aviation Authority (the 'CAA')<sup>2</sup> has been obtained and the carriage is in accordance with any conditions in that permission; and the commander of the aircraft has been informed in writing<sup>3</sup> by the

operator, before the commencement of the flight, of the type, weight or quantity, and location of the munitions and of any relevant conditions of the CAA's permission<sup>4</sup>. In no case may a sporting weapon<sup>5</sup> or munition of war be carried in any compartment or apparatus to which passengers have access<sup>6</sup>.

It is unlawful for any person to carry or have in his possession or to take or cause to be taken on board an aircraft, or to suspend or cause to be suspended beneath an aircraft, or to deliver or cause to be delivered for carriage thereon, any sporting weapon or munition of war, unless:

- 136 (1) it is part of the baggage of a passenger or consigned as cargo, is carried in a part of the aircraft (or apparatus attached to it) inaccessible to the passengers and, in the case of a firearm, is unloaded<sup>7</sup>;
- 137 (2) particulars of the sporting weapon or munition have been furnished by the passenger or consignor to the operator before the flight commences<sup>8</sup>; and
- 138 (3) the operator consents to the carriage of the relevant articles<sup>9</sup>.

These provisions do not apply to any sporting weapon or munition of war taken or carried on board an aircraft registered outside the United Kingdom if the sporting weapon or munition of war concerned may under the law of the state of registration be lawfully taken or carried on board for the purpose of ensuring the safety of the aircraft or of persons on board<sup>10</sup>.

1 'Munition of war' means any weapon or ammunition, any article containing an explosive or noxious liquid, gas, or any other thing which is designed or made for use in warfare or against persons, including parts (whether components or accessories) for such weapon, ammunition or article: Air Navigation Order 2005, SI 2005/1970, art 69(7)(a).

2 As to the constitution of the CAA see the Civil Aviation Act 1982 s 2(1); and **AIR LAW** vol 2 (2008) PARA 50 et seq.

3 In the case of an aircraft which is flying under and in accordance with the terms of a police air operator's certificate the commander of the aircraft must be informed of the relevant matters but he need not be so informed in writing: Air Navigation Order 2005, SI 2005/1970, art 69(2). As to police air operator's certificates see **AIR LAW** vol 2 (2008) PARAS 99, 100.

4 Air Navigation Order 2005, SI 2005/1970, art 69(1). Violation of the provisions of art 69 is an offence punishable on summary conviction by a fine not exceeding the statutory maximum and on conviction on indictment to a fine or imprisonment for a term not exceeding two years or both: art 148(6), Sch 14 Pt B. As to the statutory maximum see PARA 97 note 3. For powers to prevent flights in contravention of the Air Navigation Order 2005, SI 2005/1970, art 69 see art 144; and **AIR LAW** vol 2 (2008) PARA 528. As to the application of these provisions to the Crown and visiting forces and military aircraft see **AIR LAW** vol 2 (2008) PARA 353.

5 'Sporting weapon' means any weapon or ammunition, any article containing an explosive, noxious liquid or gas, or any other thing, including parts, whether components or accessories, for such weapon, ammunition or article, which is not a munition of war: Air Navigation Order 2005, SI 2005/1970, art 69(7)(b).

6 Air Navigation Order 2005, SI 2005/1970, art 69(3). The provisions of art 69(3), (4) do not apply to or in relation to an aircraft which is flying under and in accordance with the terms of a police air operator's certificate: art 69(5).

7 Air Navigation Order 2005, SI 2005/1970, art 69(4)(a). See note 6.

8 Air Navigation Order 2005, SI 2005/1970, art 69(4)(b). See note 6.

9 Air Navigation Order 2005, SI 2005/1970, art 69(4)(c). See note 6.

10 Air Navigation Order 2005, SI 2005/1970, art 69(6).

## UPDATE

### 204 Carriage of weapons and munitions of war by air

NOTE 4--SI 2005/1970 Sch 14 Pt B amended: SI 2009/1742.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/3. CARRIAGE BY SEA/(1) CARRIAGE OF GOODS/(i) The Contract/A. CONTRACTS OF AFFREIGHTMENT GENERALLY/205. Contracts of affreightment generally.

### **3. CARRIAGE BY SEA**

#### **(1) CARRIAGE OF GOODS**

##### **(i) The Contract**

#### **A. CONTRACTS OF AFFREIGHTMENT GENERALLY**

##### **205. Contracts of affreightment generally.**

A contract for the carriage of goods in a ship is called in law a contract of affreightment. In practice these contracts are usually written<sup>1</sup> and most often are expressed in one or other of two types of document called respectively a charterparty<sup>2</sup> and a bill of lading<sup>3</sup>. Since the contract of carriage will have been entered into before the bill of lading is issued, the bill of lading itself is not, strictly speaking, the contract of carriage but is usually the best evidence of its terms<sup>4</sup>. In some cases the terms of a contract of affreightment are contained partly in a charterparty and partly in a bill of lading, depending on whether we are dealing with the relationship between the carrier and a charterer or between the carrier and a non-charterer all of whom are involved in the same transaction<sup>5</sup>.

The contract may also be contained in or evidenced by other documents such as 'any similar document of title' to a bill of lading under the Hague-Visby Rules<sup>6</sup>, booking notes<sup>7</sup>, through and combined transport bills of lading<sup>8</sup>, sea waybills<sup>9</sup>, ship's delivery orders<sup>10</sup> or booking notes<sup>11</sup>.

The term 'contract of affreightment' is also used in the market to refer to long-term arrangements between shipping lines and cargo-interests providing for the supply by the former to the latter of shipping space on several vessels over a long period of time, the use of each vessel being covered by the terms of the overall contractual arrangement and possibly by separate charterparties covering a particular vessel<sup>12</sup>.

1 As to formation of the contract see PARA 219.

2 As to charterparties see PARA 207 et seq.

3 As to bills of lading see PARA 313 et seq. For examples of shipments on a general ship without the issue of a bill of lading or (apparently) any document recording the terms on which the goods were carried see *Nugent v Smith* (1876) 3 Asp MLC 198, CA; *Hill v Scott* [1895] 2 QB 371, 8 Asp MLC 46 (affd [1895] 2 QB 713, 8 Asp MLC 109, CA).

4 In practice it is commonplace, if not wholly accurate, to refer to the 'bill of lading contract'. As to the bill of lading and the terms of the contract of carriage see PARA 320 et seq.

5 See PARA 321.

6 See the Hague-Visby Rules art I(b); and PARA 372.

7 See PARA 320.

8 See PARA 322.

9 See PARA 364.

- 10 See PARA 365.
- 11 See PARA 320.
- 12 See for example the contract of affreightment in *P v A* [2008] 1 CLC 1029.

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## 206. Incorporation of standard conditions via the Hague-Visby Rules.

By virtue of the Carriage of Goods by Sea Act 1971, an international convention containing standardised conditions of liability, namely the Hague-Visby Rules<sup>1</sup>, is written into the contract of carriage where that contract is covered by a bill of lading or any similar document of title<sup>2</sup>.

The Rules do not apply to charterparties but are often embodied in them anyway<sup>3</sup>. This is usually effected by means of a clause called a 'clause paramount'<sup>4</sup> which applies to the contract the legislation of the loci contractus bringing the Hague-Visby Rules into force<sup>5</sup>. In such cases the foreign enactment will be treated as if it were a set of contractual terms added, as far as applicable<sup>6</sup>, to the terms of the charterparty<sup>7</sup>; the terms so incorporated will be given the same meaning, so far as is possible, as they would bear in the enactment<sup>8</sup>.

1 The International Convention for the Unification of certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924; TS 17 (1931); Cmd 3806), which embodied the 1921 body of rules defining the rights and immunities of carriers known as the 'Hague Rules', was adopted by the first International Conference on Maritime Law at the Hague in 1923 and was given the effect of law in the United Kingdom by the Carriage of Goods by Sea Act 1924 (repealed). The Convention was subsequently amended by the Brussels Protocol of 1968 (Brussels, 23 February 1968; TS 83 (1977); Cmnd 6944), and new rules known as 'the Hague-Visby Rules' defining the rights and immunities of carriers were adopted. These were given the force of law in the United Kingdom by the Carriage of Goods by Sea Act 1971 s 1(2) and, as further amended by the Brussels Protocol of 1979 (Brussels 21 December 1979; Misc 18 (1980); Cmnd 7969), are set out in the Schedule to the Carriage of Goods by Sea Act 1971: see PARAS 367, 371 et seq. The Hague-Visby Rules have not yet been adopted by all countries: see PARA 368. Likewise, the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg, 31 March 1978), in which the United Kingdom is not a participant, entered into force in some countries on 1 November 1992. Consequently, the Hague Rules, the Hague-Visby Rules and (where applicable) the Hamburg Rules may operate side by side.

For an analysis of the general scheme of the Hague Rules see *The Arawa* [1977] 2 Lloyd's Rep 416 at 424, 425 per Brandon J, and for the seminal commentary on the Hague-Visby Rules see A Diamond *The Hague-Visby Rules* [1978] LMCLQ 225. The rules are to be treated for the purposes of United Kingdom law as if they were part of directly enacted statute law and are to be given a purposive, rather than a narrow literalistic, construction (see *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, sub nom *The Morviken* [1983] 1 Lloyd's Rep 1, HL; and *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57); however the rules are a translation of the French text as adopted by the 1923 Conference and, in the event of difficulties in their construction, recourse may be had to the French text which is the only authoritative version of the Convention (see *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 421, [1954] 2 All ER 158 at 165, [1954] 1 Lloyd's Rep 321 at 330 per Devlin J). As to construction generally see PARA 370.

2 As to the meaning of 'contract of carriage' see PARA 372. See *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807 at 879, [1961] 1 All ER 495 at 528, [1961] 1 Lloyd's Rep 57 at 91, HL, per Lord Hodson. Generally speaking, the tenor of the Carriage of Goods by Sea Act 1971 is to place obligations on the carrier, especially in respect of the safety of the cargo.

3 See *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] QB 933 at 943, 944, [1976] 2 All ER 842 at 846, 847, [1976] 2 Lloyd's Rep 47 at 50, 51, CA, per Lord Denning MR ('It seems to me that, when the 'Paramount clause' is incorporated, without any words of qualification, it means that all the Hague Rules are incorporated. If the parties intend only to incorporate part of the rules ..., or only so far as compulsorily applicable, they say so. In

the absence of any such qualification, it seems to me that a 'clause paramount' is a clause which incorporates all the Hague Rules'). See also *Seabridge Shipping AB v AC Orsleff's EFTF's A/S* [1992] Lloyd's Rep 685. Bills of lading issued under charterparties must comply with the rules: see the Hague-Visby Rules art V; and PARA 396.

4 '[The word 'paramount'] is used in relation to the Hague Rules in two rather different senses. It is sometimes used as a form of shorthand to describe a clause in a bill of lading or in a charterparty making the whole or part of the Hague Rules applicable to those documents, but without any addition. On other occasions it has a wider meaning, in that it refers not only to a clause incorporating the Hague Rules in a bill of lading or charterparty, but to one going further and expressly providing that the provisions of the Hague Rules, where there is any conflict with the provisions of the bill of lading or charterparty, are to prevail, or in other words be paramount': *Marifortuna Naviera SA v Government of Ceylon* [1970] 1 Lloyd's Rep 247 at 255 per Mocatta J.

5 See eg *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL (where a charterparty contained the following clause 'Paramount Clause. This bill of lading (sic) shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States ... which shall be deemed to be incorporated herein ...'); *D/S A/S Idaho v Peninsular and Oriental Steam Navigation Co, The Strathnewton* [1983] 1 Lloyd's Rep 219, CA (where the United States Act was incorporated). As to the determination of the law governing a contract see also the Rome Convention (ie the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980; Cmd 8489)); and PARA 2.

6 See *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 184, [1958] 1 All ER 725 at 752, [1958] 1 Lloyd's Rep 73 at 99, HL, per Lord Somervell of Harrow.

7 This method of securing conformity of contract became common after the passing of the Harter Act 1893 (see PARA 280 note 6), and the English courts, from the first, took the view that the terms of the Act should, as far as they are applicable, be read into the contract, that is to say, they should be applied contractually and not legislatively: see *GE Dobell & Co v SS Rossmore Co Ltd* [1895] 2 QB 408, 8 Asp MLC 33; *Minister of Food v Reardon Smith Line Ltd* [1951] 2 TLR 1158 at 1162, [1951] 2 Lloyd's Rep 265 at 271 per McNair J. This view has been adopted by the courts in similar cases coming within the Hague Rules: see *Golodetz v Kersten, Hunik & Co* (1926) 24 Ll L Rep 374, particularly at 375 per Bankes LJ; *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, [1939] 1 All ER 513, 19 Asp MLC 257, PC; *Ocean Steamship Co Ltd v Queensland State Wheat Board* [1941] 1 KB 402, [1941] 1 All ER 158, CA; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp* [1942] AC 154, [1941] 2 All ER 165, 70 Ll L Rep 1, HL; *WR Varnish & Co Ltd v Kheti (Owners)* (1949) 82 Ll L Rep 525. It was finally applied authoritatively in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 152, [1958] 1 All ER 725 at 729, [1958] 1 Lloyd's Rep 73 at 79, HL, where Viscount Simonds said: 'the contract must be read as if the provisions of the Act were written out therein and thereby gained such contractual force as a proper construction of the document admits'. The result may be that the Rules apply more widely in a particular case than they would have done if imposed by the legislation. Thus, in the last-mentioned case, the paramount clause was held to cover all voyages under the charterparty whether from United States ports or not. Conversely, when the Rules are applied in this way, the contract must, according to the usual rule of construction, be read as a whole, which may mean that some other clause may control their application: see *Vita Food Products Inc v Onus Shipping Co Ltd* (bill of lading expressly made subject to English law). See also *Sabah Flour and Feedmills Sdn Bhd v Comfex Ltd* [1988] 2 Lloyd's Rep 18, CA.

8 See *Imperial Smelting Corp Ltd v Joseph Constantine Steamship Line Ltd* [1940] 1 KB 812 at 840, [1940] 2 All ER 46 at 65 per Atkinson J; the decision at first instance was affd in the House of Lords sub nom *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, [1941] 2 All ER 165, 70 Ll L Rep 1, HL. See also *Mauritius Oil Refineries Ltd v Stolt-Nielsen Nederlands BV, The Stolt Sydness* [1997] 1 Lloyd's Rep 273, where Rix J held that when the Rules are incorporated into a charterparty by reference to a foreign enactment they are interpreted by an English court as if they were contained in the English enactment, at any rate where the charterparty chose English law as the governing law.

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## **B. CHARTERPARTIES**

### **(A) CHARTERPARTIES GENERALLY**

#### **207. Meaning of 'charterparty'.**

A charterparty is a contract whereby an entire vessel or some principal part of her may be used or employed by the charterer for a voyage or series of voyages or for a period of time<sup>1</sup>. There are three main categories of charterparty:

- 1 (1) a voyage charterparty whereby the vessel is chartered for a specified voyage<sup>2</sup>;
- 2 (2) a time charterparty whereby the vessel is chartered for a specified period of time<sup>3</sup>; and
- 3 (3) a charterparty by demise whereby the vessel is leased to the charterer<sup>4</sup>.

1 'Charterparty' is derived from 'charta partita': *Leighton v Green and Garret* (1613) Godb 204 per Coke CJ. Sale of a chartered vessel after the date of the charterparty will not of itself be a breach of the charterparty (*Sorrentino Fratelli v Buerger* [1915] 3 KB 367, 13 Asp MLC 164, CA; cf *M Isaacs & Sons Ltd v William McAllum & Co Ltd* [1921] 3 KB 377, 15 Asp MLC 411); but a sale followed by a transfer of possession without any reservation of the shipowner's right himself to perform the charterparty will be a repudiation of that contract (*Omnium d'Enterprises v Sutherland* [1919] 1 KB 618, 14 Asp MLC 402, CA).

2 As to voyage charterparties see PARA 208.

3 As to time charterparties see PARA 209.

4 As to charterparties by demise see PARAS 210-212.

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## **208. Voyage charterparties.**

A voyage charterparty is a contract to carry specified goods on a defined voyage or series of voyages<sup>1</sup>. The shipowner is remunerated by the payment of freight<sup>2</sup>, which is usually calculated by reference to the quantity of cargo shipped or delivered, but may be fixed as a lump sum for the voyage<sup>3</sup>.

Under a voyage charterparty the shipowner must present the vessel in a seaworthy condition<sup>4</sup>. The vessel must proceed to the port of loading and there load the cargo<sup>5</sup> and carry it to the agreed discharging port or place<sup>6</sup>.

The principal obligations of the charterer are:

- 4 (1) to furnish cargo complying with the charterparty, in reasonable time to enable it to be loaded within the permitted laytime<sup>7</sup>;
- 5 (2) to nominate safe loading or discharging ports or berths if the charterparty requires him to do so<sup>8</sup>;
- 6 (3) to perform his part in the loading<sup>9</sup> and discharging<sup>10</sup> operations; and
- 7 (4) to pay the freight punctually in the agreed manner<sup>11</sup>.

Voyage charterparties usually contain detailed provisions for payment by the charterer of liquidated damages ('demurrage') at a daily rate for the detention of the vessel beyond the agreed laytime<sup>12</sup>. There is usually provision for payment of a rebate ('dispatch money') to the charterer for completing loading or discharging the cargo in less than the agreed laytime<sup>13</sup>. In the absence of express laytime provisions, the charterer must load and unload in a reasonable time and is liable in damages for any detention after that time<sup>14</sup>.

Voyage charterparties often provide that the charterer's liability is to cease on shipment of the cargo<sup>15</sup>; but the charterer's liability generally ceases if, and only to the extent that, the shipowner has an effective alternative remedy by way of lien on the goods under the bills of lading<sup>16</sup>. In the absence of express agreement, the shipowner has a lien for freight and general average contribution, but not, for example, for demurrage or damages for detention<sup>17</sup>.

1 It is suggested that a voyage charterparty will be subject to the statutory implied terms which apply to the supply of services under the Supply of Goods and Services Act 1982 Pt II (ss 12-16): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 97-99.

2 As to freight see PARA 567 et seq.

3 As to lump freight see PARA 599.

4 See PARAS 418 et seq, 464 et seq. In any contract for the carriage of goods by sea to which the Hague-Visby Rules (see PARA 206) apply, there is not, however, to be implied any absolute undertaking by the carrier of the goods to provide a seaworthy ship; instead the carrier is bound before and at the beginning of the voyage only to exercise due diligence to make the ship seaworthy: see PARAS 371, 376.

5 See PARA 402 et seq.

6 As to the voyage see PARA 464 et seq; and as to the unloading see PARA 515 et seq.

7 See PARA 284.

8 See PARAS 517-519.

9 See PARA 402 et seq.

10 See PARA 515 et seq.

11 See PARAS 255, 567 et seq.

12 See PARA 289 et seq.

13 See PARA 296.

14 See PARA 458 et seq.

15 See PARAS 304-305.

16 See PARA 306.

17 See PARA 551 et seq.

## UPDATE

### 208-210 Voyage charterparties ... Charterparty by demise

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

### 208 Voyage charterparties

TEXT AND NOTES--See *Petroleum Oil and Gas Corp'n of South Africa (Pty) Ltd v FR8 Singapore Pte Ltd* [2008] EWHC 2480 (Comm), [2008] All ER (D) 236 (Oct).

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## 209. Time charterparties.

A time charterparty is a contract to perform services during a specified period<sup>1</sup> in consideration of the payment of hire for the time during which the charterer is entitled to the use of the vessel<sup>2</sup>. Under a time charterparty which is not by demise<sup>3</sup> the shipowner retains possession of the vessel through the master and crew, who remain his servants. The charterer is entitled to determine how the vessel is to be employed, within the agreed limits.

Time charterparties are usually for a specified period, provide for hire to be paid at a specified rate commencing from the date of delivery to the charterer and give the shipowner an express right to withdraw the vessel if the hire is not paid on the due date<sup>4</sup>. The charterparty may contain an 'anti-technicality' clause by which, where the payment of the hire has not been received by the due date, the shipowners must give the charterers a specified period in which to rectify the cause of the delay before the right to withdraw the vessel is exercised<sup>5</sup>. There is usually an off-hire clause whereby the liability for hire ceases in certain specified events<sup>6</sup>. The time for redelivery to the shipowner is not normally of the essence and, provided that he acts reasonably, the time charterer may legitimately send the vessel on a final voyage which is not completed until after the charter period<sup>7</sup>.

The shipowner will normally be required to provide and pay for the members of the crew and their wages, the vessel's provisions and her insurance. He will be obliged to deliver the vessel in a seaworthy condition<sup>8</sup> and to maintain her in an efficient condition throughout the charterparty. The master must undertake the voyage with due dispatch and follow the charterer's instructions regarding the employment of the vessel and the issue of bills of lading<sup>9</sup>. The shipowner remains responsible for the navigation and management of the vessel<sup>10</sup>.

The charterer must pay for and supply fuel for the vessel, load, stow and discharge the cargo<sup>11</sup>, give lawful orders as to the employment of the vessel between safe ports<sup>12</sup> and redeliver the vessel at the end of the charterparty service<sup>13</sup> in the same good order and condition, making good any damage other than ordinary wear and tear suffered<sup>14</sup>. The charterparty may contain an 'employment and indemnity clause'<sup>15</sup> under which the charterer must indemnify the shipowner against consequences or liabilities arising from the failure of the master, officers or agents to comply with the charterer's orders as regards employment, agency and other arrangements, but this does not extend to the navigation and management of the vessel, which remain the responsibility of the master as agent for the shipowner<sup>16</sup>.

Time charterparties may also be consecutive voyage charterparties under which a vessel is chartered for a period of time for a number of consecutive voyages<sup>17</sup>.

1 It is suggested that a time charterparty will be subject to the statutory implied terms which apply to the supply of services under the Supply of Goods and Services Act 1982 Pt II (ss 12-16): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 97-99.

2 See *Sea and Land Securities Ltd v William Dickinson & Co Ltd* [1942] 2 KB 65, sub nom *Re an Arbitration between Sea and Land Securities Ltd and William Dickinson & Co Ltd, The Alresford* [1942] 1 All ER 503, CA.

3 As to charterparties by demise see PARAS 210-212.

4 See PARA 256.

5 *Italmare Shipping Co v Ocean Tanker Co Inc (No 2), The Rio Sun* [1982] 3 All ER 273, [1982] 1 Lloyd's Rep 404; *Tradax Export SA v Dorada Compania Naviera SA, The Lutetian* [1982] 2 Lloyd's Rep 140; *Schelde Delta Shipping BV v Astarte Shipping Ltd, The Pamela* [1995] 2 Lloyd's Rep 249.

6 See PARA 256.

7 See PARA 253.

8 See PARAS 418 et seq, 464 et seq. In any contract for the carriage of goods by sea to which the Hague-Visby Rules (see PARA 206) apply, there is not, however, to be implied any absolute undertaking by the carrier of the goods to provide a seaworthy ship; instead the carrier is bound before and at the beginning of the voyage only to exercise due diligence to make the ship seaworthy: see PARAS 371, 376.

9 An improper refusal to comply with the charterer's orders may amount to a repudiatory breach and entitle the charterer to terminate the contract: see *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc, The Nanfri, The Benfri and The Lorfri* [1979] AC 757, [1979] 1 All ER 307, [1979] 1 Lloyd's Rep 201, HL (cited in PARAS 256, 262).

10 The rights and obligations of the shipowner may be extended by acts of the master (see *Canadian Transport Co Ltd v Court Line Ltd* [1940] AC 934, [1940] 3 All ER 112, 19 Asp MLC 374, HL) or by express words (see *MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd, The Argonaut* [1985] 2 Lloyd's Rep 216).

11 See *MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd, The Argonaut* [1985] 2 Lloyd's Rep 216; *Alexandros Shipping Co of Piraeus v MSC Mediterranean Shipping Co SA of Geneva, The Alexandros P* [1986] 1 Lloyd's Rep 421; *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd, The Fantasy* [1992] 1 Lloyd's Rep 235, CA; *CV Scheepvaartonderneming Flintermar v Sea Malta Co Ltd* [2005] EWCA Civ 17, [2005] 1 Lloyd's Rep 409, [2005] 1 All ER (Comm) 497.

12 See *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736, [1982] 3 All ER 350, [1982] 2 Lloyd's Rep 307, HL; *A/C Shipping Ltd v Marine Pilot Ltd, The Archimidis* [2008] EWCA Civ 175, [2008] 2 All ER (Comm) 545, [2008] 1 Lloyd's Rep 597. As to the meaning of 'safe port' see PARAS 517-519.

13 See *Alma Shipping Corp of Monrovia v Mantovani, The Dione* [1975] 1 Lloyd's Rep 115, CA; *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd, The Peonia* [1991] 1 Lloyd's Rep 100, CA; *Chiswell Shipping Ltd and Liberian Jaguar Transports Inc v National Iranian Tanker Co, The World Symphony and World Renown* [1992] 2 Lloyd's Rep 115, CA; *Torvald Klaveness A/S v Arni Maritime Corp, The Gregos* [1995] 1 Lloyd's Rep 1, HL; *Petroleo Brasileiro SA v Kriti Akti Shipping Co SA; Kriti Akti Shipping Co SA v Petroleo Brasileiro SA, The Kriti Akti* [2004] EWCA Civ 116, [2004] 1 Lloyd's Rep 712, [2004] 2 All ER (Comm) 396; *Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia, The Achilles* [2008] UKHL 48, [2008] 4 All ER 159, [2008] 2 Lloyd's Rep 275. As to the duration of time charterparties see PARA 253; and as to options to continue time charterparties see PARA 254.

14 See *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH, The Puerto Buitrago* [1976] 1 Lloyd's Rep 250, CA; cf *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA and Occidental Shipping Establishment, The Odenfeld* [1978] 2 Lloyd's Rep 357; *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S, The Rijn* [1981] 2 Lloyd's Rep 267; *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd, The Pamphilos* [2002] EWHC 2292 (Comm), [2002] 2 Lloyd's Rep 681.

15 See PARA 308. Where the charterparty does not contain an express 'employment and indemnity' clause, an indemnity will normally be implied: see PARA 308.

16 This proposition may be affected by the incorporation of the Hague-Visby Rules: see *Actis Co Ltd v Sanko Steamship Co Ltd, The Aquacharm* [1982] 1 All ER 390, [1982] 1 WLR 119, [1982] 1 Lloyd's Rep 7, CA.

17 See eg *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale NV* [1967] 1 AC 361, [1966] 2 All ER 61, [1966] 1 Lloyd's Rep 529, HL; *Sanko Steamship Co Ltd v Propet Co Ltd* [1970] 2 Lloyd's Rep 235; *Agro Co of Canada Ltd v Richmond Shipping Ltd, The Simonburn* [1973] 1 Lloyd's Rep 392, CA; *Yoho Maru (Owners) v Agip SpA C/O SNAM SpA* [1973] 1 Lloyd's Rep 409; *Marmara Transport A/S v Mobil Tankers SA, The Mersin* [1973] 1 Lloyd's Rep 532; *Skibsaktieselskapet Snefonn, Skibsaksjeselskapet Bergehus and Sig Bergesen DY & Co v Kawasaki Kisen Kaisha Ltd, The Berge Tasta* [1975] 1 Lloyd's Rep 422; *Mitsui OSK Lines Ltd v Agip SpA, The Bungamawar* [1978] 1 Lloyd's Rep 263; *Intermare Transport GmbH v Tradax Export SA, The Oakwood* [1978] 2 Lloyd's Rep 10, CA; *Pole Star Compania Naviera SA v Koch Marine SA, The Maritsa* [1979] 1 Lloyd's Rep 581; *Bravo Maritime (Chartering) Est v Baroom, The Athinoula* [1980] 2 Lloyd's Rep 481; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, [1981] 2 All ER 1030, sub nom *BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema* [1981] 2 Lloyd's Rep 239, HL; *Rashtriya Chemicals and Fertilizers Ltd v Huddart Parker Industries Ltd, The Boral Gas* [1988] 1 Lloyd's Rep 342; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL.

## UPDATE

### 208-210 Voyage charterparties ... Charterparty by demise

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## **210. Charterparty by demise.**

Charterparties by demise<sup>1</sup> are of two kinds:

- 8 (1) a charterparty without master or crew, or 'bareboat charter', where the hull is the subject matter of the charterparty<sup>2</sup>; and
- 9 (2) a charterparty with master and crew, under which the ship passes to the charterer in a state fit for the purposes of a business adventure<sup>3</sup>.

A charterparty by demise is not, strictly speaking, a contract of carriage but rather a contract for the hire of the vessel as a chattel<sup>4</sup>.

In both cases the charterer becomes for the time being the owner of the ship<sup>5</sup>; the master and crew are, or become to all intents and purposes, his employees, and through them the possession of the ship is in him<sup>6</sup>. The owner has, however, divested himself of all control either over the ship or over the master and crew<sup>7</sup>, his sole right being to receive the hire specified in the charterparty and to take back the ship when the charterparty comes to an end<sup>8</sup>. During the currency of the charterparty the owner is, therefore, under no liability to third persons whose goods may have been carried on the demised ship<sup>9</sup> or who may have done work or supplied stores for her<sup>10</sup>, and those persons must look only to the charterer who has taken his place<sup>11</sup>.

A charterparty by demise with an option to purchase is sometimes used as a method of financing the purchase of the vessel.

1 Charterparties by way of demise were formerly said to be obsolete: see *Sea and Land Securities Ltd v William Dickinson & Co Ltd* [1942] 2 KB 65, sub nom *Re an Arbitration between Sea and Land Securities Ltd and William Dickinson & Co Ltd, The Alresford* [1942] 1 All ER 503, CA. See also *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683 at 689, 9 Asp MLC 472 at 473, CA, per Vaughan Williams LJ. Such charterparties are, however, now more common: see eg *RM and R Log Ltd v Texada Towing Co Ltd, Minnette and Johnson, The Coast Prince* [1967] 2 Lloyd's Rep 290; *Falmouth Docks and Engineering Co v Fowey Harbour Comrs, The Briton* [1975] 1 Lloyd's Rep 319, CA; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, CA; *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574, [1978] 2 All ER 1134, [1978] 1 Lloyd's Rep 334, CA; *CN Marine Inc v Stena Line A/B and Regie Voor Maritiem Transport, The Stena Nautica* [1982] 2 Lloyd's Rep 323, CA; *CN Marine Inc v Stena Line A/B and Regie Voor Maritiem Transport, The Stena Nautica (No 2)* [1982] 2 Lloyd's Rep 336, CA; *The Stolt Loyalty* [1995] 1 Lloyd's Rep 598, CA.

A charterparty by demise is not registrable. This can sometimes cause difficulties to claimants who bring proceedings against the registered shipowner in ignorance of the fact that a charterparty by demise exists: see eg *Marubeni Corp and Marubeni American Corp v Pearlstone Shipping Corp, The Puerto Acevedo* [1978] 1 Lloyd's Rep 38, CA (where leave was granted under RSC Ord 15 r 6 for the charterer to be joined as second defendant where existence of the charterparty by demise was not discovered until after the expiry of the limitation period).

2 *Reeve v Davis* (1834) 1 Ad & El 312; *Schuster v McKellar* (1857) 7 E & B 704; *Meiklerid v West* (1876) 1 QBD 428, 3 Asp MLC 129, DC.

3 *Trinity House Master v Clark* (1815) 4 M & S 288; *Colvin v Newberry and Benson* (1832) 1 Cl & Fin 283, HL; *Schuster v McKellar* (1857) 7 E & B 704. Cf *Sack v Ford* (1862) 13 CBNS 90.

4 A charterparty by demise will, therefore, be subject to the statutory implied terms which apply to the hire of goods under the Supply of Goods and Services Act 1982 ss 6-11: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 469.

5 *Colvin v Newberry and Benson* (1832) 1 Cl & Fin 283, HL; *Medway Drydock and Engineering Co Ltd v MV Andrea Ursula, The Andrea Ursula* [1973] QB 265, [1971] 1 All ER 821, [1971] 1 Lloyd's Rep 145; cf *Sir John Jackson Ltd v Blanche (Owners), The Hopper No 66* [1908] AC 126, 11 Asp MLC 37, HL. In *Scott v Scott* (1818) 2 Stark 438, Best J thought that on the same principle the owner of a Thames barge who had lent it to another person would not be liable for the negligent navigation of the borrower's employees.

6 *Belcher v Capper* (1842) 4 Man & G 502 (where the charterer appointed the master, being allowed by the shipowners the amount paid to their own masters). The fact that the charterer pays the wages of the master and crew is not in itself sufficient to exclude the owner's liability to third persons for their negligence: *Fenton v City of Dublin Steam Packet Co* (1838) 8 Ad & El 835.

7 *Meiklerid v West* (1876) 1 QBD 428, 3 Asp MLC 129, DC; *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL. Sometimes the shipowner retains in his hands the appointment and control of the chief engineer: see *Baumwoll Manufactur von Carl Scheibler v Furness*.

8 *Meiklerid v West* (1876) 1 QBD 428, 3 Asp MLC 129, DC. The owner has, therefore, no lien on the cargo for the hire: *Hutton v Bragg* (1816) 7 Taunt 14. In so far as this case decided that the particular charterparty there in question amounted to a demise, it appears to be of doubtful authority: see *Dean v Hogg* (1834) 10 Bing 345; *The Great Eastern* (1868) LR 2 A & E 88 at 92; *Belcher v Capper* (1842) 4 Man & G 502.

9 *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL. The shipowner may, however, render himself liable by delivering the cargo to the wrong person: *Schuster v McKellar* (1857) 7 E & B 704. As to his liability to the charterers under a charterparty by demise see PARA 264 note 1; and as to his liability on the bill of lading see PARA 354.

10 *Frazer v Marsh* (1811) 13 East 238; *Reeve v Davis* (1834) 1 Ad & El 312.

11 Cf *Sir John Jackson Ltd v Blanche (Owners), The Hopper No 66* [1908] AC 126 at 132, 11 Asp MLC 37 at 38, HL, per Lord Atkinson.

## UPDATE

### 208-210 Voyage charterparties ... Charterparty by demise

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 211. Charterparty which is not a demise.

Although a charterparty which does not operate as a demise confers on the charterer the temporary right to have his goods loaded and carried in the ship, the ownership remains in the original owner<sup>1</sup>, and through the master and crew, who continue to be his employees<sup>2</sup>, the possession of the ship also remains in him<sup>3</sup>. The existence of the charterparty does not, therefore, necessarily divest the owner of liability to third persons whose goods may have been carried on the ship<sup>4</sup>, nor does it deprive him of his rights as owner<sup>5</sup>.

1 *Schuster v McKellar* (1857) 7 E & B 704.

2 Time charterparties usually contain an employment and indemnity clause which provides that the master, although appointed by the owners, is under the orders of the charterer as regards 'employment, agency or other arrangements': see PARA 308.

3 *Sandeman v Scurr* (1866) LR 2 QB 86 at 96 per Cockburn CJ. See also *Saville v Campion* (1819) 2 B & Ald 503; *Omoa Coal and Iron Co v Huntley* (1877) 3 Asp MLC 501, DC; *The Beeswing* (1885) 5 Asp MLC 484, CA; cf *Thin v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* (1901) 18 TLR 226.

4 It is, therefore, immaterial that the shipowner is ignorant of the charterparty, if it is in fact covered by the master's authority: *Steel v Lester and Lilee* (1877) 3 CPD 121.

5 *Lucas v Nockells* (1833) 1 Cl & Fin 438, HL; *Dean v Hogg* (1834) 10 Bing 345.

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## 212. Test whether charterparty operates as demise.

Whether a charterparty operates as a demise or not is a question of construction, to be determined by reference to the language of the particular charterparty<sup>1</sup>. The principal test to be applied is whether the master is the employee of the owner or of the charterer<sup>2</sup>. Even where the charterparty provides for the nomination of the master by the charterer, he must be regarded as the owner's employee if the effect of the charterparty is that he is to be paid or dismissed by the owner and that he is to be subject to the owner's orders as to navigation<sup>3</sup>. If, however, the charterparty is otherwise to be regarded as a demise, it is immaterial that the owner reserves the right, in certain circumstances, of removing the master and appointing another in his place<sup>4</sup>, or of appointing the chief engineer<sup>5</sup>.

1 *Sandeman v Scurr* (1866) LR 2 QB 86 at 96 per Cockburn CJ. The charterparty may be a demise, even if no express words of demise are used: *Colvin v Newberry and Benson* (1832) 1 Cl & Fin 283, HL. The use of words of demise does not, however, necessarily take the ship out of the shipowner's possession: *Christie v Lewis* (1821) 2 Brod & Bing 410. Charterparties often contain references to the delivery of the ship to the charterers and her redelivery to the owners, but these expressions do not make the charter a demise charter: see *Italian State Railways v Mavrogordatos* [1919] 2 KB 305, 14 Asp MLC 504, CA; *Sea and Land Securities Ltd v William Dickinson & Co Ltd* [1942] 2 KB 65, sub nom *Re an Arbitration between Sea and Land Securities Ltd and William Dickinson & Co Ltd*, *The Alresford* [1942] 1 All ER 503, CA.

2 *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL; cf *Elliott Steam Tug Co Ltd v Admiralty Comrs*, *Page v Admiralty Comrs* [1921] 1 AC 137, 15 Asp MLC 81, HL.

3 *The Beeswing* (1885) 5 Asp MLC 484, CA; cf *Weir v Union Steamship Co Ltd* [1900] AC 525, 9 Asp MLC 111, HL.

4 *Colvin v Newberry and Benson* (1832) 1 Cl & Fin 283, HL.

5 *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL.

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## 213. Commercial use of chartered vessel.

The purpose for which the vessel is chartered may be the carriage of goods or, less commonly, the carriage of passengers, or salvage or towage, or other specialised purposes. A charterer may himself sub-charter the vessel and will in that sub-charter commonly describe himself as the 'disponent owner'.

Where the goods are shipped by the charterer himself and the bill of lading is taken by him in his own name, then, in the absence of anything to show the contrary, the bill of lading is usually only a receipt and a document of title, the contract of carriage being found in the charterparty alone<sup>1</sup>. Where the goods are shipped by someone other than the charterer, the contract of carriage with the shipper is prima facie to be found in the bill of lading<sup>2</sup>. Where the charterparty is by demise, the contract under the bill of lading is between the shipper and the charterer<sup>3</sup>. Where, on the other hand, the charterparty is not by demise, the question whether the contract under the bill of lading is between the shipper and the shipowner or between the shipper and the charterer now depends in large part on the signature at the bottom and any logo at the top of the bill of lading covering the goods<sup>4</sup>. In what is likely to be the rare situation where the signature and logo do not clearly identify the carrier, the identity of the carrier will depend upon the circumstances of the particular case<sup>5</sup>, although in the majority of cases the contract is made with the shipowner.

1 *Rodocanachi, Sons & Co v Milburn Bros* (1886) 18 QBD 67, CA; *Temperley Steam Shipping Co v Smyth & Co* [1905] 2 KB 791, CA.

2 As to bills of lading see PARA 313 et seq.

3 *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115; *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, HL.

4 *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2003] 2 All ER 785, [2003] 1 Lloyd's Rep 571, where it was held that these identifying features on a bill of lading prevailed over a so-called 'demise clause' purporting to identify the carrier, at any rate where that clause appeared on the reverse side of the bill of lading. As to demise clauses see *The Berkshire* [1974] 1 Lloyd's Rep 185; *W & R Fletcher (New Zealand) Ltd v Sigurd Haavik A/S, The Vikfrost* [1980] 1 Lloyd's Rep 560, CA; *Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif* [1982] 1 Lloyd's Rep 456; *Ngo Chew Hong Edible Oil Pte Ltd v Scindia Steam Navigation Co Ltd, The Jalamohan* [1988] 1 Lloyd's Rep 443.

5 *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115.

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## (B) PARTIES

### 214. Contracts by agents.

The parties to a charterparty are the shipowner and the charterer, and, where the charterparty is signed by both, no difficulty arises<sup>1</sup>. In practice, however, the contract is often made, on behalf of the owner, by the managing owner<sup>2</sup> or other agent<sup>3</sup>, and, on behalf of the charterer, by a shipbroker<sup>4</sup>. A question then arises as to the respective rights and liabilities under the contract of the several principals and agents.

1 Where one of two joint contractors is sued on a charterparty, he cannot claim as of right to have his co-contractor joined as co-defendant if the co-contractor is resident out of the jurisdiction: *Wilson, Sons & Co v Balcarres Brook Steamship Co* [1893] 1 QB 422, 7 Asp MLC 321, CA. A master who is also a part owner may sue upon a charterparty made between himself and the charterer without joining his co-owners: *Seeger v Duthie*

(1860) 8 CBNS 45; affd without dealing with this point 8 CBNS 72, Ex Ch. If, however, by the charterparty a specific proportion of the freight is made payable to each co-owner, the contract is a several contract and cannot be sued on as though it were joint: *Servante v James* (1829) 10 B & C 410.

2 As to managing owners see PARA 215.

3 See eg *Mmecen SA v Inter Ro-Ro SA and Gulf Ro-Ro Services SA, The Samah and Lina V* [1981] 1 Lloyd's Rep 40 (where the shipowners' agent was held to have ostensible authority to conclude the charterparty); *Woodstock Shipping Co v Kyma Compania Naviera SA, The Wave* [1981] 1 Lloyd's Rep 521 (where it was held that the shipowners' agent had ostensible, if not actual, authority to enter into a charterparty). In earlier times the vessel was sometimes chartered on behalf of the owner by the ship's master. The master might have had express authority to charter the ship (*Messageries Imperiales Co v Baines* (1863) 7 LT 763); his implied authority arose only when he was in a foreign port and communication with the shipowner was difficult (*The Fanny, The Mathilda* (1883) 5 Asp MLC 75, CA). Cf *The Sir Henry Webb* (1849) 13 Jur 639. As to the authority of an agent see **AGENCY** vol 1 (2008) PARAS 29 et seq (general authority) 48 et seq (delegation of authority).

4 An authority to an agent to procure a charterparty does not necessarily include an authority to cancel it when procured: *Thomas v Lewis (Oxley)* (1878) 4 Ex D 18, 4 Asp MLC 51. Nor does authority to offer a ship on certain terms necessarily imply authority to receive notice of withdrawal of an acceptance of those terms: *Raeburn and Verel v Burness & Sons* (1895) 1 Com Cas 22. Neither the master (*Burton v Sharpe* (1810) 2 Camp 529; *Pearson v Göschel* (1864) 17 CBNS 352 (where the extent of the master's authority was discussed); *Reynolds v Jex* (1865) 7 B & S 86; *Capper & Co v Wallace* (1880) 5 QBD 163, 4 Asp MLC 223, DC; *The Canada* (1897) 13 TLR 238), nor the agent to whom the charterers direct the master to apply for cargo (*Sickens v Irving* (1859) 7 CBNS 165; *Lindsay & Son v Scholefield* (1897) 24 R 530), has authority, as such, to vary the terms of the charterparty after completion. Cf *Wiggins v Johnston* (1845) 14 M & W 609 (where the master and the charterer's agents were expressly authorised to vary the charterparty).

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## 215. Managing owners.

Part owners sometimes delegate authority in respect of the managing of the ship to one of their number, who is known as the managing owner<sup>1</sup>. The managing owner is agent for all the other owners<sup>2</sup>, with power to do what is necessary to enable the ship to prosecute her voyage and to earn freight<sup>3</sup>.

1 'Managing owner' is a term used in the Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138, reg 23 (see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 271), but it is not defined. It is a commercial and not a legal expression: see *Frazer v Cuthbertson* (1880) 6 QBD 93 at 98 per Bowen J. A person who is not a part owner may exercise the functions of a managing owner, in which case he is known as a 'ship's husband'.

2 *The Ida* (1886) 6 Asp MLC 21 (managing owner received contributions from one part owner as agent for all the rest).

3 As to the general powers of a managing owner in regard to the working of the ship and the ordering of the necessary supplies and repairs see *Card v Hope* (1824) 2 B & C 661; *Thompson v Finden* (1829) 4 C & P 158; *Green v Briggs* (1848) 6 Hare 395; *Darby v Baines* (1851) 9 Hare 369; *Whitwell v Perrin* (1858) 4 CBNS 412; *Ritchie v Couper* (1860) 28 Beav 344; *Barker v Highley* (1863) 15 CBNS 27; *Vanner v Frost* (1870) 39 LJ Ch 626; *The Huntsman* [1894] P 214, 7 Asp MLC 431. See also *Sims v Brittain* (1832) 4 B & Ad 375 (rights of part owners against agents appointed by managing owners); *Steele & Co v Dixon* (1876) 3 R 1003 (no authority to order structural alterations); *Swanston v Lishman* (1881) 4 Asp MLC 450, CA (practice as to discovery where managing owner is a member of a firm); *The Charles Jackson* (1885) 5 Asp MLC 399 (claims by managing owner to recover sums he had not paid allowed in settlement of accounts with other co-owners, but subject to stay of execution until such co-owners protected against claims of third persons in respect of those sums); *The Meredith* (1885) 10 PD 69, 5 Asp MLC 400 (right to reasonable remuneration); *The Bellcairn* (1886) 5 Asp MLC 582 (authority to take legal proceedings); *Ocean Iron Steamship Insurance Association Ltd v Leslie* (1887) 6 Asp MLC 226 (authority to make co-owners liable for calls in a mutual insurance association); *Williamson v Hine* [1891] 1 Ch 390, sub nom *Williamson v Hine Bros* 6 Asp MLC 559 (apart from special agreement a shipbroker

who is also managing owner, receiving as such a fixed remuneration and whose duties include procuring charters and freights, cannot as shipbroker make extra profit for himself by commission or brokerage for obtaining charters and freights); *The Mount Vernon* (1891) 7 Asp MLC 32 (managing owner must account within reasonable time); *Nicol v Hennessy* (1896) 1 Com Cas 410 (managing owner selling shares in a ship which do not belong to him impliedly covenants to pay actual value of shares to the true owner); *Doeg v Trist* (1897) 2 Com Cas 153 (ship's husband cannot delegate his authority without sanction of owners, or pledge their credit unnecessarily).

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## **216. Forwarding agents.**

Although there is a clear distinction between a forwarding agent and a carrier<sup>1</sup>, the same person may conduct both activities at once and may contract sometimes as one and sometimes as the other<sup>2</sup>. Persons properly describing themselves as shipping and forwarding agents often act as carriers themselves with respect to part or even the whole of the carriage, for example, by performing collection and delivery services between customers' premises, their own depots and warehouses, docks and carriers' depots<sup>3</sup>. In such cases they have the rights and duties of carriers with respect to such carriage as they undertake personally<sup>4</sup>, but the rights and liabilities of forwarding agents with respect to the remainder of the transit.

The rights and liabilities of a forwarding agent are governed by general principles of the law of agency<sup>5</sup> and by the terms of any special contract<sup>6</sup>. A forwarding agent is entitled to be indemnified against all expenses incurred on behalf of his principal<sup>7</sup> and to be paid his proper charges<sup>8</sup> for his services.

A forwarding agent is liable for failure to make proper arrangements for the carriage of the goods and for any ancillary matters which he undertakes, such as customs clearance<sup>9</sup>. Where he expressly promises to perform a particular act or service, he may be strictly liable for failure to perform that act or service<sup>10</sup>. A forwarding agent must exercise reasonable care in selecting and appointing<sup>11</sup> the carrier and any other independent contractor involved in the carriage of the goods<sup>12</sup>; but he is not otherwise liable for the defaults of such parties and owes no general duty to supervise them<sup>13</sup>. Provided that he engages contractors whom he can reasonably expect to perform their normal obligations competently, he is entitled to leave performance of those duties to their discretion<sup>14</sup>. A forwarding agent is not, therefore, ordinarily answerable for the failings of those whom he engages on his principal's behalf unless he knew or should reasonably have known of those failings and could reasonably have been expected either to remedy them personally or, at least, to inform his principal so that damage might be avoided or mitigated<sup>15</sup>.

In ordinary transactions a forwarding agent is not liable for failing to insure the goods in the absence of instructions to that effect from his customer<sup>16</sup>. In certain circumstances he may, however, be liable for not consulting his customer and for not advising him as to the appropriate transport and insurance arrangements to be made for valuable goods<sup>17</sup>.

A forwarding agent does not normally owe a personal obligation to pay the charges of carriers whom he engages to carry goods on behalf of his principal<sup>18</sup>; but there is a custom of the London freight market that forwarding agents incur personal liability to shipowners for the payment of freight or of dead freight for booked space left unfilled<sup>19</sup>.

A forwarding agent who tenders dangerous goods to carriers without warning them of their nature or of the precautions which should be taken in their carriage is personally liable to the carriers for any resulting damage through breach of the implied warranty that the goods are fit for carriage<sup>20</sup>.

1 As to forwarding agents generally see PARA 92 et seq.

2 See eg *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280, [1964] 1 Lloyd's Rep 300 (where a person carrying on business as a shipping, customs and forwarding agent was held to have made separate contracts as a principal with his customer and with the actual carrier of the goods); *Troy v Eastern Co of Warehouses, Insurance and Transport of Goods (of Petrograd)* (1921) 91 LJB 632, 8 Ll L Rep 17, CA; *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd's Rep 57; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49 at 52 per Hobhouse J ('forwarding agents act in many capacities').

In *Langley, Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297 at 306 Mocatta J stated that cases where a forwarding agent acted as a principal were likely to be exceptional; but it is doubtful whether this is still the case. Notwithstanding the fact that a forwarding agent, now commonly known as a freight forwarder, may continue to act simply as an agent, in practice, consequent on the large growth of this type of commercial activity, the forwarding agent may also act for all intents and purposes as the carrier, in which case he is commonly known as a non-vessel owning cargo carrier (NVOCC).

3 See *AF Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280, [1964] 1 Lloyd's Rep 300.

4 A forwarding agent will normally act as a private carrier in respect of those parts of the overall carriage operation which he performs personally; but he may act as a common carrier if the conditions relative to that status (see PARAS 3-5) are satisfied: *Hellaby v Weaver* (1851) 17 LTOS 271; *Date & Cocke v GW Sheldon & Co (London) Ltd* (1921) 7 Ll L Rep 53. As to the liabilities of a common carrier see PARA 7 et seq.

5 See **AGENCY** vol 1 (2008) PARA 1 et seq.

6 Standard terms are in frequent use: see eg *Swiss Bank Corpn v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79.

7 See **AGENCY** vol 1 (2008) PARA 111 et seq.

8 The charges whose amount or mode of calculation has been agreed or charges calculated on a quantum meruit: see **AGENCY** vol 1 (2008) PARA 102.

9 *Von Trautenberg v Davies, Turner & Co Ltd* [1951] 2 Lloyd's Rep 462, CA.

10 As to the duties of agents to principals generally see PARA 217; and **AGENCY** vol 1 (2008) PARA 74 et seq.

11 A forwarding agent might be liable to his principal where the contract which he concludes with the carrier or other independent contractor is, while binding on the principal, not on proper terms: see eg *Swiss Bank Corpn v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79 (a case of substitutional bailment where an allegation to similar effect was not substantiated).

12 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306 at 311, CA, per Lord Denning MR and at 312 per Phillimore LJ. See also *Langley, Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297. In a contract for the supply of a service, where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill: see the Supply of Goods and Services Act 1982 s 13; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 97.

13 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306 at 312, CA, per Phillimore LJ.

14 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306 at 312, CA, per Phillimore LJ.

15 *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* [1971] 2 Lloyd's Rep 306 at 311, CA, per Lord Denning MR.

16 *WLR Traders (London) Ltd v British & Northern Shipping Agency Ltd and I Leftley Ltd* [1955] 1 Lloyd's Rep 554.

17 *Von Trautenberg v Davies, Turner & Co Ltd* [1951] 2 Lloyd's Rep 462, CA.

18 The position is likely to be otherwise in those exceptional cases where a forwarding agent, while not undertaking the carriage of the customer's goods, contracts as principal with the carrier or other party engaged to handle those goods: see PARA 92 note 7.

19 *Anglo-Overseas Transport Co Ltd v Titan Industrial Corpn (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152; *Perishables Transport Co Ltd v N Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep 379; *Langley, Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297; *Cory Bros Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep 58.

20 *Great Northern Rly Co v LEP Transport and Depository Ltd* [1922] 2 KB 742, CA (rail carriage).

## UPDATE

### 216 Forwarding agents

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 217. Liability of agents generally.

Whether the agent was intended to be a party to the charterparty depends upon its language taken as a whole<sup>1</sup>. If the signature is expressed to be 'for' or 'on behalf of ' a named person, it will be inferred that the signatory was not intended to be a party to the contract, provided that the language used in the rest of the charterparty does not clearly negative this inference and there is no proof of a custom making the signatory personally liable<sup>2</sup>.

Where the agent signs 'as agent' without naming his principal, the same result follows, even if in the body of the charterparty the agent is named as a party and the word 'charterer' follows his name<sup>3</sup>, provided that the agent intended to bind an existing person, and it seems that this is so even if the intended principal is resident abroad<sup>4</sup>. Even if the language of the charterparty is such as to render the agent personally liable, he will be relieved from such liability if he can prove that, before he signed the charterparty, the other party expressly or impliedly agreed that the agent should incur no personal liability by signing<sup>5</sup>. Whatever the terms of the charterparty<sup>6</sup> or form of signature<sup>7</sup>, a person purporting to contract as agent will be personally liable if it can be proved that he was himself the real principal<sup>8</sup>, and in such a case he will, it seems, also be entitled to sue on the charterparty in his own name<sup>9</sup>.

1 *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492 at 499, 16 Asp MLC 184 at 187, HL, per Lord Sumner.

2 *Kimber Coal Co Ltd v Stone and Rolfe Ltd* [1926] AC 414, 17 Asp MLC 37, HL, applying *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, 16 Asp MLC 184, HL. In *Adams v Hall* (1877) 3 Asp MLC 496, letters written by the defendant in which he did not deny his liability on the charterparty were admitted as evidence that he contracted as principal.

3 *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, 16 Asp MLC 184, HL, overruling *Lennard v Robinson* (1855) 5 E & B 125, and approving *Gadd v Houghton* (1876) 1 Ex D 357, CA. See also *Ariadne Steamship Co Ltd v James McKelvie & Co Ltd* [1922] 1 KB 518 at 535, 15 Asp MLC 450 at 454, CA, per Atkin LJ; affd sub nom *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, 16 Asp MLC 184, HL. This observation of Atkin LJ is apparently approved by Lord Sumner in *Kimber Coal Co Ltd v Stone and Rolfe Ltd* [1926] AC 414 at 420, 17 Asp MLC 37 at 39, HL. See also *Deslandes v Gregory* (1860) 2 E & E 610, Ex Ch (cited and approved in *Universal Steam Navigation Co Ltd v James McKelvie & Co* at 496, 504 and at 185, 189); and **AGENCY** vol 1 (2008) PARA 157.

4 *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492 at 496, 16 Asp MLC 184 at 185, 186, HL, per Viscount Cave LC. Cf *Cooke v Wilson* (1856) 1 CBNS 153; *Parker v Winlow* (1857) 7 E & B 942;

*Hough & Co v Manzanos & Co* (1879) 4 Ex D 104, in which cases the agents were described as such in the body of the charterparty and yet were held liable because they signed without qualification. The fact that in these cases the agent's signature was unqualified distinguished them from *Universal Steam Navigation Co Ltd v James McKelvie & Co*, but it seems doubtful whether they are still good law: see at 495 and at 185 per Viscount Cave LC.

5 *Wake v Harrop* (1862) 1 H & C 202, Ex Ch, followed in *Cowie v Witt* (1874) 23 WR 76; cf *Wagstaff v Anderson* (1880) 4 Asp MLC 290.

6 *Carr v Jackson* (1852) 7 Exch 382 at 385; cf **AGENCY** vol 1 (2008) PARA 156 et seq.

7 *Jenkins v Hutchinson* (1849) 13 QB 744.

8 *Carr v Jackson* (1852) 7 Exch 382 at 385.

9 *Harper & Co v Vigers Bros* [1909] 2 KB 549, 11 Asp MLC 275, applying *Schmaltz v Avery* (1851) 16 QB 655; cf **AGENCY** vol 1 (2008) PARA 167. Some qualification of these cases was suggested in *Hill Steam Shipping Co v Hugo Stinnes Ltd* 1941 SC 324, where it was said (but not decided) that a person who signed a charterparty 'as agent only' could not be heard to say that he was in fact the principal.

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## 218. Unauthorised charterparties.

An agent who contracts as such and has no authority to bind his principal is liable for breach of warranty of authority<sup>1</sup>, although he cannot, as being an agent, be sued upon the charterparty<sup>2</sup>. The principal may, however, ratify the charterparty<sup>3</sup>, provided that the agent did not purport to make it on his (the agent's) own behalf, and intended at the time of making the contract that it should enure for the principal's benefit<sup>4</sup>.

1 *Wagstaff v Anderson* (1880) 4 Asp MLC 290 at 291 per Bramwell LJ. Cf *Suart v Haigh* (1893) 9 TLR 488, HL, and *Lilly, Wilson & Co v Smales, Eeles & Co* [1892] 1 QB 456. As to damages and mitigation of damages in such cases see **AGENCY** vol 1 (2008) PARAS 160, 161; and *Mitchell v Kahl* (1862) 2 F & F 709; and as to the measure of damages where a shipbroker wrongly represents to his principals that he has concluded a charterparty between them and third persons see *Salvesen & Co v Rederi Aktiebolaget Nordstjernan* [1905] AC 302, HL.

2 *Jenkins v Hutchinson* (1849) 13 QB 744; *Wagstaff v Anderson* (1880) 4 Asp MLC 290.

3 *The Fanny, The Mathilda* (1883) 5 Asp MLC 75, CA (where it was held that there was no ratification); cf *Ocean Aktieselskabet v B Harding & Sons Ltd* [1928] 2 KB 371, 17 Asp MLC 465, CA (where the shipowner was held to have ratified a charterparty which his agent had purported to make with the charterers for whom the agent had no authority to contract, the agent intending himself to act as charterer). See also **AGENCY** vol 1 (2008) PARA 57 et seq.

4 *Watson v Swann* (1862) 11 CBNS 756; *Keighley, Maxsted & Co v Durant* [1901] AC 240, HL. See also **AGENCY** vol 1 (2008) PARAS 60, 61.

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## (C) FORMATION AND CONSTRUCTION

*(a) Fixing the Contract and Identifying the Terms*

**219. Formation of the contract, including formalities.**

A charterparty usually consists of a signed contract embodying the terms already negotiated and agreed by the parties or their agents<sup>1</sup>. It need not be in any particular form, nor is a signed contract necessary provided that the parties have agreed to be bound by identifiable terms<sup>2</sup>. Standard forms of charterparty are, however, invariably used<sup>3</sup>.

Where the charterparty is entered into by an agent, the ordinary rules of agency apply<sup>4</sup>. The principal may, therefore, sue<sup>5</sup> and be sued upon the contract of his agent, whether he was known at the time when the contract was made or not, or whether it was or was not known that there was a principal at all<sup>6</sup>, unless the language of the charterparty shows that it was intended that the agent alone should have rights and liabilities under it<sup>7</sup>.

1 A valid charterparty may be concluded by correspondence even if it is intended that the contract is to be afterwards embodied in a formal charterparty: see *Rederi Aktiebolaget Nordstjernan v Salvesen & Co* (1903) 6 F 64 at 74; judgment varied on another point sub nom *Salvesen & Co v Rederi Aktiebolaget Nordstjernan* [1905] AC 302, HL.

2 *Lidgett v Williams* (1845) 4 Hare 456 at 462; *Granit SA v Benship International Inc* [1994] 1 Lloyd's Rep 526 (agreement not made 'subject to details'; nothing of importance left unagreed and the fact that some minor matters remained on which agreement was to be reached did not mean that no binding agreement had been concluded). See also *Welex AG v Rosa Maritime Ltd, The Epsilon Rosa* [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep 509 (arbitration clause in a recap telex not drawn up 'subject to details', held to be incorporated into bill of lading because terms of charterparty readily ascertainable). It has been suggested, however, that a charterparty by demise must be in writing: see *William Cory & Son Ltd v Dorman, Long & Co Ltd* (1936) 41 Com Cas 224 at 235, 236 per Slesser LJ. See also *Adamson v Newcastle Steamship Freight Insurance Association* (1879) 4 QBD 462 at 468, 4 Asp MLC 150 at 152, DC, per Lush J ('a verbal charter' [ie a contract for the use of a whole ship as distinct from a contract for the carriage of a parcel of goods in a ship] 'is a thing unknown in maritime commerce'). As to where a binding agreement is not concluded see PARA 220.

3 As to the use of standard forms see PARA 222; as to the effect of written and printed terms see PARA 223; and as to the admission of oral evidence see PARA 225.

4 See **AGENCY** vol 1 (2008) PARA 1 et seq. Hence the principal may be liable when he has held out the agent as having authority to enter into a charterparty: *Smith v M'Guire* (1858) 3 H & N 554; cf *The Fanny, The Mathilda* (1883) 5 Asp MLC 75, CA (where there was, in the circumstances, no holding out). Where a shipbroker who is employed by a shipowner to obtain freight for his ship wrongly represents to the shipowner that he has obtained a charterparty on certain terms, the shipowner is entitled to recover from the shipbroker any actual loss which he has sustained in consequence of the misrepresentation, but not the profit he would have made if the charterparty had in fact been obtained: *Salvesen & Co v Rederi Aktiebolaget Nordstjernan* [1905] AC 302, HL. See also **AGENCY** vol 1 (2008) PARA 86.

5 *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] AC 203, 14 Asp MLC 400, HL. See also **AGENCY** vol 1 (2008) PARA 125.

6 *Christoffersen v Hansen* (1872) LR 7 QB 509 at 513, 1 Asp MLC 305 at 307 per Blackburn J.

7 See *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] AC 203 at 209, 14 Asp MLC 400 at 402, HL, per Lord Sumner. In *Humble v Hunter* (1848) 12 QB 310 it was held that the charterparty showed that the agent alone was intended to have the benefit of it on the ground that the charterparty stated that it was mutually agreed between the agent, 'owner of the (chartered) ship' and the charterer. This decision was doubted in *Killick & Co v WR Price & Co and Lingfield Steamship Co Ltd* (1896) 12 TLR 263, but held to be good law despite these doubts in *Formby Bros v Formby* (1910) 102 LT 116, CA. In *Rederiaktiebolaget Argonaut v Hani* [1918] 2 KB 247, 14 Asp MLC 310, it was held that, as the charterparty was expressed to be made between the owners and the agents 'as charterers', their undisclosed principal could not enforce the charterers' rights. In *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* the decisions in *Humble v Hunter* and *Rederiaktiebolaget Argonaut v Hani* were distinguished. Lord Sumner declined to give an opinion as to their correctness. Lord Shaw took the same course as regards *Humble v Hunter* but said that he was not prepared to be held as in any sense agreeing with the decision arrived at in *Rederiaktiebolaget Argonaut v Hani*. If it can be shown that owing to a mutual mistake the names of the contracting parties are wrongly stated in the

charterparty, the court will correct the mistake and enforce the charterparty against or in favour of the true contracting parties: *Breslauer v Barwick* (1876) 3 Asp MLC 355.

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## 220. Charterparties agreed 'subject to contract' etc.

Where there is an informal agreement between the parties which expressly requires or envisages the subsequent signing of a formal contract, the legal effect of that prior informal agreement depends on the intention of the parties. The parties to a charterparty may, therefore, have entered into a binding contract, whilst envisaging its subsequent replacement by a more formal one<sup>1</sup>; or they may show an intention to be bound only on the signing of a formal contract, the prior informal agreement being of no legal effect<sup>2</sup>.

It is common<sup>3</sup> for negotiations to crystallise into a 'recap telex' recapitulating the terms on which 'agreement' has been reached and either indicating that the 'fixture' or 'agreement' is 'subject to details'<sup>4</sup> or expressly listing the 'subjects' yet to be agreed between the parties<sup>5</sup>. Where this is the case, it is clear that under English law there is normally<sup>6</sup> no contract binding the parties until full agreement<sup>7</sup> (where 'agreement' had been reached 'subject to details') or when the stipulated 'subjects' have been 'lifted', that is to say agreed upon<sup>8</sup>. Thus, where the agreement is 'subject to contract'<sup>9</sup>, 'subject to details'<sup>10</sup>, 'subject to survey'<sup>11</sup>, 'subject to stem'<sup>12</sup>, or 'subject to satisfactory completion of two trial voyages'<sup>13</sup>, no binding agreement will have been concluded.

1 See *Rossiter v Miller* (1878) 3 App Cas 1124, HL; *Damon Compania Naviera SA v Hapag-Lloyd International SA, The Blankenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, [1985] 1 Lloyd's Rep 93, CA.

2 *Sociedade Portuguesa de Navios Tanques Lda v Hvalfangerselskapet Polaris A/S* [1952] 1 Lloyd's Rep 71 (affd [1952] 1 Lloyd's Rep 407, CA); *Zarati Steamship Co Ltd v Frames Tours Ltd (J Gibson Johnston Ltd, third parties)* [1955] 2 Lloyd's Rep 278; *Okura & Co Ltd v Navara Shipping Corpn SA* [1982] 2 Lloyd's Rep 537, CA; *Atlantic Marine Transport Corpn v Coscol Petroleum Corpn, The Pina* [1992] 2 Lloyd's Rep 103, CA; *Hofflinghouse & Co Ltd v C-Trade SA, The Intra Transporter* [1985] 2 Lloyd's Rep 158 (exchange of telexes; charterparty not intended to be binding until it was signed); *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep 566 (no intention to be bound until formal contract came into existence).

3 Though not necessary: see *Egon Oldendorff v Libera Corpn* [1995] 2 Lloyd's Rep 64 at 69, 70 per Mance J ('there is nothing in the concept of 'subject to details' in English or under English law which requires details so agreed to be recapitulated, still less which requires any recapitulation to be confirmed by either or both of the parties').

4 *Star Steamship Society v Beogradska Plovidba, The Junior K* [1988] 2 Lloyd's Rep 583. The same 'subject' is sometimes used in the absence of a charterparty: *CPC Consolidated Pool Carriers GmbH v CTM Cia Transmediterranea SA, The CPC Gallia* [1994] 1 Lloyd's Rep 68.

5 See *Mmecen SA v Inter Ro-Ro SA and Gulf Ro-Ro Services, The Samah and Lina V* [1981] 1 Lloyd's Rep 40; *Woodstock Shipping Co v Kyma Compania Naviera SA, The Wave* [1981] 1 Lloyd's Rep 521.

6 See, however, *Hanjin Shipping Co Ltd v Zenith Chartering Corpn, The Mercedes Envoy* [1995] 2 Lloyd's Rep 559 (where the parties, through their conduct, showed that they considered a contract to have come into existence, the court found that a contract had indeed come into being). Where the 'recap telex sub details' contains a clear agreement regarding the forum of arbitration, see also *F and G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep 53, CA.

7 *Sotiros Shipping Inc and Aeoo Maritime SA v Sameiet Solholt, The Solholt* [1981] 2 Lloyd's Rep 574 at 576 obiter per Staughton J ('[fixed subject to details] means that the main terms were agreed, but until the subsidiary terms and the details had also been agreed no contract existed'); *Samos Shipping Enterprises Ltd v*

*Eckhardt and Co KG, The Nissos Samos* [1985] 1 Lloyd's Rep 378 at 385 per Leggatt J ('Subject to details' is a well-known expression in broking practice which is intended to entitle either party to resile from the contract if in good faith either party is not satisfied with any of the details as discussed between them').

8 See *Albion Sugar Co Ltd v William Tankers Ltd and Davies, The John S Darbyshire* [1977] 2 Lloyd's Rep 457 (the words 'subject to satisfactory completion of two trial voyages' must be construed subject to bona fides, and the subject matter of satisfactory completion must be limited to the technical aspects of the venture ie the loading etc of the cargo), applying *Astra Trust Ltd v Adams and Williams* [1969] 1 Lloyd's Rep 81.

9 *Sociedad Portuguesa de Navios Tanques Lda v Hvalfangerselskapet Polaris A/S* [1952] 1 Lloyd's Rep 71 (affd [1952] 1 Lloyd's Rep 407, CA); *Zarati Steamship Co Ltd v Frames Tours Ltd (J Gibson Johnston Ltd, third parties)* [1955] 2 Lloyd's Rep 278; cf *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574, [1978] 2 All ER 1134, [1978] 1 Lloyd's Rep 334, CA. See also *Oceanografia SA de CV v DSND Subsea AD, The Botnica* [2006] EWHC 1360 (Comm), [2007] 1 Lloyd's Rep 37 (contract 'subject to the signing of mutually agreeable contract terms and conditions: no contract prior to signing but charterers estopped from denying existence of charterparty by conduct).

10 *Star Steamship Society v Beogradska Plovidba, The Junior K* [1988] 2 Lloyd's Rep 583; *CPC Consolidated Pool Carriers GmbH v CTM Cia Transmediterranea SA, The CPC Gallia* [1994] 1 Lloyd's Rep 68 (contract 'subject to details/logical amendments'; no concluded contract until agreement reached on the detailed provisions). The same is true where a ship is sold 'subject to details': see *Thoresen & Co (Bangkok) Ltd v Fathom Marine Co Ltd* [2004] EWHC 167 (Comm), [2004] 1 Lloyd's Rep 622.

11 See *Astra Trust Ltd v Adams and Williams* [1969] 1 Lloyd's Rep 81 ('subject to a satisfactory survey'); distinguished in *Varverakis v Compania de Navegacion Artico SA, The Merak* [1976] 2 Lloyd's Rep 250 (offer 'subject to superficial inspection afloat'; price subsequently agreed and agreement reached on all outstanding points 'subject to inspection by the buyers at a port and date to be agreed'; condition for inspection not fulfilled; there was held to be a concluded contract).

12 See *Kokusai Kisen Kabushiki Kaisha v Johnson* (1921) 8 Ll L Rep 434; *Albion Sugar Co Ltd v William Tankers Ltd and Davies, The John S Darbyshire* [1977] 2 Lloyd's Rep 457 at 466.

13 *Albion Sugar Co Ltd v William Tankers Ltd and Davies, The John S Darbyshire* [1977] 2 Lloyd's Rep 457.

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## 221. Express terms.

The express terms of a charterparty are those agreed by the parties, whether orally or in writing. The contract will normally be embodied in a written contract, the provisions in that contract being regarded as contractual terms which are binding on the parties<sup>1</sup>.

Where there is a written contract, it will normally be presumed to contain all the terms agreed between the parties. There may, however, be express oral terms<sup>2</sup> or a collateral contract<sup>3</sup>. The question whether the agreement between the parties contains additional, or even contradictory, oral terms is one of fact, to be decided by extrinsic evidence<sup>4</sup>. Once all the express terms of a contract have been ascertained, their meaning is a matter of construction<sup>5</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARA 770.

2 See **CONTRACT** vol 9(1) (Reissue) PARA 620 et seq.

3 See eg *Hassan v Runciman & Co and Lohne* (1904) 10 Asp MLC 31; *Heilbut, Symons v Buckleton* [1913] AC 30, HL; *De Lassalle v Guildford* [1901] 2 KB 215, CA; and see **CONTRACT** vol 9(1) (Reissue) PARA 753.

4 See **CONTRACT** vol 9(1) (Reissue) PARA 690.

5 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq.

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## **222. Standard forms of charterparty.**

Although the shipowner and the charterer may make their contract in any form they choose, standard forms of charterparties are ordinarily used<sup>1</sup>. The terms found in the standard forms vary according to the type of trade concerned and are known by their code names<sup>2</sup>.

The consequence of the use of standard forms is that there is often substantial identity between the terms of charterparties used in a particular field of commerce. Hence a decision on one term in one charterparty may give valuable guidance on the effect of a like term in another charterparty based on the same standard form. The use of printed forms can also lead to conflict between printed words and written variations or additions; in reconciling these the written words prevail<sup>3</sup>.

1 As to standard form contracts see further **CONTRACT** vol 9(1) (Reissue) PARA 771.

2 See eg Gencon (for trades for which no approved form is in force); Asbatankvoy (for tanker voyage charterparties); Amwelsh (for coal charterparties); Baltimore and Norgrain (for grain charterparties).

3 See PARA 223.

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## **223. Effect of written and printed terms.**

In practice, charterparties are made on printed forms of a more or less standard character<sup>1</sup> containing blank spaces for the purpose of enabling the parties to adapt the form used to their particular contract by writing in the necessary details. So far as possible, those terms of the charterparty which are in print<sup>2</sup> are to be treated as forming the contract equally with those which are in writing<sup>3</sup>. The printed terms are, however, the words of a common form, representing the usual terms of a charterparty, which are intended to suit each particular case as far as they can, but which are not introduced in contemplation of any particular case<sup>4</sup>. The written terms embody the special terms which the parties, after consideration of all the circumstances, have introduced for the purpose of meeting their particular requirements<sup>5</sup>. More weight must, therefore, be given to the written than to the printed terms<sup>6</sup>; if they conflict and cannot be reconciled, the written terms must be preferred, and the printed terms treated as though they had been struck out of the charterparty<sup>7</sup>.

1 As to standard forms of charterparty see PARA 222.

2 The fact that different clauses are printed in different sizes of type has no legal significance: *Yorkshire Insurance Co Ltd v Campbell* [1917] AC 218, PC.

3 *Gumm v Tyrie* (1865) 6 B & S 298, Ex Ch; *The Nifa* [1892] P 411, 7 Asp MLC 324; *Briscoe & Co v Powell & Co* (1905) 22 TLR 128; cf *Dixon v Heriot* (1862) 2 F & F 760.

4 *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470 at 474, 5 Asp MLC 353 at 354, HL, per Lord Selborne LC; *Glynn v Margetson & Co* [1893] AC 351, 7 Asp MLC 366, HL. As to the priority of writing over print see *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 1 QB 462 at 501, [1956] 1 All ER 209 at 222, CA (affd [1957] AC 149, [1956] 3 All ER 957, HL); *Neuchatel Asphalte Co Ltd v Barnett* [1957] 1 All ER 362, [1957] 1 WLR 356, CA, per Denning LJ; and the text and note 7.

5 *Robertson v French* (1803) 4 East 130 at 134 per Lord Ellenborough (followed in *Glynn v Margetson & Co* [1893] AC 351, 7 Asp MLC 366, HL); *Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag Svea, The Brabant* [1967] 1 QB 588, [1966] 1 All ER 961, [1965] 2 Lloyd's Rep 546 at 553 per McNair J; *Ismail v Polish Ocean Lines, The Ciechocinek* [1975] 2 Lloyd's Rep 170 at 186 per Kerr J (revsd on other grounds [1976] QB 893, [1976] 1 All ER 902, [1976] 1 Lloyd's Rep 489, CA).

6 *Scrutton v Childs* (1877) 3 Asp MLC 373, DC.

7 See generally PARA 78; *Scrutton v Childs* (1877) 3 Asp MLC 373, DC; *Moore v Harris* (1876) 1 App Cas 318 at 327, 3 Asp MLC 173 at 177, PC; *Baumvoll Manufactur von Scheibler v Gilchrest & Co* [1892] 1 QB 253 at 257, 7 Asp MLC 130 at 133, CA, per Lord Esher MR (affd sub nom *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL); *France, Fenwick & Co Ltd v Philip Spackman & Sons* (1912) 12 Asp MLC 289; *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 1 QB 462 at 501, 502, [1956] 1 All ER 209 at 222, CA, per Jenkins LJ (affd [1957] AC 149, [1956] 3 All ER 957, HL). Cf *Cross v Pagliano* (1870) LR 6 Exch 9; *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL; *Hadjipateras v S Weigall & Co* (1918) 34 TLR 360; *Taylor v John Lewis Ltd* 1927 SC 891; *Bravo Maritime (Chartering) Est v Alsayed Abdullah Mohamed Baroom, The Athinoula* [1980] 2 Lloyd's Rep 481. In *London Transport Co Ltd v Trechmann Bros* [1904] 1 KB 635 at 645, 9 Asp MLC 518 at 523, 524, CA, Collins MR referred to the fact that a portion of the printed form of the charterparty had been deleted as evidence of the intention of the parties. Whether this is legitimate cannot be regarded as clear on the authorities: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 211. See also *Baumvoll Manufactur von Scheibler v Gilchrest & Co* at 256 and at 133 per Lord Esher MR, followed in *Rowland and Marwood's Steamship Co Ltd v Nilson Sons & Co Ltd* (1897) 2 Com Cas 198 at 200. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 175.

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## 224. Additions and alterations; riders.

The general principles governing the effect of an addition (known in the shipping market as a 'rider'), alteration, erasure or obliteration after the completion of a written document<sup>1</sup> apply equally to a charterparty<sup>2</sup>. The charterparty is not avoided when its terms are varied by subsequent agreement<sup>3</sup>, but to be enforceable the variation must be assented to by both parties<sup>4</sup>.

1 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 158 et seq. As to where there is an inconsistency between a rider and a standard charterparty form see PARA 78.

2 *Croockewit v Fletcher* (1857) 1 H & N 893.

3 *Hall v Brown* (1814) 2 Dow 367, HL (where no alteration was made on the face of the charterparty, it being varied by subsequent instructions).

4 *Croockewit v Fletcher* (1857) 1 H & N 893.

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Formation and Construction/(a) Fixing the Contract and Identifying the Terms/225. Admission of oral evidence.

## 225. Admission of oral evidence.

Oral evidence is not admissible to vary the terms of the charterparty<sup>1</sup>, but only to explain them if ambiguous<sup>2</sup> or used in a technical sense<sup>3</sup>, or to supplement them by proving an independent collateral undertaking<sup>4</sup>. Since, however, it is well known that different trades and different ports have usages of their own<sup>5</sup> which regulate the supply<sup>6</sup>, loading<sup>7</sup> or discharging<sup>8</sup> of the cargo, or by which the extent of the duties<sup>9</sup>, rights<sup>10</sup>, or liabilities<sup>11</sup> of the parties are to be determined, the parties must be taken, in the absence of anything to show the contrary<sup>12</sup>, to have contracted with reference to such usages, and to have intended to incorporate them in the contract<sup>13</sup>.

Oral evidence of such usages is, therefore, admissible for the purpose of supplementing the written terms of the charterparty<sup>14</sup>, or, where the written terms are ambiguous or used in a technical sense, for the purpose of explaining them and making clear the intention of the parties<sup>15</sup>. Where, however, the usage is plainly inconsistent with an express term of the charterparty<sup>16</sup>, or where the language of the charterparty is clear and unambiguous<sup>17</sup>, the charterparty prevails and the inconsistent usage is rejected<sup>18</sup>.

1 *Leduc & Co v Ward* (1888) 20 QBD 475, 6 Asp MLC 290, CA. See also *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA; *Northern Sales Ltd v The Giancarlo Zeta*, *The Giancarlo Zeta* [1966] 2 Lloyd's Rep 317, Can Ex Ct; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 185 et seq. Cf, however PARA 228.

2 *The Curfew* [1891] P 131, 7 Asp MLC 29, DC; *The Nifa* [1892] P 411, 7 Asp MLC 324. See also *Adams v Hall* (1877) 3 Asp MLC 496; *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd*, *The Karen Oltmann* [1976] 2 Lloyd's Rep 708.

3 *Birch v Depeyster* (1816) 4 Camp 385; *Hibbert v Owen* (1859) 2 F & F 502.

4 *Hassan v Runciman & Co and Lohne* (1904) 10 Asp MLC 31; cf *Ardennes (Cargo Owners) v Ardennes (Owners)* [1951] 1 KB 55, [1950] 2 All ER 517, 84 Ll L Rep 340 (bill of lading). As to the admission of oral evidence to connect the different parts of the contract see *Hibbert v Owen* (1859) 2 F & F 502.

5 See further **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 687 et seq.

6 See, however, *Cockburn v Alexander* (1848) 6 CB 791 (where the custom was excluded).

7 *Benson v Schneider* (1817) 7 Taunt 272; *Cuthbert v Cumming* (1855) 11 Exch 405; *Pust v Dowie* (1864) 5 B & S 20 (affd 5 B & S 33, Ex Ch); *Encyclopaedia Britannica Inc v The Hong Kong Producer and Universal Marine Corp* [1969] 2 Lloyd's Rep 536 (alleged custom to ship containers on deck); *Du Pont de Nemours International SA and El Du Pont de Nemours & Co Inc v SS Mormacvega etc and Moore-McCormack Lines Inc*, *The Mormacvega* [1973] 1 Lloyd's Rep 267 (SDNY); affd [1974] 1 Lloyd's Rep 296 (US 2nd Cir) (alleged custom to ship containers on deck); *Nissan Automobile Co (Canada) Ltd v Owners of the Vessel Continental Shipper*, *The Continental Shipper* [1976] 2 Lloyd's Rep 234, Fed CA (custom for cars to be shipped uncrated).

8 *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC; *Marzetti v Smith & Son* (1883) 5 Asp MLC 166, CA; *Nielsen v Wait* (1885) 16 QBD 67, 5 Asp MLC 553, CA; *Helios A/S v Ekman & Co* [1897] 2 QB 83, 8 Asp MLC 244, CA. See also *Catley v Wintringham* (1792) Peake 150. Cf *Robinson v Turpin* (1805) Peake 151n; and see PARAS 282, 283, 534, 545.

9 *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC.

10 *Norway (Owners) v Ashburner*, *The Norway* (1865) 3 Moo PCCNS 245; *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC.

11 *Dickenson v Lano* (1860) 2 F & F 188; *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610; *Hutchinson v Tatham* (1873) LR 8 CP 482. See also *Brown v Byrne* (1854) 3 E & B 703; *Hall v Janson* (1855) 4 E & B 500; *Falkner v Earle* (1863) 3 B & S 360; *Lilly, Wilson & Co v Smales, Eeles & Co* [1892] 1 QB 456.

12 The conduct of the parties may be sufficient: *Bottomley v Forbes* (1838) 5 Bing NC 121.

13 *Robinson v Mollett* (1875) LR 7 HL 802; *Anglo-Hellenic Steamship Co Ltd v Louis Dreyfus & Co* (1913) 12 Asp MLC 291. The custom must, however, be reasonable (*Hathesing v Laing, Laing v Zeden* (1873) LR 17 Eq 92, 2 Asp MLC 170; *Robinson v Mollett* at 818 per Brett J; *Marwood v Taylor* (1901) 6 Com Cas 178, CA; *Sea Steamship Co v Price, Walker & Co* (1903) 8 Com Cas 292; *United States Shipping Board v John Westrope & Co, Hull* (1924) 19 LI L Rep 246 (where a usage for receivers to rebag barley for discharge was held not unreasonable)), and must not be inconsistent with the general law (*Meyer v Dresser* (1864) 16 CBNS 646; *Atwood v Sellar & Co* (1880) 5 QBD 286, 4 Asp MLC 283, CA).

14 It is not, however, admissible for the purpose of introducing a fresh contract: *Phillipps v Briard* (1856) 1 H & N 21 at 27 per Pollock CB.

15 *Cochran v Retberg* (1800) 3 Esp 121; *Leidemann v Schultz* (1853) 14 CB 38; *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610; *Buckle v Knoop* (1867) LR 2 Exch 125, Ex Ch; *Pool Shipping Co Ltd v SJ Moreland & Sons Ltd* (1936) 56 LI L Rep 175 (meaning of 'intake string measure'). See also **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 669.

16 *Palgrave, Brown & Son Ltd v SS Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL, applying *Holman v Wade* (1877) Times, 11 May, CA. See also *Hayton v Irwin* (1879) 4 Asp MLC 212, CA; *The Alhambra* (1881) 6 PD 68, CA; *Kearon v Radford & Co* (1895) 11 TLR 226; *Gulf Line Ltd v Laycock* (1901) 7 Com Cas 1; *Metcalfe, Simpson & Co v Thompson, Pattrick, and Woodward* (1902) 18 TLR 706 (where the charterparty provided for loading 'as fast as the steamer can receive, but according to the custom of the port'; it was held that a custom as to an average rate of loading, if proved, would be inconsistent with the above term); *Sea Steamship Co v Price, Walker & Co* (1903) 8 Com Cas 292. The charterparty may expressly provide that the custom is not to apply: *SS Brenda Co v Green* [1900] 1 QB 518, 9 Asp MLC 55, CA.

17 *Lewis v Marshall* (1844) 7 Man & G 729; *Krall v Burnett* (1877) 25 WR 305, DC; *The Nifa* [1892] P 411, 7 Asp MLC 324; *Bennetts & Co v Brown* [1908] 1 KB 490, 11 Asp MLC 10.

18 *Phillipps v Briard* (1856) 1 H & N 21.

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## 226. Implied terms.

In certain circumstances a term or condition, although not expressly stated in the charterparty, may be implied by the court in construing the contract, with the object of giving efficacy to the transaction which both parties must have intended it should have. The circumstances in which terms will be so implied are considered elsewhere<sup>1</sup>.

<sup>1</sup> See **CONTRACT** vol 9(1) (Reissue) PARA 778 et seq. Where, with the knowledge that the Suez Canal was blocked, the shipowners accepted a cargo tendered by agents of the charterers at a port in India for carriage to Genoa, no new agreement could be implied that the cargo would be carried via the Cape of Good Hope at the same rate of freight as that provided by the charterparty or on the charterparty terms: see *Société Franco Tunisienne d'Armement v Sidermar SpA* [1961] 2 QB 278, [1960] 2 All ER 529, [1960] 2 Lloyd's Rep 594 (shipowners held to be entitled on a quantum meruit to a reasonable remuneration for carrying the goods via the Cape).

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### (b) General Principles of Construction

## 227. Rules of construction.

Like any other commercial document<sup>1</sup>, a charterparty must be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract<sup>2</sup>.

The legal effect of the particular terms to which reference will be made<sup>3</sup> depends in every case not only on the exact words of the term but also on the language of the charterparty taken as a whole and construed in the light of the circumstances in which it was made<sup>4</sup>. Thus, for example, a decision on the effect of a term in one charterparty as to whether it creates a condition whose non-fulfilment gives a right to treat the contract as at an end, or whether it is merely a term of the contract a breach of which gives rise to a right of action for damages<sup>5</sup>, may not be decisive of the effect of a similarly worded term in another charterparty if there is a material difference between other relevant provisions of the charterparties or in their surrounding circumstances<sup>6</sup>.

1 As to the construction of documents generally, other than wills, see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq. As the rules governing the construction of charterparties are equally applicable to the construction of bills of lading, cases relating to the construction of bills of lading are included in this section. It is not, however, necessary for the contract of affreightment to be expressed in writing: see PARA 219.

2 *Constable v Cloberie* (1625) Palm 397; *Tarrabochia v Hickie* (1856) 1 H & N 183; *Mira Oil Resources of Tortola v Bocimar NV* [1999] 2 Lloyd's Rep 101; *Nippon Yusen Kubishiki Kaisha v Golden Strait Corpn, The Golden Victory* [2003] EWHC 16 (Comm), [2003] 2 Lloyd's Rep 592, [2003] All ER (D) 150 (Jan). Where the charterparty contains no provision relating to the events which have happened, it must be presumed that the parties intended to provide for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract; and the meaning of the contract must be taken to be that which the parties, as fair and reasonable persons, would presumably have agreed on if they had taken such events into consideration, and had made express provision to meet them: *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 59, 4 Asp MLC 392 at 398, HL, per Lord Watson. The rules of construction to be applied are the same as for any other written instrument: see note 1.

3 See in PARA 241 et seq.

4 *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Comptoir Commercial Anversoise v Power Son & Co* [1920] 1 KB 868 at 899, CA.

5 *Glaholm v Hays* (1841) 2 Man & G 257 at 266.

6 See eg *Burton v English* (1883) 12 QBD 218 at 222, 5 Asp MLC 187 at 189, CA, per Bowen LJ ('nobody can lay down a universal rule of law for the interpretation of charterparties or of bills of lading'); applied in *Tor Line AB v Alltrans Group of Canada Ltd, The TFL Prosperity* [1984] 1 All ER 103, [1984] 1 WLR 48, [1984] 1 Lloyd's Rep 123, HL.

### UPDATE

## 227 Rules of construction

NOTE 2--*BW Gas AS v JAS Shipping Ltd* [2010] EWCA Civ 68, [2010] All ER (D) 134 (Feb) (nothing in provisions of sub-charter required defendant to provide buyer's supply items).

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## 228. Intention of the parties; interpretation of words used.

The words used in charterparties are to be understood in their plain, ordinary and popular meaning<sup>1</sup>, unless the context shows that the parties, for the purposes of the contract, intended to place a different meaning on them<sup>2</sup>, or unless, by the usage of a particular trade, business or port<sup>3</sup>, they have to such an extent acquired a secondary or technical meaning that that is clearly the meaning intended by the parties<sup>4</sup>.

The words used are to be construed with reference to the surrounding circumstances to which they were intended by the parties to apply<sup>5</sup>, and evidence of such circumstances is admissible<sup>6</sup>.

General words, even if preceded by words of more specific application, must prima facie be construed as having their natural and larger meaning<sup>7</sup>, unless there is something in the document itself showing an intention to limit them to things ejusdem generis with those enumerated<sup>8</sup>. If the specific words cannot be comprised within a single genus, it does not follow that no limitation can be applied to the general words; the parties may have intended to cover things like one or more of those specified, but not precisely covered by the specific words used<sup>9</sup>.

1 *Robertson v French* (1803) 4 East 130 at 136 per Lord Ellenborough CJ; *Croockewit v Fletcher* (1857) 1 H & N 893 at 911 per Martin B; *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580 at 587, 5 Asp MLC 499 at 500, CA, per Brett MR; *Mendl & Co v Ropner & Co* [1913] 1 KB 27, 12 Asp MLC 268; *Dow Europe SA v Novoklav Inc* [1998] 1 Lloyd's Rep 306; *Mira Oil Resources of Tortola v Bocimar NV* [1999] 2 Lloyd's Rep 101; *Nippon Yusen Kubishiki Kaisha v Golden Strait Corpn, The Golden Victory* [2003] EWHC 16 (Comm), [2003] 2 Lloyd's Rep 592, [2003] All ER (D) 150 (Jan). Cf **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 169, 170. Terms eg as to the quantity of cargo must be substantially, but need not be literally, fulfilled: *Williams v Manisselian Frères* (1923) 17 Ll L Rep 72, CA; and see PARA 259.

2 *Robertson v French* (1803) 4 East 130.

3 See PARA 225.

4 *Robertson v French* (1803) 4 East 130 at 136. Where it is shown that a term or phrase has acquired a peculiar meaning in a particular trade, it is prima facie to be taken as used with that meaning when used in relation to that trade: *Myers v Sarl* (1860) 3 E & E 306 at 319 per Blackburn J.

5 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245; *Dimech v Corlett* (1858) 12 Moo PCC 199 at 224. Cf *Johnson v Greaves* (1810) 2 Taunt 344; *John Potter & Co v Burrell & Son* [1897] 1 QB 97, 8 Asp MLC 200, CA; *Australian Oil Refining Pty Ltd v RW Miller & Co Pty Ltd* [1968] 1 Lloyd's Rep 448 at 452 per Barwick CJ; *Segovia Compagnia Naviera SA v R Pagnan and Fratelli, The Aragon* [1975] 2 Lloyd's Rep 216 at 221 per Donaldson J; *Tropwood AG of Zug v Jade Enterprises Ltd, The Tropwind* [1982] 1 Lloyd's Rep 232, CA. Where a charterparty contained a clause, beginning 'This bill of lading', purporting to incorporate into the charterparty the Carriage of Goods by Sea Act 1936 (a United States Act), which expressly excludes charterparties from its application, it was decided that it was the plain intention of the parties to incorporate the rules scheduled to the Act, and gave effect to the clause: *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL. 'No doubt there are rules or canons of construction applicable to careless and slovenly, as to other, documents': see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* at 158, 733, 83 per Viscount Simonds. See also PARA 370.

6 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 198; cf PARA 225.

7 *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, [1950] 1 All ER 768, 83 Ll L Rep 385 (revsd on another point [1951] 1 KB 255, [1950] 2 All ER 618, 84 Ll L Rep 347, CA), applying *Anderson v Anderson* [1895] 1 QB 749, CA; *Arab Maritime Petroleum Transport Co v Luxor Trading Corpn of Panama, The Al Bida* [1987] 1 Lloyd's Rep 124, CA (construction of 'about 15.5 knots' and 'average consumption' in speed and consumption warranty). The contract itself may make it plain, by the use of some such words as 'any other cause whatsoever', that the ejusdem generis rule is not to apply: see *Larsen v Sylvester & Co* [1908] AC 295, 11 Asp MLC 78, HL; *France, Fenwick & Co Ltd v Philip Spackman & Sons* (1912) 12 Asp MLC 289; *Sidermar SpA v Apollo Corpn, The Apollo* [1978] 1 Lloyd's Rep 200.

8 In the following cases the thing in question was excluded as not being ejusdem generis: *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA; *Steamship Knutsford Ltd v Tillmanns & Co* [1908] AC 406, 11 Asp MLC 105, HL (following *Thames and Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co* (1887) 12 App Cas 484, 6 Asp MLC 200, HL); *Mudie & Co v Strick* (1909) 11 Asp MLC 235 (new trial ordered without

affecting this point, 14 Com Cas 227, CA); *Thorman v Dowgate Steamship Co Ltd* [1910] 1 KB 410, 11 Asp MLC 481; *Jenkins v L Walford (London) Ltd* (1917) 87 LJKB 136 (shortage of labour); *Aktieselskabet Frank v Namaqua Copper Co Ltd* (1920) 15 Asp MLC 20 (government interference); *Diana Maritime Corp of Monrovia v Southern Ltd* [1967] 1 Lloyd's Rep 114. Cf *Micada Compania Naviera SA v Texim* [1968] 2 Lloyd's Rep 57. In the following cases the thing in question was included: *Re an Arbitration between Lokie and Craggs & Son* (1901) 9 Asp MLC 296; *Re Allison & Co and Richards* (1904) 20 TLR 584, CA; *SS Magnhild v McIntyre Bros & Co* [1921] 2 KB 97, 15 Asp MLC 230, CA (grounding). See also *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175, 16 Asp MLC 28, HL (cited in PARA 301 note 1). As to the ejusdem generis rule generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 233-234.

9 See *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at 246, [1950] 1 All ER 768 at 773, 83 Ll L Rep 385 at 393 per Devlin J.

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## 229. Construction of exceptions and terms.

Where exceptions and terms<sup>1</sup> in a charterparty are ambiguous<sup>2</sup> and are pleaded for the benefit of one of the parties to the charterparty, such exceptions and terms must, under the so-called *contra preferentum* rule, be construed narrowly against the party pleading their benefit<sup>3</sup>. Thus, a term that the shipowner is not to be liable for damage capable of being covered by insurance does not cover the theft of the goods<sup>4</sup>, or damage attributable to negligence<sup>5</sup>, or to the unseaworthiness of the ship<sup>6</sup>.

1 The contra preferentum rule of construction applies not only to exception clauses but also to indemnity clauses and provisos, although it may be that the rule applies less strictly to limitation of damages clauses: see **CONTRACT** vol 9(1) (Reissue) PARA 803.

2 See *Mira Oil Resources of Tortola v Bocimar NV* [1999] 2 Lloyd's Rep 101 at 104, per Colman J; *Mabanaft International Ltd v ERG Petroli SpA, The Yellow Star* [2000] 2 Lloyd's Rep 637; *Waterfront Shipping Co Ltd v Trafifura AG, The Sabrewing* [2007] EWHC 2482 (Comm), [2008] 1 All ER (Comm) 958, [2008] 1 Lloyd's Rep 286.

3 *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546 at 549, 2 Asp MLC 275 at 277 per Lush J, as explained in *Norman v Binnington* (1890) 25 QBD 475 at 477, 6 Asp MLC 528 at 530, DC, per AL Smith J; *Burton v English* (1883) 12 QBD 218 at 224, 5 Asp MLC 187 at 189, CA, per Bowen LJ; *Elderslie Steamship Co v Borthwick* [1905] AC 93, 10 Asp MLC 24, HL, discussed in *Wiener & Co v Wilsons and Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413, CA; *Produce Brokers Co Ltd v Furness Withy & Co Ltd* (1912) 12 Asp MLC 188 at 189 per Scrutton J; *Diana Maritime Corp of Monrovia v Southern Ltd* [1967] 1 Lloyd's Rep 114 at 123 per Megaw J; *Encyclopaedia Britannica Inc v The Hong Kong Producer and Universal Marine Corp* [1969] 2 Lloyd's Rep 536 at 542; cf *C Wilh Svenssons Travaruaktiebolag v Cliffe Steamship Co* [1932] 1 KB 490, 18 Asp MLC 284 (where the charterparty provided for shipment of a deckload 'at charterers' risk' and also contained an exception clause in which, among other things, 'accidents to hull' were excepted, even when occasioned by the negligence of the shipowner's employees; part of a deckload was lost through negligent overloading and it was held (applying *Wade & Sons Co Ltd v Cockerline & Co* (1905) 10 Com Cas 115, CA, and following *Herbert Whitworth Ltd v Pacific Steam Navigation Co* (1926) 25 Ll L Rep 573) that, although the words 'at charterers' risk' would not have protected the shipowner as the loss was due to negligence, these words must be read together with the exception of 'accidents to hull even when occasioned by negligence', and that the combined effect of the two clauses was to protect the shipowner). See also *Tor Line AB v Alltrans Group of Canada Ltd, The TFL Prosperity* [1984] 1 All ER 103, [1984] 1 WLR 48, [1984] 1 Lloyd's Rep 123, HL (clause in 'Baltimere' charterparty purporting to exempt shipowners from liability for damage 'whatsoever and howsoever caused'). As to this construction, which is known as the contra proferentem rule, see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 178-179.

4 *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546, 2 Asp MLC 275.

5 *Price & Co v Union Lighterage Co* [1904] 1 KB 412, CA.

6 *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16, 10 Asp MLC 581. HL. See also *Ingram and Royle Ltd v Services Maritimes du Tréport* [1914] 1 KB 541, 12 Asp MLC 387, CA.

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### (c) Remedies

#### 230. Misrepresentation.

If the charterer has entered into a charterparty after a misrepresentation has been made to him, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he is entitled to rescind, notwithstanding that the misrepresentation has become a term of the contract<sup>1</sup>. Furthermore, in appropriate circumstances, the same statement may form the basis of claims for damages for breach of contract and for damages in tort for negligently making the statement<sup>2</sup>.

Where the charterer has entered into a contract after a misrepresentation has been made to him by the shipowner and as a result he has suffered loss, then, if the shipowner would be liable to damages in respect of it had the representation been made fraudulently, he may be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true<sup>3</sup>.

Where the charterer has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the charterparty, then, if it is claimed, in any proceedings arising out of the charterparty, that the charterparty ought to be or has been rescinded, the court may declare the charterparty subsisting and award damages in lieu of rescission if of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the charterparty were upheld, as well as to the loss that rescission would cause to the other party<sup>4</sup>.

If the misrepresentation is fraudulent, the charterer may rescind the charterparty and claim damages for deceit<sup>5</sup>.

No remedy is available to him if the misrepresentation, whether innocent or fraudulent, does not induce him to enter into the charterparty<sup>6</sup>.

1 See the Misrepresentation Act 1967 s 1; **CONTRACT** vol 9(1) (Reissue) PARA 987; and *Atlantic Lines & Navigation Co Inc v Hallam Ltd, The Lucy* [1983] 1 Lloyd's Rep 188. As to claims for rescission see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 812 et seq.

2 As to the liability of a shipowner for negligent misstatements see *Markappa Inc v NW Spratt & Son Ltd, The Arta* [1985] 1 Lloyd's Rep 534, CA (negligent assurance as to the financial standing and reliability of the charterers on which it was clear that the plaintiffs would rely).

3 See the Misrepresentation Act 1967 s 2(1); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801. As to the principal's liability for an agent's misrepresentation see eg *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857, [1983] 1 Lloyd's Rep 431.

4 See the Misrepresentation Act 1967 s 2(2); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834.

5 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 755 et seq, 791 et seq.

6 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 768 et seq.

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### **231. Mistake and verification.**

If the shipowner and the charterer have reached agreement<sup>1</sup> but by mistake this has not been correctly expressed in the charterparty purporting to state what they have agreed, upon proof of their having come to agreement, equity may order rectification of the charterparty at the instance of either party<sup>2</sup>.

If one party knows or suspects<sup>3</sup> that the charterparty contains a mistake in his favour but does nothing to correct it, rectification will be granted if the mistaken party can establish that it would be inequitable to hold the mistaken party to the contract and not inequitable to hold the other party to the contract as understood by the mistaken party<sup>4</sup>. It is not necessary for the mistaken party to go further and prove sharp practice by the other party, for example actual knowledge of the mistake, fraud or misrepresentation<sup>5</sup>. The loss of which the mistaken party complains must, however, be attributable to his mistake and not merely to his own carelessness in failing to read the terms of the charterparty<sup>6</sup>.

1 The parties can be held to have reached agreement despite the fact that, when the charterparty was concluded, both parties have made a common mistake as to the current position of the vessel, in circumstances where the central purpose of the charter could still be realised despite the mistake: see *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689.

2 As to the circumstances in which the remedy of rectification is available see *Etablissements Georges et Paul Levy v Adderley Navigation Co Panama SA, The Olympic Pride* [1980] 2 Lloyd's Rep 67 at 72, 73 per Mustill J. For cases where rectification was ordered see eg *Vergottis & Co v H Ford & Co Ltd* (1918) 34 TLR 233; *Joint Danube and Black Sea Shipping Agencies v Rederiaktiebolaget Iris* (1932) 43 Ll L Rep 97; *Chandris v Louis Dreyfus & Co* (1934) 50 Ll L Rep 141; *Rhodian River Shipping Co SA and Rhodian Sailor Shipping Co SA v Halla Maritime Corpn, The Rhodian River and Rhodian Sailor* [1984] 1 Lloyd's Rep 373; cf *Federazione Italiana dei Consorzi Agrari v Federal Commerce & Navigation Co Ltd* (1949) 82 Ll L Rep 717 (for a case where rectification was not given). As to rectification generally see **MISTAKE** vol 77 (2010) PARA 57 et seq.

3 *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 at 280, [1995] 2 All ER 929 at 946, CA.

4 *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd, The Ypatia Halcoussi* [1985] 2 Lloyd's Rep 364 at 371.

5 *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 at 280, [1995] 2 All ER 929 at 946, CA.

6 *Agip SpA v Navigazione Italia SpA, The Nai Genova and Nai Superba* [1984] 1 Lloyd's Rep 353, CA.

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### **232. Duress.**

Where a party to a transaction enters into it under duress in the strict sense, that is to say, where he is compelled to it by bodily restraint or fear of bodily harm, the transaction is voidable at law and will be set aside in equity<sup>1</sup>. Relief is, however, also granted where the compulsion is not of this extreme nature, and to avoid the transaction it is sufficient that there were such circumstances of pressure, including commercial pressure, as to prevent the party from being a free agent<sup>2</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARAS 710, 711; **EQUITY** vol 16(2) (Reissue) PARA 436.

2 *Occidental Worldwide Investment Corp v Skibs A/S Avanti, Skibs A/S Glarona, Skibs A/S Navolis, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170, [1979] 1 Lloyd's Rep 89; *Universal Tankships Inc of Monrovia v International Transport Workers Federation, The Universe Sentinel* [1983] 1 AC 366, [1982] 2 All ER 67, [1982] 1 Lloyd's Rep 537, HL; *Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials LLC, The Alev* [1989] 1 Lloyd's Rep 138; *Enimont Overseas AG v RO Jugotanker Zadar, The Olib* [1991] 2 Lloyd's Rep 108; *Dimskal Shipping Co SA v International Transport Workers Federation, The Evia Luck (No 2)* [1992] 2 AC 152, [1991] 4 All ER 871, [1992] 1 Lloyd's Rep 115, HL. See also *Pao On v Lau Yiu Long* [1980] AC 614, sub nom *Pao On v Lau Yiu* [1979] 3 All ER 65, PC; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, CA.

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### 233. Illegality.

A contract which is entered into with the object of committing an illegal act is unenforceable, the application of this principle depending on proof of the intent, at the time the contract was made, to break the law. If the intent is mutual, the contract is not enforceable at all and, if unilateral, it is unenforceable at the suit of the party who is proved to have the intent<sup>1</sup>.

The court will not enforce a contract which is expressly or impliedly prohibited by statute. It does not matter what the intention of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not<sup>2</sup>.

Thus, any term in a contract of affreightment which is contrary to the law of England at the time the contract is made is void. If a contract of affreightment is lawful at the date of the contract but thereafter becomes unlawful as regards all or some of its terms by the law of England<sup>3</sup> or if the performance of the contract will involve, to the knowledge of the parties, the doing of an act in a foreign and friendly country violating the law of that country<sup>4</sup>, the contract will not be enforced in England<sup>5</sup>. The term must, however, really be unlawful; a prohibition by an officer of the government which is not authorised by law will not afford an excuse for non-performance on the ground of illegality<sup>6</sup>, but such a prohibition may fall within an express exception of restraint of princes<sup>7</sup>.

A contract will not always be totally illegal and certain parts of it may be entirely lawful in themselves. In such a case the court may in certain circumstances sever the illegal part from the contract and enforce the rest of the contract without the illegal part<sup>8</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARAS 839, 869, 874.

2 See **CONTRACT** vol 9(1) (Reissue) PARAS 869-870.

3 *Esposito v Bowden* (1857) 7 E & B 763, Ex Ch.

4 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301, [1957] 3 All ER 286, [1957] 2 Lloyd's Rep 289, HL.

- 5 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 31.
- 6 *Evans v Hutton* (1842) 4 Man & G 954.
- 7 See PARA 270.
- 8 See **CONTRACT** vol 9(1) (Reissue) PARA 877.

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### 234. Statements on face of charterparty.

All statements of fact, other than immaterial representations<sup>1</sup>, and all undertakings as to the future<sup>2</sup> contained in the terms of a charterparty form part of the contract and bind the person from whom they proceed<sup>3</sup>. If, therefore, the fact is untrue, or the undertaking is not fulfilled, that person is guilty of a breach of contract which entitles the injured party to recover damages, and may also justify him in refusing to perform his own part of the contract, on the ground that the charterparty has been discharged by the breach<sup>4</sup>.

1 *Hunter v Fry* (1819) 2 B & Ald 421 at 424 per Abbott CJ; *Behn v Burness* (1863) 3 B & S 751 at 754, Ex Ch, per Williams J; *Engman v Palgrave, Brown & Son* (1898) 4 Com Cas 75.

2 *Hyundai Marine Co Ltd v Karanfer Maritime Inc, The Niizuru* [1996] 2 Lloyd's Rep 66 (condition precedent as to giving charterer notice of vessel's delivery).

3 An oral representation not embodied in the charterparty may amount to a collateral warranty: *Hassan v Runciman & Co and Lohne* (1904) 10 Asp MLC 31. Cf *Snell v Marryatt* (1808, unreported); *Ardennes (Cargo Owners) v Ardennes (Owners)* [1951] 1 KB 55, [1950] 2 All ER 517, 84 Ll L Rep 340 (bill of lading).

4 *Behn v Burness* (1863) 3 B & S 751 at 755, Ex Ch, per Williams J.

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### 235. Test of condition precedent.

As in the general law of contract<sup>1</sup>, certain breaches of a charterparty are considered to be repudiatory, such as to give the party not in breach the option of terminating the charterparty, an option whose attraction will vary with the movement of the charter market compared with the rate of freight or hire agreed in the charterparty. A party is in repudiatory breach if he is in breach of a condition<sup>2</sup> or of an innominate term<sup>3</sup> the effect of the breach of which goes to the root of the contract.

Whether or not a term is a condition<sup>4</sup> is a matter of construction, the court seeking to establish whether it was the intention of the parties that a breach of the term would give the party not in breach the option of termination<sup>5</sup>. If the parties make it clear that a breach of a particular term will not give the other party such an option, then that term is classified as a warranty<sup>6</sup> and the other party will be restricted to his remedy in damages<sup>7</sup>. However, the mere use of the label 'condition' or 'warranty' in the charterparty will not necessarily determine whether the party not in breach can terminate the charterparty for breach of the term so labelled<sup>8</sup>.

Where the parties fail to give any indication in the charterparty whether a term is a condition or warranty, the term breached is considered to be an innominate term<sup>9</sup> and the party not in breach will only have the option to terminate the charterparty if he can prove that the loss caused by the breach goes to the root of the contract<sup>10</sup>. Thus, for example, where a breach of the implied duty to provide a seaworthy vessel caused the laying up of a vessel, it was held that the charterer was not entitled to terminate the contract<sup>11</sup>; but, where a shipowner purported to withdraw the charterer's express authority to sign bills of lading, the charterer was held to be entitled to terminate the charterparty for breach of an innominate term<sup>12</sup>.

1 As to the nature of conditions precedent see **CONTRACT** vol 9(1) (Reissue) PARA 962 et seq; as to anticipatory breach of contract by repudiation see **CONTRACT** vol 9(1) (Reissue) PARA 997 et seq; as to the effect of anticipatory breach and the remedies therefor see **CONTRACT** vol 9(1) (Reissue) PARA 1002 et seq; and as to the usual terms in charterparties see PARA 241 et seq.

2 As to conditions and warranties generally see **CONTRACT** vol 9(1) (Reissue) PARAS 993, 994.

3 As to innominate terms generally see **CONTRACT** vol 9(1) (Reissue) PARA 995.

4 For examples of cases where a term of the charterparty was held to be a condition see *Behn v Burness* (1863) 3 B & S 751 (position of the ship at the date of the charterparty); *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274, CA (time of sailing); *Lothian v Henderson* (1803) 3 Bos & P 499 (nationality of ship); *Routh v MacMillan* (1863) 2 H & C 750 (ship's class on the register); *Louis Dreyfus et Cie v Parnaso Cia Naviera SA, The Dominator* [1960] 2 QB 49, [1960] 1 All ER 759, [1960] 1 Lloyd's Rep 117, CA (ship's capacity for a particular cargo); *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, [1970] 2 Lloyd's Rep 43, CA (the date when a ship is 'expected ready to load'); *Olearia Tirrena SpA v NV Algemeene Oliehandel, The Osterbek* [1973] 2 Lloyd's Rep 86, CA (time within which the vessel is to be provided); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, [1977] 1 Lloyd's Rep 315, HL, and *Awilco A/S v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652, [1981] 1 WLR 314, [1981] 1 Lloyd's Rep 371, HL (payment of hire under a time charter); *Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd, The Mavro Vetranic* [1985] 1 Lloyd's Rep 580 (time within which ship must be nominated); *Universal Bulk Carriers Ltd v Andre et Cie SA* [2001] EWCA Civ 588, [2001] 2 All ER (Comm) 510, [2001] 2 Lloyd's Rep 65 (term relating to the time within which the ship was to be nominated held not to be a condition, but see *Mansel Oil Ltd v Troon Storage Tankers SA* [2008] EWHC 1269 (Comm), [2008] All ER (D) 95 (Jun)).

5 The right to rescind may be lost by affirmation, express or implied: see **CONTRACT** vol 9(1) (Reissue) PARAS 1010, 1011.

6 For an example of a case where a term of the charterparty was held to be a warranty see *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH, The Puerto Buitrago* [1976] 1 Lloyd's Rep 250, CA (where a term in a charterparty by demise provided that the charterer was to redeliver the vessel to the shipowner in the same good order and condition as on delivery and, before redelivery, he was to make all such repairs found to be necessary).

7 *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1013, CA, per Fletcher Moulton LJ; approved on appeal [1911] AC 394, HL. For damages for breach of contract see **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq.

8 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, [1973] 2 Lloyd's Rep 53, HL. As to the criteria for distinguishing between conditions and warranties see **CONTRACT** vol 9(1) (Reissue) PARA 994.

9 'There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties' ... Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking, as a 'condition' or a 'warranty': *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70, [1962] 1 All ER 474 at 487, [1961] 2 Lloyd's Rep 478 at 494, CA, per Diplock LJ. See also *MacAndrew v Chapple* (1886) LR 1 CP 643; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at 60, [1975] 3 All ER 739 at 747, [1975] 2 Lloyd's Rep 445 at 450, CA, per Lord Denning MR; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 113, HL, per Lord Wilberforce; *Compagnie Generale Maritime v Diakan Spirit SA, The Ymnos* [1982] 2 Lloyd's Rep 574; *Aktion Maritime Corp of Liberia v S Kamas & Bros Ltd, The Aktion* [1987] 1 Lloyd's Rep 283.

10 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 64, [1962] 1 All ER 474 at 485, [1961] 2 Lloyd's Rep 478 at 491, 492, CA, per Upjohn LJ ('... does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?'); *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 193, [1970] 3 All ER 125 at 128, [1970] 2 Lloyd's Rep 43 at 47, CA, per Lord Denning MR.

11 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, [1961] 2 Lloyd's Rep 478, CA. See also *Nitrate Corp'n of Chile Ltd v Pansuiza Compania de Navegacion SA* [1980] 1 Lloyd's Rep 638.

12 *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri and The Lorfri* [1979] AC 757, [1979] 1 All ER 307, [1979] 1 Lloyd's Rep 201, HL (cited in PARA 262).

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### 236. Effect of subsequent events.

A term which was not originally intended to be a condition cannot be turned into a condition by subsequent events<sup>1</sup>. Subsequent events may, however, prevent the injured party from relying on a term as a condition precedent and thus claiming that he is discharged from his duty of performing his part of the contract, in which event he is entitled to recover damages only<sup>2</sup>. This takes place where the injured party waives his right to repudiate the contract<sup>3</sup>, or where he has already received the whole or any substantial part of the consideration for his own promise<sup>4</sup>.

1 *Behn v Burness* (1863) 3 B & S 751, Ex Ch (discussing *Freeman v Taylor* (1831) 8 Bing 124, *Tarrabochia v Hickie* (1856) 1 H & N 183 and *Dimech v Corlett* (1858) 12 Moo PCC 199); *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125 at 143, 148, 2 Asp MLC 435 at 442, 444, Ex Ch, per Bramwell B.

2 *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Pust v Dowie* (1864) 5 B & S 20 (affd (1865) 5 B & S 33, Ex Ch); *Engman v Palgrave, Brown & Son* (1898) 4 Com Cas 75.

3 *Havelock v Geddes* (1809) 10 East 555; *Dimech v Corlett* (1858) 12 Moo PCC 199; *Bentsen v Taylor Sons & Co* (2) [1893] 2 QB 274, 7 Asp MLC 385, CA; *Re Tyrer & Co and Hessler & Co* (1902) 9 Asp MLC 292, CA.

4 *Davidson v Gwynne* (1810) 12 East 381; *Elliot v Von Glehn* (1849) 13 QB 632; *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Pust v Dowie* (1864) 5 B & S 20 (affd (1865) 5 B & S 33, Ex Ch); *Stanton v Richardson, Richardson v Stanton* (1872) LR 7 CP 421 at 436, 1 Asp MLC 449 at 454 per Brett J.

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### 237. Frustration.

Where circumstances arise, without any breach by either party, which render performance of the contract impossible or possible only in a radically different way from that originally contemplated, the parties are excused from further performance<sup>1</sup>. In considering whether a written contract has been frustrated by fundamental alteration of the situation in which the thing contracted for was to be done, the essential comparison is between that which the party contracted to do (which is a question of construing the contract in the light of the surrounding circumstances) and that which, in the event, had to be done to fulfil the job undertaken<sup>2</sup>. In

construing the contract, the fact that at the time when the contract was made the parties appreciated that a certain event might occur is one of the surrounding circumstances to be taken into account, and does not prevent the contract from being frustrated by the happening of the event<sup>3</sup>.

Charterparties are most commonly frustrated either by the ship becoming an actual or constructive total loss, or by a delay or interruption of the charter service of such length as to render the eventual performance a thing radically different from that undertaken by the contract<sup>4</sup>. The question whether a prospective delay will have this effect depends on the situation as it objectively appeared at the time of the supervening event<sup>5</sup>. The fact that the vessel is prevented from following the usual route and is compelled to take a longer and more expensive route will not frustrate a voyage charterparty, at least where the cargo is non-perishable<sup>6</sup>. A charterparty may be frustrated by a strike, even where there are comprehensive strike clauses, if the delay is long enough<sup>7</sup>. A declaration of war does not of itself frustrate a charterparty where the charterparty would not involve trading with the enemy<sup>8</sup>.

Accrued rights are unaffected by the dissolution, but neither party is liable in damages for breach of an obligation in the charterparty performance of which was not already due at the date of the dissolution<sup>9</sup>, nor can either party be compelled to repay money received by him under the charterparty before it was dissolved, unless at the date of the dissolution a right to this repayment had already accrued<sup>10</sup>. These consequences follow whether the charterparty is for a voyage or for time, and whether the delay is or is not due to a cause covered by an exception in the charterparty<sup>11</sup>.

The contract may comprise more than one adventure, and frustration of one may not involve the frustration of the others<sup>12</sup>.

The contract may contain express provisions dealing with the occurrence either of the precise event in question, or of events of a similar character. Full effect must be given to such provisions, and, if they deal with the precise event which has occurred, and show that the parties intended the contract to remain in force, effect will be given to that intention<sup>13</sup>.

Dissolution of the contract by frustration of the adventure will not, as a rule, affect an arbitration clause in the contract, which will remain valid<sup>14</sup>.

With regard to the effect of frustration on payments of freight and hire<sup>15</sup> the Law Reform (Frustrated Contracts) Act 1943 applies to time charterparties and to charterparties by way of demise but not to other charterparties or contracts (other than charterparties) for the carriage of goods by sea<sup>16</sup>. A time charterer will thus normally be liable only for hire up to the date of frustration<sup>17</sup>. The rule as regards voyage charterparties and bills of lading is that freight payable in advance cannot be recovered by the shipper on frustration of the adventure<sup>18</sup>.

1 As to the general principles of frustration of contract see **CONTRACT** vol 9(1) (Reissue) PARA 897 et seq. The following cases relate specifically to charterparties (and as to time charterparties see also PARA 256 note 17): *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435; *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 13 Asp MLC 467, HL; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 455, 14 Asp MLC 370 at 376, HL; *The Angelia, Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 2 All ER 144, [1973] 1 WLR 210, [1972] 2 Lloyd's Rep 154; *Kodros Shipping Corp v Monrovia v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736, [1982] 3 All ER 350, [1982] 2 Lloyd's Rep 307, HL. This rule applies not only before loading but throughout the currency of the charterparty (*Embiricos v Sydney Reid & Co* [1914] 3 KB 45 at 53, 12 Asp MLC 513 at 514; approved in *Bank Line Ltd v Arthur Capel & Co* at 455 and at 376 per Lord Sumner), and it extends to matters which make performance altogether impossible as well as those which merely delay it (*French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494, 15 Asp MLC 358, HL). The doctrine ought not, however, to be extended: *Bank Line Ltd v Arthur Capel & Co* at 459 and at 377 per Lord Sumner; and see *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 529, 18 Asp MLC 551 at 553, PC, per Lord Wright. It does not apply where either party is responsible for the event which causes the frustration: *Maritime National Fish Ltd v Ocean Trawlers Ltd* at 530 and at 553, applying *Bank Line Ltd v Arthur Capel & Co* per Lord Sumner.

2 *Société Franco Tunisienne d'Armement v Sidermar SpA* [1961] 2 QB 278, [1960] 2 All ER 529, [1960] 1 Lloyd's Rep 594 (where the contract was frustrated through closure of the Suez Canal; the shipowners were not estopped from alleging frustration since there was no representation of fact such as could found estoppel at common law, and the doctrine of promissory estoppel was not wide enough to cover the facts of the case). As to estoppel see **ESTOPPEL** vol 16(2) (Reissue) PARAS 1076 et seq (estoppel by representation generally), 1082 et seq (promissory estoppel).

3 See *Société Franco Tunisienne d'Armement v Sidermar SpA* [1961] 2 QB 278, [1960] 2 All ER 529, [1960] 1 Lloyd's Rep 594; *Select Commodities Ltd v Valdo SA, The Florida* [2006] EWHC 1137 (Comm), [2006] 2 All ER (Comm) 493, [2007] 1 Lloyd's Rep 1.

4 See *Admiral Shipping Co Ltd v Weidner, Hopkins & Co* [1916] 1 KB 429 at 436, 437 per Bailhache J (cited in PARA 245 note 1); approved on appeal [1917] 1 KB 222. The 'radically different' test reveals that the doctrine of frustration is not lightly to be invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be a break in identity between the contract as provided for and contemplated and its performance in the new circumstances: see *Edwinton Commercial Corp'n v Tsavlis Russ (Worldwide Salvage and Towage) Ltd, The Sea Angel* [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634, [2007] 2 Lloyd's Rep 517.

5 As to delay see PARA 245.

6 See eg *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, [1961] 1 Lloyd's Rep 329, HL.

7 See *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 at 754, [1981] 2 All ER 1030 at 1048, [1981] 2 Lloyd's Rep 239 at 255, HL, per Lord Roskill.

8 *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 2 All ER 658, [1983] 1 WLR 1469, [1983] 1 Lloyd's Rep 503.

9 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch; *Countess of Warwick Steamship Co v Le Nickel SA* [1918] 1 KB 372, 14 Asp MLC 242, CA.

10 *Lloyd Royal Belge SA v Stathatos* (1917) 34 TLR 70, CA; *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494, 15 Asp MLC 358, HL. In the second case (at 512 and at 362) Lord Dunedin criticises the language attributed to the Court of Appeal in the first case. See also *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, 17 Asp MLC 8, PC, per Lord Sumner; *Scottish Navigation Co Ltd v WA Souter & Co, Admiral Shipping Co Ltd v Weidner, Hopkins & Co* [1917] 1 KB 222, 13 Asp MLC 539, CA. Where a ship under charter was requisitioned by the Admiralty, but the requisition did not frustrate the charterparty, it was held that, as the Admiralty's use of the ship was more onerous to the owners than the employment authorised by the charterparty, the hire paid by the Admiralty was divisible between the owners and the charterers in proportion to their respective interests in the ship: *Chinese Mining and Engineering Co Ltd v Sale & Co* [1917] 2 KB 599, 14 Asp MLC 95. The rule as to frustration of the adventure, being part of the general law of contract, appears to be applicable to all contracts of affreightment including those evidenced by a bill of lading. There seems to be no reported case in which it has been applied to a bill of lading contract, probably because bills of lading are usually issued after the goods have been shipped, and, if there was a danger of the voyage being frustrated, neither shipper nor shipowner would wish to ship the goods.

11 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL.

12 *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla, Paris* (1923) 16 Asp MLC 133 at 139, HL, per Lord Sumner. See also *Countess of Warwick Steamship Co Ltd v Le Nickel SA* [1918] 1 KB 372, 14 Asp MLC 242, CA; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, [1981] 2 All ER 1030, sub nom *BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema* [1981] 2 Lloyd's Rep 239, HL. If the contract is of a speculative character, the doctrine of frustration can rarely apply to it: *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla, Paris* at 140 per Lord Sumner. The question when delay will put an end to a charterparty by frustration was discussed in *Universal Cargo Carriers Corp'n v Citati* [1957] 2 QB 401, [1957] 2 All ER 70, [1957] 1 Lloyd's Rep 174 (affd [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 1 Lloyd's Rep 191, CA). See also *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 460, 14 Asp MLC 370 at 378, HL, per Lord Sumner, following *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119 at 128, HL, per Lord Dunedin. The question whether the supervening event has rendered the completion of the contemplated adventure impracticable is, it seems, one of fact: *Countess of Warwick Steamship Co Ltd v Le Nickel SA* at 378 and at 246 per Pickford LJ. See, however, his observations at 381 and at 246.

13 *James Scott & Sons Ltd v Del Sel* 1923 SC (HL) 37, 14 Ll L Rep 65; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, [1981] 2 All ER 1030, sub nom *BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema* [1981] 2 Lloyd's Rep 239, HL; cf *Banck v Bromley & Son* (1920) 37 TLR 71, 5 Ll L Rep 124 per Bailhache J; but see *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, [1938] 3 All ER 135, 19 Asp MLC 216.

14 *Heyman v Darwins Ltd* [1942] AC 356, [1942] 1 All ER 337, HL; *Kruse v Questier & Co Ltd* [1953] 1 QB 669, [1953] 1 All ER 954, [1953] 1 Lloyd's Rep 310; *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, 17 Asp MLC 8, PC, in which the contrary was decided, cannot be taken as establishing a general rule.

15 As to the distinction between freight and hire see PARA 567.

16 See the Law Reform (Frustrated Contracts) Act 1943 s 2(5)(a); and **CONTRACT** vol 9(1) (Reissue) PARA 919.

17 See the Law Reform (Frustrated Contracts) Act 1943 s 1(2), (3); and **CONTRACT** vol 9(1) (Reissue) PARAS 913, 914.

18 See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, 73 Ll L Rep 45, HL; and **CONTRACT** vol 9(1) (Reissue) PARA 919.

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### 238. Damages.

Damages are the pecuniary recompense given by process of law to a person for the actionable wrong which another has done him<sup>1</sup>. The general rule is that, so far as money can do so, the injured person should be put in the same position as he would have been in if he had not sustained the wrong, that is to say, if the contract had been performed<sup>2</sup>. Damages may not be recovered if the damage is too remote<sup>3</sup>. The claimant must, however, take all reasonable steps to mitigate the loss which he has sustained consequent on the defendant's wrong and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided<sup>4</sup>.

Damages may thus be recovered for (inter alia):

- 10 (1) overcarriage of cargo<sup>5</sup>;
- 11 (2) unseaworthiness of the ship<sup>6</sup>;
- 12 (3) failure to load the specified goods<sup>7</sup>;
- 13 (4) failure to provide a ship<sup>8</sup>;
- 14 (5) partial failure to load<sup>9</sup>;
- 15 (6) loss of profit<sup>10</sup>;
- 16 (7) failure to ship a proper cargo ('dead freight')<sup>11</sup>;
- 17 (8) breach of contract<sup>12</sup>;
- 18 (9) wrongful sale of the cargo<sup>13</sup>;
- 19 (10) failure to provide a cargo<sup>14</sup>;
- 20 (11) delay on the voyage<sup>15</sup>;
- 21 (12) late delivery of goods<sup>16</sup>;
- 22 (13) non-delivery of cargo<sup>17</sup>;
- 23 (14) delivery of goods in a damaged condition<sup>18</sup>.

1 See Co Litt 257a; 2 Bl Com (14th Edn) 438; *Jabbour v State of Israel Absentee's Property Custodian* [1954] 1 All ER 145 at 150, [1954] 1 WLR 139 at 143, [1953] 2 Lloyd's Rep 760 at 774 per Pearson J.

2 See **DAMAGES** vol 12(1) (Reissue) PARA 941.

3 See *Total Transport Corp v Arcadia Petroleum Ltd, The Eurys* [1998] 3 Lloyd's Rep 351, CA (where charterers had to pay more for oil carried on a voyage owing to failure to comply with charterers' instructions as to timing of loading, it was held that the increased price was too remote to recover). As to remoteness of damage see **DAMAGES** vol 12(1) (Reissue) PARA 1015 et seq.

4 As to mitigation see **DAMAGES** vol 12(1) (Reissue) PARA 1041 et seq.

- 5 See PARA 289 note 3.
- 6 See PARA 472.
- 7 See PARA 461.
- 8 See PARA 461.
- 9 See PARA 462.
- 10 See PARA 463.
- 11 See PARA 460.
- 12 See PARA 560.
- 13 See PARA 513.
- 14 See PARA 458.
- 15 See PARA 561.
- 16 See PARA 561.
- 17 See PARA 562.
- 18 See PARA 566.

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### **239. Specific performance.**

Where a contract is not duly performed on one side, the normal remedy is an action to recover damages for breach of contract<sup>1</sup>; but, if this were the only remedy, it would always be at the option of the defaulting party either to perform his contract or to pay damages. In many cases damages provide an adequate remedy and the exercise of this option does no injury to the other party; but in cases where the remedy of damages is not adequate, equity assumes jurisdiction to deprive the defaulting party of this option and to compel him to carry his contract into effect by an order for specific performance<sup>2</sup>.

Traditionally the court has not enforced the performance of contracts which involve continuous acts which require the supervision of the court<sup>3</sup>. Hence charterparties, unless they are charterparties by demise<sup>4</sup>, have not ordinarily been enforceable by specific performance<sup>5</sup>. More recent cases indicate, however, that the courts are now more ready to enforce contracts requiring supervision. The question is whether the contract sufficiently defines the work to be done, expressly or by implication, to permit the court to make an order which enables the defendant to know what he has to do to comply with it<sup>6</sup>.

- 1 As to the remedy of damages see PARA 238.
- 2 As to specific performance see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 801 et seq.
- 3 See **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 807.
- 4 As to charterparties by demise see PARAS 210-212.

5 *De Mattos v Gibson* (1858) 4 De G & J 276; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694 at 700, 701, [1983] 2 All ER 763 at 766, [1983] 2 Lloyd's Rep 253 at 257, HL, per Lord Diplock ('being a contract for services it [a time charterparty] is thus the very prototype of a contract of which before the fusion of law and equity a court would never grant specific performance').

6 See **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 806.

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## 240. Injunctions.

An injunction<sup>1</sup> may be granted to restrain the shipowner from employing the ship in a manner inconsistent with the charterparty<sup>2</sup>. Moreover, if a purchaser or mortgagee of the ship has acquired his interest in the ship with knowledge of the charterparty, he may similarly be restrained by injunction<sup>3</sup>.

Under its wide power to grant an injunction without notice or an interim injunction<sup>4</sup> the court has jurisdiction to grant such an injunction so as to prevent a defendant from disposing of assets in order to defeat a judgment<sup>5</sup>. 'Assets' includes ships<sup>6</sup> and the cargo on ships<sup>7</sup>.

1 As to injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

2 *De Mattos v Gibson* (1859) 4 De G & J 276 at 299 per Lord Chelmsford LC, discussed in *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416 at 431, CA, per Kay LJ. See also *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683 at 692, CA, per Stirling LJ; *Modern Transport Co Ltd v Dunerich Steamship Co* [1917] 1 KB 370, CA; *Sevin v Deslandes* (1860) 30 LJ Ch 457; *Messageries Imperiales Co v Baines* (1863) 11 WR 322 (where the injunction was against purchasers of a ship with notice of the charterparty to restrain them from interfering with its performance (considered in *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787, [1958] 1 Lloyd's Rep 290)); *Heriot v Nicholas* (1864) 12 WR 844; *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2006] 1 All ER 866, [2005] 2 All ER (Comm) 183. According to *Sevin v Deslandes* the owner is entitled to an injunction restraining the charterer from doing anything inconsistent with the charterparty.

3 *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, 16 Asp MLC 585, PC, applying the principle enunciated by Knight Bruce LJ in *De Mattos v Gibson* (1858) 4 De G & J 276 at 282 (where an interlocutory injunction was granted against the mortgagee of the ship). In *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787, [1958] 1 Lloyd's Rep 290, Diplock J reviewed all the earlier cases and held that, if the first-mentioned case was rightly decided (and he thought that it was not), it was restricted to cases where the purchaser of the ship had actual knowledge at the time of the purchase of the charterers' rights, and that in any case the charterers' only right against the purchaser was the negative right to restrain the use of the vessel in a manner inconsistent with the terms of the charterparty.

A mortgagee of a ship who has taken possession of her is not bound by a charterparty which impairs his security if the charterparty was entered into after the date of the mortgage: *Law Guarantee and Trust Society v Russian Bank for Foreign Trade* [1905] 1 KB 815, 10 Asp MLC 41, CA (where a ship was chartered to carry contraband, uninsurable against war risk). As the authorities now stand, it seems that a mortgagee may disclaim an agreement of which he had no notice at the date of the mortgage: see *The Celtic King* [1894] P 175, 7 Asp MLC 440; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 331.

4 An interim injunction will not be granted if there is a serious doubt whether the charterparty is binding on the shipowner (*Le Blanch v Granger* (1866) 35 Beav 187); but, where the question was whether a provisional charterparty was binding on the parties, an interlocutory injunction was granted restraining the charterers from proceeding with an arbitration under the terms of the charterparty (*Sociedade Portuguesa de Navios Tanques Lda v Hvalfangerselskapet Polaris A/S* [1952] 1 Lloyd's Rep 407, CA). An interim injunction may be granted in respect of an intermittent as well as an ordinary time charterparty: *Associated Portland Cement Manufacturers Ltd v Teigland Shipping A/S* [1975] 1 Lloyd's Rep 581, CA.

5 *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n at 215n, [1975] 2 Lloyd's Rep 509 at 510, 511, CA, per Lord Denning MR; *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, [1975] 2 Lloyd's Rep 137, CA; *Rasu Maritima SA v Perusahaan Pertambangan*

*Minyak Dan Gas Bumi Negara and Government of the Republic of Indonesia (as interveners)* [1978] QB 644, [1977] 3 All ER 324, [1977] 2 Lloyd's Rep 397, CA (for a historical survey see at 657-658, 331-332, 401-402 per Lord Denning MR). See also *Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina* [1979] AC 210 at 254, [1977] 3 All ER 803 at 822-823, [1978] 1 Lloyd's Rep 1 at 4, HL, per Lord Diplock and at 261, 828-829 and 9 per Lord Hailsham of St Marylebone. As to Mareva injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 396 et seq.

6 *The Rena K* [1979] QB 377, [1979] 1 All ER 397, [1978] 1 Lloyd's Rep 545.

7 See *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport, The Marie Leonhardt* [1981] 3 All ER 664, [1981] 1 WLR 1262, [1981] 2 Lloyd's Rep 458, CA. For a case where a Mareva injunction was refused see *Galaxia Maritime SA v Mineralimportexport, The Eleftherios* [1982] 1 All ER 796, [1982] 1 WLR 539, [1982] 1 Lloyd's Rep 351, CA (to allow a plaintiff to serve a Mareva injunction on a third party in order to prevent his vessel from sailing out of the jurisdiction was an abuse of the court's jurisdiction because it involved an unwarrantable act of interference with the third party's business).

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## (D) USUAL TERMS IN CHARTERPARTIES

### (a) Terms as to the Ship

#### **241. Description of ship.**

It is usual to specify in the charterparty the name of the ship which is to be chartered and to give her description in detail. The charterparty may, however, entitle<sup>1</sup>, or oblige<sup>2</sup>, the owners to substitute another ship for the named ship, or may provide that they are to nominate a ship to perform the charterparty<sup>3</sup>. The description usually includes statements as to the ship's registered tonnage<sup>4</sup>, her classification at Lloyd's<sup>5</sup>, her position at the date of the charterparty and her fitness for the purposes of the charterparty<sup>6</sup>. In addition, it may specify her carrying capacity and the name of her master<sup>7</sup>.

1 *Alexander King Ltd v Howden Bros* (1915) 50 ILT 27 (charterparty of named ship 'or substitute at owner's option'). The right to substitute does not imply the right to replace a vessel which is lost: *Niarchos (London) Ltd v Shell Tankers Ltd* [1961] 2 Lloyd's Rep 496.

2 In *Société Navale de l'Ouest v RW Sutherland & Co* (1920) 4 Ll L Rep 58, where the defendants had parted with their interest in the named steamer at the date of the charterparty, it was held that the substitution clause did not apply as the defendants had repudiated the contract. In *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd* [1954] 1 All ER 529, [1954] 1 WLR 492, [1954] 1 Lloyd's Rep 1, CA, it was held that the substitution clause entitled the owners to make successive substitutions. See also *Terkol Rederierne v Petroleo Brasileiro SA and Frota Nacional de Petroleiros, The Badagry* [1985] 1 Lloyd's Rep 395, CA.

3 *Phosphate Mining Co v Rankin, Gilmour & Co* (1916) 86 LJB 358, 13 Asp MLC 418; *Dinham, Fawcus & Co v Witherington and Everett* [1916] WN 154 (whether defendants excused from nominating ship by exception of 'restraint of princes' in charterparty).

4 See PARA 242. As to registered tonnage see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 248-250.

5 As to the effect of a statement as to class see PARA 242.

6 See *Golden Fleece Maritime Inc v St Shipping and Transport Inc, The Elli and The Frixos* [2008] EWCA Civ 584, [2008] 2 Lloyd's Rep 119, [2008] All ER (D) 321 (May).

7 See PARA 242 note 4.

## **UPDATE**

## 241 Description of ship

NOTE 6--*Golden Fleece*, cited, reported at [2009] 1 All ER (Comm) 908.

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### 242. How far statements are conditions.

The shipowner must tender to the charterer the actual ship contracted for in the charterparty and, in the absence of a clearly drafted substitution clause, the shipowner is neither bound nor entitled to tender another ship<sup>1</sup>. It does not necessarily follow, however, that the ship tendered must still bear the name or other means of identification by which it is designated in the charterparty. Unless the shipowner has expressly promised not to alter the name of the ship, or unless it can be shown that the name of the ship was of material commercial significance to the charterer, the name of the ship is not treated as a condition of the contract and a change of name would, therefore, not normally entitle the charterer to withdraw from the contract<sup>2</sup>.

Those statements in a charterparty relating to the position of the ship at the date of the charterparty<sup>3</sup> and to her carrying capacity<sup>4</sup> are to be regarded as conditions precedent<sup>5</sup> on the non-fulfilment of which the charterer may treat the contract as repudiated. Statements which do not expressly refer to the carrying capacity of the ship, but relate to her measurement or tonnage, are regarded as innominate terms, breach of which, in the absence of contrary stipulation in the charterparty, entitles the charterer to withdraw from the contract only if its effect goes to the root of the contract<sup>6</sup>.

Where a charterparty contains a bunkering clause indicating the amount of fuel in the ship at the time of the charterparty, the clause will be treated as a warranty and a breach of it will entitle the charterers to damages<sup>7</sup>. A statement as to a vessel's speed may also be construed as a warranty<sup>8</sup>.

A term as to the classification of the ship amounts to a condition precedent that she is classed as described at the date of the charterparty<sup>9</sup>. If, therefore, the condition is broken, the charterer may refuse to accept the ship<sup>10</sup>; if he accepts her, he is nevertheless entitled to recover from the shipowner any damages which he may have sustained by reason of the misdescription, for example increased premiums for insurance<sup>11</sup>. However, by that term, the shipowner does not undertake that his ship is entitled to her class as described<sup>12</sup>, or that she will continue to retain it<sup>13</sup>.

An express term as to fitness must be distinguished from the implied undertaking as to seaworthiness<sup>14</sup>. The implied undertaking refers to the commencement of loading, whereas the usual form of express term refers to the time at which the ship sails for her loading port or otherwise commences her services under the charterparty<sup>15</sup>, and is not to be regarded as a condition precedent<sup>16</sup>, except as regards freedom from defects which frustrate the object of the voyage<sup>17</sup>.

1 *Niarchos (London) Ltd v Shell Tankers Ltd* [1961] 2 Lloyd's Rep 496; *Terkol Rederierne v Petroleo Brasileiro SA and Frota Nacional de Petroleiros, The Badagry* [1985] 1 Lloyd's Rep 395, CA.

2 *Reardon Smith Line Ltd v Hansen-Tangen, The Diana Prosperity* [1976] 2 Lloyd's Rep 621, HL; *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep 156, CA.

3 *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Oppenheim v Fraser* (1876) 3 Asp MLC 146 (cf *Ollive v Booker* (1847) 1 Exch 416 (where the ship was described as 'now at sea, having sailed three weeks ago', whereas she had only sailed a week previously)); *Bentsen v Taylor Sons & Co (No 2)* [1893] 2 QB 274, 7 Asp MLC 385, CA; cf *Corkling v Massey* (1873) LR 8 CP 395, 2 Asp MLC 18. Terms as to the date of arrival (*Shadforth v Higgin* (1813) 3 Camp 385) or readiness to load (*Oliver v Fielden* (1849) 4 Exch 135; cf *Deffell v Brocklebank* (1817) 4 Price 36, Ex Ch (affd (1821) 3 Bli 561, HL)) may be conditions precedent. So may a term as to date of departure from the loading port (*Glaholm v Hays* (1841) 2 Man & G 257), or for the loading port (*Van Baggen v Baines* (1854) 9 Exch 523). As to the meaning of 'expected ready to load' see PARA 414. Charterparties often contain a 'cancelling clause' empowering the charterer to cancel the charterparty if a term as to date of arrival or readiness to load is not fulfilled: see PARA 252.

4 There seems to be no direct authority that a description of the carrying capacity of the ship, which is not expressly stated to be a condition of the contract should be construed as a condition precedent to the charterer's obligations under the charterparty: see *Pust v Dowie* (1864) 5 B & S 20 (express condition). It is submitted, however, that on principle an express statement as to the carrying capacity should be taken to be a condition precedent to the charterer's liability to load unless the contrary intention appears from the rest of the charterparty or the surrounding circumstances. Nevertheless, the statement itself may be so worded as to show that it is not a condition precedent or even a contractual term: see *Japy Frères & Co v RWJ Sutherland & Co* (1921) 15 Asp MLC 198, CA (where a statement of the vessel's carrying capacity was followed by the words 'no guarantee'; it was held that the statement had no contractual effect). See also *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167, 55 Ll L Rep 271. Even when the statement is a condition precedent and is untrue, if the charterer loads the cargo and allows the ship to sail, he cannot treat the contract as repudiated, but may recover damages for breach: *Pust v Dowie* at 32.

5 See PARA 235. Where a representation is made which is not embodied in the charterparty, it may nevertheless be treated as a collateral verbal warranty, and damages may be awarded for its breach: *Hassan v Runciman & Co and Lohne* (1904) 10 Asp MLC 31. As to representations incorporated in the charterparty see *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167, 55 Ll L Rep 271; cf *Japy Frères & Co v RWJ Sutherland & Co* (1921) 15 Asp MLC 198 at 202, CA, per Scrutton LJ. As to conditions in contracts generally see **CONTRACT** vol 9(1) (Reissue) PARA 993.

6 *Cargo Ships El-Yam Ltd v Invoer-en Transport Onderneming Invotra NV* [1958] 1 Lloyd's Rep 39; *Barker v Windle* (1856) 6 E & B 675, Ex Ch; cf *Hunter v Fry* (1819) 2 B & Ald 421; *Thomas v Clark and Todd* (1818) 2 Stark 450 (distinguished in *Morris v Levison* (1876) 1 CPD 155, 3 Asp MLC 171). See, however, the dicta of Jervis CJ and Martin B in *Barker v Windle* as reported in 25 LJQB 349 at 350, Ex Ch. For the converse case of a statement as to the weight of the cargo see *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22 at 33. An oral statement, made during the negotiation of the charterparty, as to the amount of cargo carried by the ship on the previous voyage may amount to a contractual undertaking as to the carrying capacity of the ship, even if the statement is not incorporated in the charterparty: *Hassan v Runciman & Co and Lohne* (1904) 10 Asp MLC 31. An express term as to the carrying capacity must be construed with reference to any facts known to both parties as to the contemplated voyage (*Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245), or as to the contemplated cargo (*Mackill v Wright Bros & Co* (1888) 14 App Cas 106, HL). A guarantee that a ship can carry so many cubic feet or tons deadweight may not mean that she can carry the volume or weight of the cargo specified in the charterparty: see *Carnegie v Conner* (1889) 24 QBD 45, 6 Asp MLC 447, DC; *W Millar & Co Ltd v Freden (Owners)* [1918] 1 KB 611, 14 Asp MLC 247, CA; cf *SA Ungherese di Armamento Marittimo Oriente v Tyser Line Ltd* (1902) 8 Com Cas 25. In *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167, 55 Ll L Rep 271, Branson J held that statements in a charterparty of a tanker as to the dimensions of the pipe-lines and the position of the heating coils were conditions precedent. For the term as to the amount of cargo to be carried see PARA 259.

7 *Efploia Shipping Corp Ltd v Canadian Transport Co Ltd, The Pantanassa* [1958] 2 Lloyd's Rep 449.

8 *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corp, The Apollonius* [1978] 1 All ER 322, [1978] 1 Lloyd's Rep 53 (where there is a time charterparty, the warranty applies at least at the date of the delivery of the vessel to the charterer). The effect of the word 'about' used in relation to a vessel's speed eg 'about 15.5 knots' is that some margin has to be recognised on either side of the stated figure; the size of the margin is a question of fact in each case: *Arab Maritime Petroleum Transport Co v Luxor Trading Corp and Geogas Enterprise SA, The Al Bida* [1987] 1 Lloyd's Rep 124, CA.

9 *French v Newgass* (1878) 3 Asp MLC 574, CA; and see *Routh v MacMillan* (1863) 2 H & C 750.

10 *French v Newgass* (1878) 3 Asp MLC 574, CA; cf *Ollive v Booker* (1847) 1 Exch 416 at 423 per Parke B. See also *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (No 2)* [2001] 1 All ER (Comm) 240, [2001] 1 Lloyd's Rep 341, for a term which described the vessel as being 'acceptable to oil majors': held to be a condition).

11 *Routh v MacMillan* (1863) 2 H & C 750.

12 *French v Newgass* (1878) 3 Asp MLC 574, CA.

13 *Hurst v Usborne* (1856) 18 CB 144, approved in *French v Newgass* (1878) 3 Asp MLC 574, CA.

14 As to the implied undertaking of seaworthiness see PARA 418; and as to the express term as to fitness see PARA 465. The implied undertaking is not excluded by reason of the presence in the charterparty of the express term unless it is clearly intended that the latter shall have that effect: *Seville Sulphur and Copper Co v Colvils, Lowden & Co* (1888) 15 R 616. The decision that the ship was in fact unseaworthy was not followed in the subsequent case of *Cunningham v Colvils, Lowden & Co* (1888) 16 R 295.

15 *New York and Cuba Mail Steamship Co v Eriksen and Christensen* (1922) 27 Com Cas 330. It may, however, be so worded as to refer to the date of the charterparty: *Scott v Foley, Aikman & Co* (1899) 5 Com Cas 53.

16 *Tarrabochia v Hickie* (1856) 1 H & N 183; *Hudson v Hill* (1874) 2 Asp MLC 278. The charterer may, however, be entitled to damages: *Porter v Izat* (1836) 1 M & W 381. See also *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, [1961] 2 Lloyd's Rep 478, CA.

17 *Tarrabochia v Hickie* (1856) 1 H & N 183; cf *Freeman v Taylor* (1831) 8 Bing 124. The charterers were held entitled to refuse to load by reason of a breach of this term in *New York and Cuba Mail Steamship Co v Eriksen and Christensen* (1922) 27 Com Cas 330.

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### *(b) Terms as to the Voyage or Time*

#### **243. Voyage charterparty.**

A voyage charterparty may specify<sup>1</sup> the port of loading and the port of discharge, including in some cases the dock or wharf at which the loading or unloading is to take place; or the charterer may be authorised to order the ship to proceed to any port within certain limits specified in the charterparty<sup>1</sup>. A charterparty may also specify the route of a voyage<sup>2</sup>.

1 Alternatively, the charterparty may leave it to the charterers to nominate the load port within a specified time-limit, in which case, once nominated, the load port may not be changed without the owner's approval: see *Antiparos ENE v SK Shipping Co Ltd, The Antiparos* [2008] EWHC 1139 (Comm), [2008] 2 Lloyd's Rep 237; and *P v A* [2008] 1 CLC 1029.

1 As to the charterer's duty to designate the port selected see PARAS 403, 517. In *Scottish Navigation Co Ltd v WA Souter & Co* [1917] 1 KB 222, 13 Asp MLC 539, CA, it was held that a so-called 'time charter' for 'a Baltic round' was a contract for a voyage to the Baltic and back and not a mere time charterparty; it having become impossible to perform in such a voyage, the contract was held to be dissolved by frustration of the adventure. As to frustration see PARA 237.

2 Where a clause in a charterparty required the captain to telegraph the charterers 'on passing Suez Canal', the contract was construed, in view of that clause and of the circumstances surrounding the making of the contract, as containing an implied term that the vessel was to go by the Suez Canal: *Société Franco Tunisienne d'Armement v Sidermar SpA* [1961] 2 QB 278, [1960] 2 All ER 529, [1960] 1 Lloyd's Rep 594.

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#### **244. Proceeding to port of loading.**

It is usually provided in a voyage charterparty that the ship shall with all convenient speed<sup>1</sup> proceed to the port of loading<sup>2</sup>. This term is not a condition precedent<sup>3</sup>. Hence, if the ship is unduly delayed on her voyage to the port of loading<sup>4</sup>, or even if she deviates from the proper course of her voyage on her way to that port<sup>5</sup>, the charterer is not necessarily discharged from his obligation to provide a cargo, although, in the absence of any exception or other term<sup>6</sup> excusing the delay<sup>7</sup>, he is entitled to recover damages, inasmuch as there is a breach of contract on the part of the shipowner<sup>8</sup>.

Nevertheless, it is an implied condition of the contract that the ship is to arrive at her port of loading in time for the voyage which the terms of the charterparty or the surrounding circumstances show to have been contemplated by both parties as the object of the contract<sup>9</sup>. If, therefore, the effect of the delay<sup>10</sup> or deviation<sup>11</sup> is, in a commercial sense, to put an end to the commercial speculation entered into by the shipowner and the charterer or, as it is generally expressed, to 'frustrate the adventure' which was their common object, both parties are discharged from the contract<sup>12</sup>.

Delay which is due to the default of either party cannot give rise to frustration, but, if it is not excused by the terms of the charterparty<sup>13</sup>, it may amount to a breach, in which case either the charterer<sup>14</sup> or the shipowner<sup>15</sup> may sue for damages.

1 Other phrases are 'with all reasonable speed', 'immediately' and 'with all possible dispatch'. Cf *Bornmann v Tooke* (1808) 1 Camp 377 ('with the first favourable wind'); *The Onrust* (1867) 17 LT 415 ('direct'). For cases on the construction of expressions limiting time see **TIME** vol 97 (2010) PARA 349 et seq.

2 A term that the ship is to proceed to the loading port without unreasonable delay would be implied by law in the absence of any express provision in the charterparty: see *M'Andrew v Adams* (1834) 1 Bing NC 29 and *Clipsham v Vertue* (1843) 5 QB 265 (where the existence of this implied condition is admitted in the arguments on both sides and is assumed in the judgment).

3 *Tarrabochia v Hickie* (1856) 1 H & N 183. See also *Bornmann v Tooke* (1808) 1 Camp 377; *Dimech v Corlett* (1858) 12 Moo PCC 199; *Hudson v Hill* (1874) 2 Asp MLC 278; *Forest Oak Steam Shipping Co Ltd v Richard & Co* (1899) 5 Com Cas 100. See, however, as to the position where the owner warrants that the vessel is expected ready to load by a certain date, PARA 235 note 4.

4 *Forest Oak Steam Shipping Co Ltd v Richard & Co* (1899) 5 Com Cas 100.

5 *Clipsham v Vertue* (1843) 5 QB 265; *MacAndrew v Chapple* (1866) LR 1 CP 643 (following *Boone v Eyre* (1779) 1 Hy Bl 273n; *Ritchie v Atkinson* (1808) 10 East 295; and *Davidson v Gwynne* (1810) 12 East 381).

6 Eg the charterparty may provide that the ship may take an outward cargo for the shipowner's benefit on her way to the loading port: *MacAndrew v Chapple* (1866) LR 1 CP 643; *Hudson v Hill* (1874) 2 Asp MLC 278. Moreover, the charterparty may be subject to a contemporaneous agreement, which need not be in writing, that the ship is to fulfil her pending engagements: *Corkling v Massey* (1873) LR 8 CP 395, 2 Asp MLC 18.

7 *Bruce v Nicolopulo* (1855) 11 Exch 129; *Barker v M'Andrew* (1865) 18 CBNS 759 (distinguishing *Crow v Falk* (1846) 8 QB 467 and *Valente v Gibbs* (1859) 6 CBNS 270); *Harrison v Garthorne* (1872) 1 Asp MLC 303; *Hudson v Hill* (1874) 2 Asp MLC 278. Cf *Donaldson Bros v Little & Co* (1882) 10 R 413. If, however, the ship, before sailing for the loading port named in the charterparty, engages on another voyage, the exceptions will not apply to this other voyage: *Monroe Bros Ltd v Ryan* [1935] 2 KB 28, CA.

8 *Clipsham v Vertue* (1843) 5 QB 265; *MacAndrew v Chapple* (1866) LR 1 CP 643. See also *Engman v Palgrave, Brown & Son* (1898) 4 Com Cas 75.

9 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125 at 145, 2 Asp MLC 435 at 443, Ex Ch, per Bramwell B. See also *Clipsham v Vertue* (1843) 5 QB 265; and PARAS 403-404.

10 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch. See also *Geipel v Smith* (1872) LR 7 QB 404, 1 Asp MLC 268; *Hudson v Hill* (1874) 2 Asp MLC 278 at 281 per Brett J.

11 *Freeman v Taylor* (1831) 8 Bing 124; *MacAndrew v Chapple* (1866) LR 1 CP 643 at 648 per Willes J.

12 *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70, [1957] 1 Lloyd's Rep 74; affd on other grounds [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA. See also *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1961] 2 All ER 257, [1961] 1 Lloyd's Rep 159; affd [1962] 2 QB 26, [1962] 1 All ER 474, [1961] 2 Lloyd's Rep 478, CA.

13 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125 at 144, 2 Asp MLC 435 at 442, Ex Ch, per Bramwell B; *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360, DC; and see *Barker v M'Andrew* (1865) 18 CBNS 759.

14 *Pope v Bavidge* (1854) 10 Exch 73 (where the charterparty provided for six successive voyages within a specified period, and the shipowner was held liable in damages for not making more than three voyages, although his failure to do so was attributable to excepted perils). See also *Dunford & Co Ltd v Cia Anonima Maritima Union* (1911) 12 Asp MLC 32; and PARA 404. The observations in the text as to the effect of a breach of an express term as to proceeding to the loading port apply also to the term to the same effect implied by law: see note 2.

15 This seems to follow from *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70, [1987] 1 Lloyd's Rep 174 (affd [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA), although the actual decision did not proceed on this ground. As to the burden of proof in these cases see **EVIDENCE** vol 17(1) (Reissue) PARA 420 et seq.

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## 245. Unavoidable delay.

Charterparties are often frustrated by a delay or interruption of the charter service of such length as to render the eventual performance a thing radically different from that undertaken by the contract<sup>1</sup>. The question whether a prospective delay will have this effect depends on the situation as it objectively appeared at the time of the supervening event<sup>2</sup>. The burden of proving that a sufficiently serious interruption has occurred to put an end to the contract is on the party who asserts it<sup>3</sup>.

In the case of time charterparties the tendency of the court is to regard the contract as frustrated only where performance is prevented for a period at least equal to the unexpired portion of the charter period<sup>4</sup>.

1 'The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay, without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract, in the only way in which fulfilment is contemplated and practicable, is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made': *Admiral Shipping Co Ltd v Weidner, Hopkins & Co* [1916] 1 KB 429 at 436, 437 per Bailhache J; cited with approval on appeal [1917] 1 KB 222 at 242, CA. As to frustration generally see PARA 237.

2 See *Anglo-Northern Trading Co Ltd v Emllyn Jones and Williams* [1917] 2 KB 78 at 84, 85 per Bailhache J; *Embiricos v Sydney Reid & Co* [1914] 3 KB 45.

3 *Metropolitan Water Board v Dick, Kerr & Co* [1917] 2 KB 1 at 31, CA, per Scrutton LJ.

4 See *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 1 KB 485 at 491, CA, per Bankes LJ; affd [18916] 2 AC 397, HL.

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Terms in Charterparties/(b) Terms as to the Voyage or Time/246. Liability of shipowner under a charterparty for delay in proceeding to port of loading.

#### **246. Liability of shipowner under a charterparty for delay in proceeding to port of loading.**

Where a voyage charterparty contains a term that the ship is to sail<sup>1</sup> for the port of loading, or to arrive there<sup>2</sup> or is 'expected ready to load' there<sup>3</sup> by a named day, the term must be construed as a condition<sup>4</sup>. Where the shipowner fails to fulfil the condition, the charterer may refuse to load, even if the failure is due to an excepted peril<sup>5</sup>. If, however, the language of the exceptions clause shows that the exceptions were meant to apply to this condition, and if the shipowner's failure to fulfil it was due to an excepted peril, he will not be liable in damages<sup>6</sup>. Even where the failure is not due to an excepted peril, the shipowner will not be liable if it occurred without the fault of the shipowner or his agents and the case falls within the rule as to 'frustration of the adventure'<sup>7</sup>. Moreover, where the term provides that the ship is to arrive at the port of loading by a named day, otherwise the charterer is to be discharged from his obligation to load, the shipowner must nevertheless use all reasonable dispatch, and is liable in damages for any breach of this obligation by deviation or delay, even if the ship reaches the port of loading before the expiration of the time allowed<sup>8</sup>.

1 As to what constitutes sailing see PARAS 405, 476. The charterparty may sometimes impose a penalty if the ship fails to sail by a given date: see *Sharp v Gibbs* (1857) 1 H & N 801; *Sparrow v Paris* (1862) 7 H & N 594. As to the effect of such a provision see note 4.

2 As to the meaning of 'arrival' see *Whites etc v The Winchester* (1886) 13 R 524; and PARA 406 et seq.

3 *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, [1970] 2 Lloyd's Rep 43, CA; *R Pagnan and Fratelli v NGJ Schouten NV, The Filipinas I* [1973] 1 Lloyd's Rep 349 (where an arbitration award was remitted to an arbitrator for him to consider whether the statement that the vessel was expected ready to load was based on reasonable grounds). As to the meaning of 'expected ready to load' see PARA 414.

4 *Shadforth v Higgin* (1813) 3 Camp 385; *Glaholm v Hays* (1841) 2 Man & G 257; *Oliver v Fielden* (1849) 4 Exch 135; *Tarrabochia v Hickie* (1856) 1 H & N 183; *Dimech v Corlett* (1858) 12 Moo PCC 199. The term cannot be construed as a condition if, when the contract is made, both parties are aware that its performance is impossible: *Hall v Cazenove* (1804) 4 East 477.

5 *Croockewit v Fletcher* (1857) 1 H & N 893; *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360, DC.

6 This result will follow when the perils are excepted 'during the said voyage' (*Barker v M'Andrew* (1865) 18 CBNS 759, applied in *The Carron Park* (1890) 15 PD 203 at 206, 6 Asp MLC 543 at 544), or 'throughout this charterparty' (*Croockewit v Fletcher* (1857) 1 H & N 893 at 912 per Martin B). In *Granger v Dent* (1829) Mood & M 475, the exceptions expressly applied to this condition. As to the rights and obligations of the parties in respect to terms as to sailing for and arriving at the loading port see further PARA 402 et seq.

7 As to frustration of the adventure see PARAS 237, 245.

8 *M'Andrew v Adams* (1834) 1 Bing NC 29. As to the meaning of 'deviation' see PARA 248.

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#### **247. Prosecution of the voyage.**

Voyage charterparties often contain an express term that the ship shall sail on the voyage from the port of loading to the port of discharge 'with all convenient speed' or words to that effect.

Time charterparties often require 'the master to prosecute all voyages with the utmost dispatch'<sup>1</sup>. In the absence of an express term dealing with the matter, a term that the master should prosecute the voyage with reasonable dispatch will be implied<sup>2</sup>. Unless protected by an exception in the charterparty, the shipowner will be liable to the charterer in damages for any failure by his servants or agents to comply with this express or implied term<sup>3</sup>. Moreover, a breach of the term may amount to a deviation<sup>4</sup>. Where a vessel is chartered for a lump sum freight<sup>5</sup>, the charterer is not entitled to set off against the freight a claim for damages for an alleged failure to prosecute the voyage with reasonable dispatch<sup>6</sup>.

1 See *Re an Arbitration between Suzuki & Co Ltd and T Benyon & Co Ltd* (1926) 17 Asp MLC 1, HL; *SS Istros (Owner) v FW Dahlstroem & Co* [1931] 1 KB 247, 18 Asp MLC 177.

2 *The Wilhelm* (1866) 14 LT 636; and see PARA 474 et seq.

3 Where the language of the exception clause is clear, he will be held to be protected even if the result of so holding is to render the term for sailing with dispatch of no practical effect: cf *SS Istros (Owner) v FW Dahlstroem & Co* [1931] 1 KB 247, 18 Asp MLC 177; *Re an Arbitration between Suzuki & Co Ltd and T Benyon & Co Ltd* (1926) 17 Asp MLC 1, HL.

4 See PARA 248 et seq.

5 See PARA 599.

6 *Gunnstein A/S & Co K/S v Jensen, Krebs and Nielsen, The Alfa Nord* [1977] 2 Lloyd's Rep 434, CA; *James & Co Scheepvaarten Handelsmij BV v Chinecrest Ltd* [1979] 1 Lloyd's Rep 126, CA. But see *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, [1989] 1 Lloyd's Rep 431, HL (cited in PARA 599).

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## 248. Deviation and delay.

Subject to any express term of a charterparty<sup>1</sup>, the shipowner impliedly agrees to proceed from the loading port to the port of discharge by the usual route<sup>2</sup> and without unreasonable delay<sup>3</sup>. A voluntary<sup>4</sup> departure from this route or an unreasonable delay, at any rate if wilful<sup>5</sup>, constitutes a deviation. Unless it can be justified on one of the grounds subsequently stated<sup>6</sup>, a deviation precludes the shipowner from relying on any exception or other term<sup>7</sup> in his favour contained in the charterparty and renders him liable for any loss of or damage to the cargo, unless he can show that this loss or damage must have occurred even if there had been no deviation<sup>8</sup>.

It is immaterial that the loss of or damage to the cargo was not due to the deviation<sup>9</sup>. It is also probably immaterial whether the loss or damage occurs before or during the deviation or after it has ceased and the ship has returned to the contractual route<sup>10</sup>. Moreover, where the contract, although for two consecutive voyages, is held to be one indivisible contract, a deviation on the first voyage entitles the charterer to treat the breach as a repudiation of the entire contract<sup>11</sup>. In addition to his liability for loss of or damage to the cargo, whether due to the deviation or not, the shipowner will also, it seems, be liable for any damage directly caused by the deviation, for example pecuniary loss resulting from the prolongation of the voyage by the deviation<sup>12</sup>. The shipowner cannot claim any contribution in respect of a general average loss occurring after deviation<sup>13</sup>, and even if he carries the goods to the agreed port of discharge, he cannot claim the freight specified in the charterparty<sup>14</sup>. He is probably entitled to a reasonable remuneration for this service<sup>15</sup>. A deviation may be waived by the charterer<sup>16</sup>, in which case the shipowner, in regard to the charterer<sup>17</sup>, may rely on all the terms and exceptions in the charterparty including those relating to general average<sup>18</sup>.

1 For the usual express terms on deviation see PARA 250. As to deviation in bills of lading where the Hague-Visby Rules apply see PARAS 378, 385.

2 *Davis v Garrett* (1830) 6 Bing 716; *Leduc & Co v Ward* (1888) 20 QBD 475, 6 Asp MLC 290, CA; *The Dunbeth* [1897] P 133, 8 Asp MLC 284. The ship may call at any intermediate port at which it is customary to call but at no others: see *Cormack v Gladstone* (1809) 11 East 347. It seems that the shipowner may follow any usual and recognised route if there is more than one: *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] AC 562, [1939] 3 All ER 444, 19 Asp MLC 311, HL. The obligation of the shipowner as to the directness of his route may be stricter under a charterparty than under a bill of lading: see *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd* at 574, 575, at 450, 451 and at 314.

3 *The Wilhelm* (1866) 14 LT 636; and see *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424, 17 Asp MLC 447.

4 *Rio Tinto Co Ltd v Seed Shipping Co* (1926) 24 Ll L Rep 316 (where the captain set a wrong course by mistake during indisposition; there was held to be no deviation); cf *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, 19 Asp MLC 62, HL (where the master sailed for the wrong port owing to the charterers' orders not being received; this was held to be a deviation).

5 Eg by towing a vessel in distress where human life is not in danger (*Scaramanga v Stamp* (1880) 5 CPD 295 at 299, 4 Asp MLC 295 at 297, CA, per Cockburn CJ) (as to the position where life is in danger see PARA 249), or using the ship as a storeship (*A-G v Benjamin Smith & Co* (1918) 14 Asp MLC 334, HL; *Wallem's Rederij A/S v WH Muller & Co Batavia* [1927] 2 KB 99 at 106, 17 Asp MLC 226 at 227 per Mackinnon J; *Cunard Steamship Co Ltd v Buerger* [1927] AC 1 at 6, 17 Asp MLC 92 at 95, HL, per Lord Sumner). Overcarriage of the goods beyond the agreed port of discharge and landing the goods at a port without promptly reloading them or otherwise forwarding them to the agreed port are both, it seems, equivalent to a deviation and have the same effect as a deviation on the terms in the contract of affreightment: *Cunard Steamship Co Ltd v Buerger*. Cf *Bruce Marriott & Co v Houlder Line Ltd* [1917] 1 KB 72, 13 Asp MLC 550, CA.

6 See PARAS 249, 250.

7 Eg as to limitations of liability (*Cunard Steamship Co Ltd v Buerger* [1927] AC 1, 17 Asp MLC 92, HL; and see *Ellis v Turner* (1800) 8 Term Rep 531), or demurrage (*United States Shipping Board v Bunge y Born Lda Sociedad* (1925) 16 Asp MLC 577, HL).

8 *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783, 13 Asp MLC 504, CA, following *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660, 10 Asp MLC 431, CA, and *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co* [1909] 2 KB 360 at 363, 11 Asp MLC 271 at 272. In view of the language of the Court of Appeal in *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* and of Fletcher Moulton LJ in *Joseph Thorley Ltd v Orchis Steamship Co Ltd* at 669 and at 434, the statement sometimes made (eg by Pickford J in *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co* at 365 and at 272) that in the event of deviation the shipowner 'must be treated as a common carrier' cannot be regarded as strictly accurate.

Deviation has been considered to be a breach by the shipowner of a fundamental condition of the contract of carriage which entitled the other party to treat the contract as repudiated: see eg *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597 at 601, 19 Asp MLC 62 at 64, HL, per Lord Atkin. Doubts have, however, been expressed whether this still represents the law: see *Kenya Rlwys v Antares Co Pte Ltd, The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424 at 430, CA, per Lloyd LJ ('Whatever may be the position with regard to deviation cases strictly so called, I would myself favour the view that [deviation cases] should now be assimilated into the ordinary law of contract'); *State Trading Corp of India Ltd v M Golodetz Ltd (now Transcontinental Affiliates Ltd)* [1989] 2 Lloyd's Rep 277 at 289, CA, per Lloyd LJ ('I remain of the view that the deviation cases should now be assimilated to the ordinary law of contract'); *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1. For an analysis of the law relating to deviation see Mills *The future of deviation in the law of the carriage of goods* [1983] LMCLQ 587; Debattista *Fundamental Breach and Deviation in the Carriage of Goods by Sea* [1989] JBL 22; Baughen *Does deviation still matter?* [1991] LMCLQ 70. See also PARA 83 note 3.

9 *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660, 10 Asp MLC 431, CA.

10 *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co* [1909] 2 KB 360 at 365, 11 Asp MLC 271 at 272.

11 *Compagnie Primera de Navagazona Panama v Compania Arrendataria de Monopolio de Petroleos SA* [1940] 1 KB 362, [1939] 4 All ER 81, 19 Asp MLC 341, CA.

12 *United States Shipping Board v Bunge y Born Lda Sociedad* (1925) 16 Asp MLC 577, HL. If it is proved that some loss or damage must have occurred even if there had been no deviation, but that, in that case, the loss or damage would have been less, the shipowner will be liable only for the amount of loss or damage which would not have occurred but for the deviation. Deviation produces the same results on a contract evidenced by a bill of lading (not subject to the Carriage of Goods by Sea Act 1971) as it does on a charterparty. This may be seen by comparing *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783, 13 Asp MLC 504, CA (bill of lading) with *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co* [1909] 2 KB 360, 11 Asp MLC 271 (charterparty). See also *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, 19 Asp MLC 62, HL, per Lord Atkin LJ. Nevertheless, the rights and liabilities of the charterer and the bill of lading holder may differ as regards the same deviation, eg the former may have waived the deviation but the latter may not: see *Hain Steamship Co Ltd v Tate and Lyle Ltd*.

13 *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, 19 Asp MLC 62, HL. As to general average see PARA 605 et seq; and as to apportionment, liability and contribution in the case of multiple fault see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARAS 1060-1062.

14 *Tate and Lyle Ltd v Hain Steamship Co Ltd* [1936] 2 All ER 597 at 601, 611, 19 Asp MLC 62 at 64, 68, HL.

15 In *Hain Steamship Co Ltd v Tate and Lyle Ltd* (1934) 39 Com Cas 259, CA, the Court of Appeal had decided that no remuneration was recoverable in such a case. The House of Lords (*Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, 19 Asp MLC 62, HL) held that the question did not arise, and, while refraining from expressing a final opinion, indicated grave doubts as to the correctness of the view of the Court of Appeal: see especially at 612 and at 69 per Lord Wright MR. Where a charterparty was frustrated by the closing of the Suez Canal, it was held that, since the shipowners had committed no breach of contract or other wrongful act, and had carried the goods via the Cape of Good Hope for the charterers' benefit and with their consent, the shipowners were entitled, on a quantum meruit, to be paid a reasonable freight: *Société Franco Tunisienne d'Armement v Sidermar SpA* [1961] 2 QB 278, [1960] 2 All ER 529, [1960] 1 Lloyd's Rep 594.

16 There must be clear evidence that the charterer knew of the deviation and intended to treat the contract contained in the charterparty as still binding. Thus, the mere fact that on hearing of the deviation the charterer does not demand his goods at a port of call will not constitute a waiver of the deviation, but, where the charterer, on learning of the deviation, caused the ship to be recalled to her second loading port where the loading was completed by sub-charterers, it was held that the charterer had waived the deviation: *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597 at 602, 19 Asp MLC 62 at 64, HL, per Lord Atkin.

17 As to the position of a bill of lading holder see note 12.

18 *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, 19 Asp MLC 62, HL.

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## 249. When deviation or delay is excused.

Deviation is excused, and no breach of contract is committed, in the following circumstances:

- 24 (1) where deviation is for the purpose of saving life, the ship may lawfully deviate for the purpose of communicating with a ship in distress, since danger to life may be involved; if the lives of those on board the ship in distress can be saved without saving the ship, as, for example, by taking them off any attempt to save the ship will render the deviation a breach of the contract; but, if the preservation of life can only be effected through the concurrent saving of property, and a genuine purpose of saving life forms part of the motive which leads to the deviation, the excuse will not be lost by reason of the purpose of saving property having formed a second motive for deviating<sup>1</sup>;
- 25 (2) where the ship cannot safely keep to her course owing to stress of weather, or where she is attempting to avoid imminent danger<sup>2</sup>, for example capture by the enemies of the country to which she belongs<sup>3</sup>, or pirates or from ice<sup>4</sup>, she may

- resort to a port of refuge, either for the purpose of sheltering from the storm or repairing any damage sustained<sup>5</sup>, or for the purpose of avoiding the danger<sup>6</sup>, but she must not remain at the port of refuge any longer than necessity requires<sup>7</sup>;
- 26 (3) if the charterer wrongfully fails to load a full cargo, the shipowner may be justified in delaying the voyage while he obtains other cargo to make up the deficiency<sup>8</sup>.

1 *Scaramanga v Stamp* (1880) 4 Asp MLC 295 at 299, CA, per Cockburn CJ.

2 It is immaterial that the necessity for the deviation arises from the unseaworthiness of the ship: *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL. As to the duty of the master where the cargo only is in danger or endangered see PARA 485 note 7.

3 *Pole v Cetcovich* (1860) 9 CBNS 430; *Duncan v Köster, The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214; *Anderson, Anderson & Co v San Roman (Owners), The San Roman* (1873) LR 5 PC 301, 1 Asp MLC 603. An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience is sufficient: *Anderson, Anderson & Co v San Roman (Owners), The San Roman* at 305 and at 604. See also *The Wilhelm Schmidt* (1871) 1 Asp MLC 82. Deviation may be justified although the danger affects the ship only, and not the goods: *Duncan v Köster, The Teutonia*.

4 *Duncan v Köster, The Teutonia* (1872) LR 4 PC 171 at 179, 1 Asp MLC 214 at 219 per Mellish LJ.

5 *Phelps, James & Co v Hill* [1891] 1 QB 605, 7 Asp MLC 42, CA.

6 *The Wilhelm Schmidt* (1871) 1 Asp MLC 82; *The Heinrich* (1871) LR 3 A & E 424, 1 Asp MLC 79; *The Express* (1872) LR 3 A & E 597, 1 Asp MLC 355. See also *The Europa* [1908] P 84, 11 Asp MLC 19, DC; *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL.

7 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 523.

8 *Wallems Rederij A/S v WH Muller & Co Batavia* [1927] 2 KB 99, 17 Asp MLC 226.

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## 250. Express terms as to deviation or delay.

The stringency of the implied undertaking not to deviate is usually modified by an express term in a charterparty<sup>1</sup>. Both delay and deviation are expressly permitted in the following circumstances:

- 27 (1) where the ship is given liberty to call at any ports in any order<sup>2</sup>; such a term does not confer the right to call at any port in the world<sup>3</sup>; it must be given a reasonable interpretation, and, therefore, must be construed as referring to ports which are substantially on the route of the specified voyage, and which would naturally and usually be ports of call<sup>4</sup>; the exercise of this liberty necessarily involves deviation, and it also involves delay, since the ship is entitled not merely to go into the port, but to remain there for some business purpose, for example loading or unloading cargo or receiving orders<sup>5</sup>;
- 28 (2) where the ship is given liberty to tow and assist vessels in distress; under such a term she may deviate<sup>6</sup>, and even return on her course<sup>7</sup>, subject to certain limitations which have not yet been fully defined<sup>8</sup>;
- 29 (3) where the ship is given liberty to deviate for the purpose of saving property as well as life<sup>9</sup>.

1 These terms will be construed strictly contra proferentem: see *Cunard Steamship Co Ltd v Buerger* [1927] AC 1, 17 Asp MLC 92, HL (where the condition, although in wide terms, failed to protect the shipowner against liability for overcarriage and for landing cargo at the wrong port). Cf *Sargant & Sons v East Asiatic Co Ltd* (1915) 21 Com Cas 344.

2 If the words 'in any order' are omitted, the ports must be called at in their geographical order: *Leduc & Co v Ward* (1888) 20 QBD 475 at 482, 6 Asp MLC 290 at 292, CA, per Lord Esher MR. Cf *Gairdner v Senhouse* (1810) 3 Taunt 16. It may, however, be that, if the customary order differs from the geographical, the shipowner is entitled to adopt the former unless it is unreasonable: see *White v Granada Steamship Co Ltd* (1896) 13 TLR 1, CA (where, however, the clauses contained words equivalent to 'in any order'); *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783 at 797, 13 Asp MLC 504 at 507, CA, per Phillimore LJ; *Frenkel v MacAndrews & Co Ltd* [1929] AC 545, 17 Asp MLC 582, HL. Calling at any port on the voyage may be prohibited: *Yrazu v Astral Shipping Co* (1904) 9 Com Cas 100 (where an exception as to force majeure was held to be inapplicable). Where the clause gave liberty to call at any ports in any order for bunkering and other purposes, it was held by the House of Lords that stopping to land engineers who had sailed in the ship in order to watch the performance of a 'superheater' was not within the liberty. All their lordships agreed that the word 'bunkering' had some limiting effect on the words 'other purposes', but there was difference of opinion as to the nature of this limiting effect: see *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 18 Asp MLC 266, HL; cf *United States Shipping Board v Bunge y Born Lda Sociedad* (1925) 16 Asp MLC 577, HL (taking in oil to carry ship on next voyage not within the liberty clause).

3 The clause may be so framed as to permit the shipowner to alter the destination of the ship, and to tranship the goods: *Hadji Ali Akbar & Sons Ltd v Anglo-Arabian and Persian Steamship Co Ltd* (1906) 10 Asp MLC 307. Cf *Wallem's Rederij A/S v WH Muller & Co, Batavia* [1927] 2 KB 99, 17 Asp MLC 226.

4 *Leduc & Co v Ward* (1888) 20 QBD 475 at 482, 6 Asp MLC 290 at 292, CA, per Lord Esher MR; *Glynn v Margetson & Co* [1893] AC 351, 7 Asp MLC 366, HL; *White v Granada Steamship Co Ltd* (1896) 13 TLR 1, CA; *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] AC 562, [1939] 3 All ER 444, 19 Asp MLC 311, HL. In determining what is the specified voyage, the charterparty, like any other contract, must be construed in the light of the surrounding circumstances. Moreover, unless a specific route is prescribed, evidence is admissible, even if the termini of the voyage are fixed, to show what is the usual, or a usual, route: *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd*. If it can be shown that to the knowledge of both parties the shipowner's ships always followed a particular route, this route will be the specified voyage even if it may involve proceeding for a time in the opposite direction to that of the port of discharge: *Frenkel v MacAndrews & Co Ltd* [1929] AC 545, 17 Asp MLC 582, HL, applying *Evans Sons & Co v Cunard Steamship Co Ltd* (1902) 18 TLR 374. See also *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd*. Cf *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 1 KB 747 at 757, 13 Asp MLC 400 at 403 (on appeal [1916] 2 KB 783 at 797-800, 13 Asp MLC 504 at 507-508, CA); *Evans Sons & Co v Cunard Steamship Co Ltd*.

5 *Leduc & Co v Ward* (1888) 20 QBD 475 at 482, 6 Asp MLC 290 at 292, CA; *Caffin v Aldridge* [1895] 2 QB 648, 8 Asp MLC 233, CA. Where cargo has been taken on board by the shipowner for his own benefit, he is not at liberty to deviate for the purpose of discharging it: *The Dunbeth* [1897] P 133, 8 Asp MLC 284. The clause must, it seems, be so construed as not to frustrate the adventure which was the common object of the parties: see *Connolly Shaw Ltd v Nordenfjeldske Steamship Co* (1934) 50 TLR 418 per Branson J; cf *John Potter & Co v Burrell & Son* [1897] 1 QB 97 at 104, 110, 8 Asp MLC 200 at 202, 204, CA; but see *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, [1956] 3 All ER 957, [1956] 2 Lloyd's Rep 379, HL.

6 *John Potter & Co v Burrell & Son* [1897] 1 QB 97, 8 Asp MLC 200, CA.

7 *Stuart v British and African Steam Navigation Co* (1875) 2 Asp MLC 497; and see *Drain v Henderson* (1860) 11 ICLR 497.

8 *Stuart v British and African Steam Navigation Co* (1875) 2 Asp MLC 497. A deviation which frustrates the object of the adventure is not within the term: *John Potter & Co v Burrell & Son* [1897] 1 QB 97, 8 Asp MLC 200, CA; *Connolly Shaw Ltd v Nordenfjeldske Steamship Co* (1934) 50 TLR 418. Cf *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, [1956] 3 All ER 957, [1956] 2 Lloyd's Rep 379, HL.

9 See *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL.

Terms in Charterparties/(b) Terms as to the Voyage or Time/251. Option to name port of discharge.

### 251. Option to name port of discharge.

Where a voyage charterparty gives the charterer the option of ordering the ship to various ports of discharge, the risks of the voyage and the position of the parties may be materially altered according to the situation of the port to which the ship is actually ordered to proceed<sup>1</sup>. It is, therefore, usual in such a case to specify in the charterparty the conditions under which the option is to be exercised by the charterer<sup>2</sup>.

<sup>1</sup> As to the position when the charterer orders the ship to a strike-bound port see *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL; *Pilgrim Shipping Co Ltd v The State Trading Corp of India Ltd, The Hadjitsakos* [1975] 1 Lloyd's Rep 356, CA; *Shipping Corp of India Ltd v Naviera Letasa SA* [1976] 1 Lloyd's Rep 132 (charterers in breach when they altered the port of delivery for the vessel to arrive on time); and PARA 300.

<sup>2</sup> Cf *Sully v Duranty* (1864) 3 H & C 270. As to the charterer's duty to name the port of discharge see PARA 517.

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### 252. Cancelling clause.

A charterparty often contains a cancelling clause under which the charterer is given the option of cancelling the charterparty if, in a voyage charterparty, the ship is not ready to load, and in a time charterparty, the ship is not at the charterer's disposal<sup>1</sup>, by a specified time<sup>2</sup>. This option need not be exercised until notice is given that the ship is ready to load<sup>3</sup>. In a time charterparty, where the charterparty gives the charterer an option both to nominate a port for the delivery of the vessel and to cancel the charterparty unless the vessel is delivered by a certain date, then the charterer cannot cancel the charterparty before he has exercised his option to nominate the delivery port: in effect the charterer's 'option' to choose a delivery port is regarded as a condition precedent to the shipowner's duty to deliver the vessel<sup>4</sup>.

In either type of charterparty, however, the cancelling clause does not operate in derogation of the charterer's general right to repudiate the contract if a condition is broken<sup>5</sup>.

Thus, where the ship has deviated or delayed on her voyage to the port of loading, and the contemplated adventure is thereby wholly frustrated, he is entitled to repudiate the contract, notwithstanding that the ship in fact arrives and is placed at his disposal before the time specified<sup>6</sup>. Further, the clause does not prevent the application of the rule that the contract is dissolved where the adventure is frustrated without the fault of either party<sup>7</sup>.

There is no contractual right to cancel the charterparty unless and until the date specified in the clause has been reached<sup>8</sup>.

<sup>1</sup> See *Marbienes Compania Naviera SA v Ferrosstaal AG, The Democritos* [1976] 2 Lloyd's Rep 149, CA (an express cancellation clause only imposes on the owner a duty to exercise reasonable diligence to deliver the ship in a fit condition by the cancelling date).

<sup>2</sup> See *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd, The Madeleine* [1967] 2 Lloyd's Rep 224. For a clause giving the owners and the charterers an option to cancel if the ship is ordered by Lloyd's to undergo a survey see *Acties Nord-Osterso Rederiet v Casper, Edgar & Co Ltd* (1923) 14 Ll L Rep 203, HL. As to

what is meant by 'readiness to load' see *Groves, Maclean & Co v Volkart Bros* (1884) Cab & El 309 (affd (1885) 1 TLR 454, CA); *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360, DC; *Hick v Tweedy & Co* (1890) 6 Asp MLC 599; and PARA 413. The charterparty may also give an option to cancel on other grounds eg outbreak of war: see *Scottish Navigation Co Ltd v WA Souter & Co* [1916] 1 KB 675 (revsd [1917] 1 KB 222, 13 Asp MLC 539, CA) and PARA 303 note 1. See also *Steel, Young & Co v Grand Canary Coaling Co* (1904) 9 Asp MLC 584, HL. As to the meaning of 'war' in this connection see *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544, [1939] 1 All ER 819, 63 Ll L Rep 155, CA (not restricted to technical meaning in international law), where both parties had the option to cancel. In *Elliott Steam Tug Co Ltd v John Payne & Co* [1920] 2 KB 693, 15 Asp MLC 78, the charterparty provided that the tug was to be hired for one calendar month at a certain rate and that the hire was to continue at the same rate until the charterers terminated it by 14 days' notice. It was held that no provision could be implied empowering the owners to terminate the charterparty, and that it continued indefinitely during the existence of the tug, subject to the charterers' right to terminate it by 14 days' notice.

3 *Moel Tryvan Ship Co Ltd v Andrew Weir & Co* [1910] 2 KB 844, 11 Asp MLC 469, CA. As to notice of readiness to load see PARA 416. The ship is, therefore, bound to proceed to the port of loading, even if she cannot arrive in time (*Shubrick v Salmond* (1765) 3 Burr 1637), and the charterer is under no obligation to exercise his option until she does arrive (*Moel Tryvan Ship Co Ltd v Andrew Weir & Co*). Where, however, the charterer refused to tell the shipowner whether he would load the ship if she did go to the loading port, but said he would only do so at a reduced rate of freight, the court refused to grant an injunction restraining the shipowner from using the vessel for any purposes other than those of the charterparty and left the charterer to his remedy in damages: *Bucknall Bros v Tatem & Co* (1900) 9 Asp MLC 127, CA, distinguishing *De Mattos v Gibson* (1858) 4 De G & J 276 and *Sevin v Deslandes* (1860) 7 Jur NS 837. In *Moel Tryvan Ship Co Ltd v Andrew Weir & Co* at 847 and at 344, Bray J cites, apparently with approval, a statement from Scrutton on Charterparties to the effect that the shipowner is bound to proceed to the port of loading unless the delay by excepted perils is such as to put an end to the charterparty. Even if the delay were not due to an excepted peril, the shipowner is not liable in damages for not proceeding if the delay frustrates the adventure and is not due to his default: see PARA 246. Where there is an option to cancel on the happening of a specified event and no time is set within which the option must be exercised, it must be exercised within a reasonable time: *Re an Arbitration between Kawasaki Kisen Kabushiki Kaisha and Belships Co Ltd, Skibsaksjeselskap* [1939] 2 All ER 108, 19 Asp MLC 278.

4 *Mansel Oil Ltd v Troon Storage Tankers SA* [2008] EWHC 1269 (Comm), [2008] All ER (D) 95 (Jun). In the case itself, however, the evidence showed that the vessel could not have made a delivery port within the agreed range even if the charterer had nominated a particular port: in these circumstances, the charterer's 'option' to nominate had never been triggered and it was held that the charterer was entitled to cancel the charterparty.

5 See PARAS 234, 242. It is immaterial that the delay is caused by an excepted peril (*Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360), unless made specially applicable (*Granger v Dent* (1829) Mood & M 475). Nor does the exercise of the option preclude the charterer from claiming damages for failure to send the ship: *Thomas Nelson & Sons v Dundee East Coast Shipping Co Ltd* 1907 SC 927. As to the measure of damages see *Blackgold Trading Ltd of Monrovia v Almare SpA di Navigazione of Genoa, The Almare Seconda and Almare Quinta* [1981] 2 Lloyd's Rep 433.

6 Cf *M'Andrew v Adams* (1834) 1 Bing NC 29.

7 See PARA 245.

8 *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd, The Madeleine* [1967] 2 Lloyd's Rep 224.

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### 253. Duration of time charterparty.

A time charterparty necessarily contains terms as to its duration<sup>1</sup>. Timely redelivery is probably not a condition of a time charterparty and is not, therefore, necessarily a repudiatory breach<sup>2</sup>, since a short delay in redelivery will not justify the termination of the contract<sup>3</sup>.

Where a charterparty is for a fixed period such as three or six months, the court may imply a reasonable margin or allowance<sup>4</sup> because it is impossible for anyone to calculate exactly the day on which the last voyage may end, but it is open to the parties to provide that there is to be no margin or allowance<sup>5</sup>. It is also open to them to fix expressly what the margin or allowance will be, and then the vessel must be redelivered within the permitted margin or allowance<sup>6</sup>.

If the charterer sends the vessel on a voyage which it is reasonably expected will be completed by the end of the charterparty period, the shipowner must obey his directions<sup>7</sup>. If she is delayed by causes for which neither party is responsible, hire is payable at the charterparty rate until redelivery even if the market rate has gone up or down<sup>8</sup>.

If the charterer sends the vessel on her last voyage at a time when there is no expectation that she will be redelivered within a reasonable time of the end of the period of the charterparty, and she is redelivered late, he is guilty of a breach of contract<sup>9</sup>. The shipowner is entitled to refuse to carry out the charterer's order and to call for another one, and, if the charterer refuses to give it, the shipowner may accept his conduct as a breach going to the root of the contract, fix a fresh charterparty and sue for damages<sup>10</sup>.

If the shipowner agrees to the voyage originally ordered by the charterer, he is entitled to be paid hire at the current market rate for the excess period<sup>11</sup>.

The time at which the validity of a charterer's order for a final voyage prior to redelivery under a time charterparty is to be judged is primarily the time when the order is to be performed<sup>12</sup>.

1 Time charterparties do not typically contain a specific date of delivery of the vessel to the charterer, it being difficult in normal trading conditions to commit a vessel to delivery on a certain date; the charterer's interests are normally protected through a cancelling clause: see PARA 252. The charterparty may provide for a series of ships at intervals: see *John Potter & Co v Burrell & Son* [1897] 1 QB 97, 8 Asp MLC 200, CA; *The Melrose Abbey* (1898) 14 TLR 202, DC.

2 Most decided cases involve late re-delivery. See, however, *Golden Strait Corp v Nippon Yusen Kubishiki Kaisha, The Golden Victory* [2007] UKHL 12, [2007] 2 Lloyd's Rep 164, where it was held, on a split decision three to two, that where a charterer redelivered a vessel early in repudiatory breach of a charterparty which allowed termination on the occurrence of an event (in this case, the start of the second Gulf War) which occurred after the termination of the charterparty but before the expiry of the agreed term of the charterparty, the owners were entitled to damages for the loss of hire between repudiation and the event, rather than between repudiation and the end of the period agreed in the charterparty.

3 *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 4 All ER 998, [1994] 1 WLR 1465, [1995] 1 Lloyd's Rep 1, HL.

4 *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd, The Peonia* [1991] 1 Lloyd's Rep 100, CA; *Chiswell Shipping Ltd and Liberian Jaguar Transports Inc v National Iranian Tanker Co, The World Symphony and World Renown* [1992] 2 Lloyd's Rep 115, CA; *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 4 All ER 998, [1994] 1 WLR 1465, [1995] 1 Lloyd's Rep 1, HL.

5 *Alma Shipping Corp of Monrovia v Mantovani, The Dione* [1975] 1 Lloyd's Rep 115 at 117, CA, per Lord Denning MR.

6 *Alma Shipping Corp of Monrovia v Mantovani, The Dione* [1975] 1 Lloyd's Rep 115 at 117, CA, per Lord Denning MR; *Gulf Shipping Lines Ltd v Compania Naviera Alanje SA, The Aspa Maria* [1976] 2 Lloyd's Rep 643, CA ('six months, 30 days more or less at charterer's option'); *Mareva Navigation Co Ltd v Canaria Armadora SA, The Mareva A/S* [1977] 1 Lloyd's Rep 368 ('five months, 20 days more or less at charterer's option'); *Jadranska Slobodna Plovidba v Gulf Shipping Lines Ltd, The Matija Gubec* [1983] 1 Lloyd's Rep 24 ('two years, 45 days more or less'); *Petroleo Brasileiro SA v Kriti Akti Shipping Co SA; Kriti Akti Shipping Co SA v Petroleo Brasileiro SA, The Kriti Akti* [2004] EWCA Civ 116, [2004] 1 Lloyd's Rep 712, [2004] 2 All ER (Comm) 396 (11 months, plus 15 days more or less at charterer's option).

7 *Alma Shipping Corp of Monrovia v Mantovani, The Dione* [1975] 1 Lloyd's Rep 115 at 117, CA, per Lord Denning MR.

8 See *Timber Shipping Co SA v London Overseas Freighters Ltd* [1972] AC 1, [1971] 2 All ER 599, [1971] 1 Lloyd's Rep 523, HL.

9 *Alma Shipping Corpn of Monrovia v Mantovani, The Dione* [1975] 1 Lloyd's Rep 115, CA; *Skibsaktieselskapet Snefonn, Skibsaksjeselskapet Bergehus and Sig Bergesen DY & Co v Kawasaki Kisen Kaisha Ltd, The Berge Tasta* [1975] 1 Lloyd's Rep 422. A 'further option to complete last voyage' protects charterers only where they have ordered a legitimate last voyage: *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd, The Peonia* [1991] 1 Lloyd's Rep 100, CA; distinguished in *Chiswell Shipping Ltd and Liberian Jaguar Transports Inc v National Iranian Tanker Co, The World Symphony and World Renown* [1992] 2 Lloyd's Rep 115, CA. See also *Marimpex Mineraloel-Handelsgesellschaft MBH & Co KB v Compagnie de Gestion et D'Exploitation Ltd* [2001] 1 All ER (Comm) 182.

10 *Alma Shipping Corpn of Monrovia v Mantovani, The Dione* [1975] 1 Lloyd's Rep 115 at 118, CA, per Lord Denning MR. Compensation for late redelivery is limited to the difference between the charter rate and the market rate of hire for the period of the delay and not for the period of the new charterparty: see *Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia, The Achilles* [2008] UKHL 48, [2008] 4 All ER 159, [2008] 2 Lloyd's Rep 275.

11 *Alma Shipping Corpn of Monrovia v Mantovani, The Dione* [1975] 1 Lloyd's Rep 115 at 118, CA, per Lord Denning MR.

12 *Torvald Klaveness A/S v Arni Maritime Corpn* [1994] 4 All ER 998, [1994] 1 WLR 1465, [1995] 1 Lloyd's Rep 1, HL.

## UPDATE

### 253 Duration of time charterparty

NOTE 10--See also *Lansat Shipping Co Ltd v Glencore Grain BV, The Paragon* [2009] EWCA Civ 855, [2010] 1 All ER (Comm) 459 (late redelivery clause providing that if market rate higher than charter rate, then market rate would be payable for specified period prior to redelivery date was unenforceable penalty).

NOTE 12--It is not possible to imply into a charter a term whereby freedom of action is in some way constrained by reference to an approximate delivery date given honestly and not on less than the specified notice: *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd, The Zenovia* [2009] EWHC 739 (Comm), [2009] 2 All ER (Comm) 177 (structure of redelivery regime militated against any argument that parties should be bound to have agreed that giving notice of early redelivery constrained claimant's freedom of action thereafter).

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### 254. Option to continue.

The charterer is sometimes given an option to continue a time charterparty for a further term<sup>1</sup>, and the shipowner is usually given the right of withdrawing the ship from the charterer's service before the expiration of the term if the hire is not duly paid<sup>2</sup>. The right to withdraw the ship may be waived by the shipowner's accepting payment of hire after it is due<sup>3</sup>, or permitting the charterer to load the ship<sup>4</sup>, but not by the mere giving of time<sup>5</sup> or by any acts of the master in obedience to the charterer's orders<sup>6</sup>. Where an actual date is fixed for payment of hire, payment a day or two later is too late<sup>7</sup>.

Provision is also usually made for the cesser of hire in certain cases<sup>8</sup>.

1 See eg *Marseille Fret SA v D Oltmann Schiffahrts GmbH & Co KG, The Trado* [1982] 1 Lloyd's Rep 157 (where it was held that the charterer had not validly exercised the option to continue the charterparty); *Chiswell Shipping Ltd and Liberian Jaguar Transports Inc v National Iranian Tanker Co, The World Symphony and World Renown* [1992] 2 Lloyd's Rep 115, CA (charterers entitled to continue to hire the vessel for such an extended time as would enable the vessel to complete the round voyage on which she was engaged when the charterparty period expired and to return to the port of redelivery). Where the charterparty was to remain in force for six or seven (at the charterers' option) consecutive voyages during 1910 and the sixth voyage was not completed until 6 January 1911, it was held that the charterers could not exercise their option for the seventh voyage: *Dunford & Co Ltd v Cia Anonima Maritima Union* (1911) 12 Asp MLC 32, not following *Pope v Bavidge* (1854) 10 Exch 73. As to the position of sub-charterers where the charterers do not exercise their option to renew see *Smith v Drummond* (1883) Cab & El 160; *Rutherford, Sender & Co v Goldthorpe, Scott and Wright Ltd, The Startforth* [1922] 1 KB 508.

2 It is not usual, nor is it necessary, for such a clause explicitly to make time 'of the essence': see *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship 'Jotunheim'* [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep 181. Neither is it necessary to demand payment before withdrawing the ship: *Re Tyrer & Co and Hessler & Co* (1902) 9 Asp MLC 292, CA.

3 *Langfond (Owners) v Canadian Forwarding and Export Co* (1907) 10 Asp MLC 414, PC; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694, [1983] 2 All ER 763, [1983] 2 Lloyd's Rep 253, HL (where it was impossible to draw any inference that, as the owners had accepted late payments of hire on previous occasions, they had expressly or impliedly represented that they would not insist on punctual payment; and it was held that the court had no jurisdiction to relieve a charterer from forfeiture if the shipowner had withdrawn the vessel for non-payment of hire).

4 *Nova Scotia Steel Co v Sutherland Steamship Co* (1899) 5 Com Cas 106.

5 See *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship 'Jotunheim'* [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep 181.

6 *Re Tyrer & Co and Hessler & Co* (1902) 9 Asp MLC 292, CA. The issue of a writ for the hire is not in itself a waiver of notice of withdrawal: *Wulfsberg & Co v Weardale (Owners)* (1916) 13 Asp MLC 416, CA.

7 *Tankexpress A/S v Compagnie Financière Belge des Petroles SA, The Petrofina* [1949] AC 76, [1948] 2 All ER 939, 82 Ll L Rep 43, HL, disapproving *Nova Scotia Steel Co v Sutherland Steamship Co* (1899) 5 Com Cas 106 at 109. Payment according to an agreed method is, however, valid, even if it fails on occasion, and reasonable notice must be given of any change: *Tankexpress A/S v Compagnie Financière Belge des Petroles SA, The Petrofina*. A shipowner cannot withdraw the ship for non-payment of hire when the amount due depends on the ship's deadweight capacity, which was within the knowledge of the owner but not communicated by him to the charterer: *Kawasaki Kisen Kabushiki Kaisha v Bantham Steamship Co Ltd* [1938] 2 KB 790, [1938] 3 All ER 690, 19 Asp MLC 233, CA.

If a shipowner exercises his right to withdraw when the ship is at sea, he is not entitled to recover hire (either as such or as damages for breach of contract) for the period between his notice of withdrawal and the time when he gets actual possession of the ship: *Italian State Rlys v Mavrogordatos* [1919] 2 KB 305, 14 Asp MLC 504, CA. Where the charterparty still has a substantial period to run and the charterer shows by his conduct that he does not intend to fulfil his obligation to pay hire in advance, the shipowner may treat the charterparty as repudiated, withdraw his ship from the charterer's service and claim as damages the difference between hire at the charterparty rate and the best rate obtainable from other charterers: *Leslie Shipping Co v Welstead, The Raithwaite* [1921] 3 KB 420, 15 Asp MLC 413. See also *Kawasaki Kisen Kabushiki Kaisha v Bantham Steamship Co Ltd* [1938] 2 KB 790, [1938] 3 All ER 690, 19 Asp MLC 233, CA.

8 See PARA 256.

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### (c) Terms as to the Freight or Hire

#### **255. Freight terms in a voyage charterparty.**

A voyage charterparty may contain various terms as to freight, that is, the sum payable to the shipowner for the safe carriage and delivery of goods. The term may provide for the payment of a lump sum as freight<sup>1</sup>; this sum is not, strictly speaking, freight at all, but is in the nature of a rent for the use and hire of the ship on the agreed voyage<sup>2</sup>, and is payable irrespective of the quantity of cargo put on board<sup>3</sup> or delivered<sup>4</sup>. Except where the freight is a lump sum, the charterparty specifies the rate at which the freight is payable, and the unit of weight or measurement on which the amount payable is to be calculated<sup>5</sup>. Different rates of freight are usually specified where the cargo is to be composed of different kinds of goods<sup>6</sup>, or where the charterer has the option of ordering the ship to ports in different areas<sup>7</sup>. As, in the absence of any term to the contrary, freight is payable on the cargo as delivered<sup>8</sup>, and is not due until delivery<sup>9</sup>, provision may be made for freight to be payable on the cargo as shipped<sup>10</sup>, and also for the payment of at least a portion in advance<sup>11</sup>. In any case, it is usually provided that sufficient cash for the ship's ordinary disbursements<sup>12</sup> is to be advanced to the master, if required by him at the port of loading, subject to the deduction of interest, insurance and other charges<sup>13</sup>.

Where the shipowner has performed services not falling within the terms of the charterparty, he may recover reasonable remuneration for those services on the basis of an implied contract<sup>14</sup>.

1 As to lump freight see PARA 599.

2 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245 at 265. Freight will be payable even if the ship does not arrive at the port of discharge, where the failure to arrive is due to excepted perils and a substantial part of the cargo is delivered: *Harrowing Steamship Co v Thomas* [1913] 2 KB 171, CA; affd sub nom *William Thomas & Sons v Harrowing Steamship Co* [1915] AC 58, 12 Asp MLC 532, HL (where the ship foundered outside the port of discharge, and two-thirds of the cargo were washed ashore and collected).

3 *Robinson v Knights* (1873) LR 8 CP 465, 2 Asp MLC 19; *Blanchet v Powell's Llantiv Collieries Co Ltd* (1874) LR 9 Exch 74, 2 Asp MLC 224 (where the consignee was held liable to pay full freight, even though the quantity stated in the bill of lading was incorrect).

4 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245 at 265; *Merchant Shipping Co v Armitage* (1873) LR 9 QB 99, 2 Asp MLC 185, Ex Ch; *Harrowing Steamship Co v Thomas* [1913] 2 KB 171, CA (affd sub nom *William Thomas & Sons v Harrowing Steamship Co* [1915] AC 58, 12 Asp MLC 532, HL).

5 See PARAS 596, 597. In *English Coaling Co Ltd v WJ Tatem Ltd* (1919) 63 Sol Jo 336, CA, the freight was payable at a given rate per ton delivered, or on bill of lading quantity less 2% in lieu of weighing, at receivers' option, to be declared in writing before bulk was broken. On completion of loading the owners' agent presented a freight account to the charterers which the charterers paid. The ship was lost on the voyage. The charterers claimed to be repaid 2% on the amount which they had paid and they were held to be entitled to this repayment, notwithstanding the loss of the ship.

6 Where cattle are to be carried, special provision is usually made as to the carriage of the necessary fodder: *Holland & Co v Pritchard & Co* (1896) 12 TLR 480; *British and South American Steamship Co Ltd v Anglo-Argentine Live Stock and Produce Agency Ltd* (1902) 18 TLR 382.

7 *Gibbens v Buisson* (1834) 1 Bing NC 283; *Fenwick v Boyd* (1846) 15 M & W 632; *Newman and Dale v Lamport and Holt* [1896] 1 QB 20, 8 Asp MLC 76.

8 See PARA 596.

9 See PARA 590.

10 See PARA 598.

11 See PARA 600.

12 For a special agreement relating to bonuses payable to officers and men see *Miles v Haslehurst & Co* (1906) 23 TLR 142 (where the telegram authorising the master to pay the bonuses was framed in ambiguous terms and the charterers were held bound by the construction placed on the telegram by the master).

13 As to when the advances are to be treated as payments on account of freight see PARA 602.

14 *Greenmast Shipping Co SA v Jean Lion et Cie SA, The Saronikos* [1986] 2 Lloyd's Rep 277; *Batis Maritime Corp v Petroleos del Mediterraneo SA, The Batis* [1990] 1 Lloyd's Rep 345.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/3. CARRIAGE BY SEA/(1) CARRIAGE OF GOODS/(i) The Contract/B. CHARTERPARTIES/(D) Usual Terms in Charterparties/(c) Terms as to the Freight or Hire/256. Payment of hire under a time charterparty.

## **256. Payment of hire under a time charterparty.**

A time charterparty<sup>1</sup> usually provides for the payment of a specified sum per month<sup>2</sup> as the hire of the chartered ship. It is usually provided that the hire is to be paid in advance<sup>3</sup>, and that, in default of payment, the ship may be withdrawn by the shipowner<sup>4</sup>. The charterparty may provide that the charterers shall provide a letter of undertaking from their bank that it will pay the hire if the owners state to the bank that the hire is due and unpaid<sup>5</sup>. Payment of the hire is sometimes guaranteed for the charterer by a third party<sup>6</sup>.

A right to withdraw the vessel from the service of the charterers 'failing the punctual and regular payment of the hire' cannot be defeated by a late tender of the hire<sup>7</sup>. Where the withdrawal clause is in the usual form, the shipowners are not entitled to effect a partial or temporary suspension or withdrawal, such as by instructing the master to stop the discharge of cargo<sup>8</sup>. The shipowners must give notice of withdrawal to the charterers within a reasonable time after the default. What is reasonable depends on the circumstances; in many cases it will be a short time, such as the shortest time reasonably necessary to enable the shipowners to hear of the default and issue instructions<sup>9</sup>. If the charterparty contains an express provision regarding notice, that provision must be applied<sup>10</sup>. The right to withdraw may be lost by waiver, express or implied<sup>11</sup>.

The charterparty usually provides that, if the ship is lost, any hire paid in advance and not earned<sup>12</sup>, reckoning from the date of the loss, is to be returned to the charterer<sup>13</sup>. If, however, the ship is not lost, but merely delayed, the hire continues to be payable (in the absence of a term to the contrary), notwithstanding the loss of time<sup>14</sup>, unless the delay is attributable to the shipowner's default<sup>15</sup>, or the charterparty expressly provides for cesser of hire during delay due to the cause in question<sup>16</sup>, or the delay is such as to frustrate the contemplated adventure, without the fault of either party, in which case the charterparty is dissolved<sup>17</sup>.

Requisition of the chartered ship by governmental authority does not necessarily put an end to the charterparty<sup>18</sup> and, if it does not, the charterers remain liable to the owners for the agreed hire throughout the period of the requisition<sup>19</sup>. If the result of the requisition is to dissolve the charterparty by frustration, the charterer cannot recover hire due in advance and paid before the frustrating event<sup>20</sup>, and must pay in full any instalments of hire which had accrued due before that time<sup>21</sup>.

It is usually provided that, in the event of time being lost for more than 24 hours<sup>22</sup> through the breakdown of machinery or damage preventing the working of the ship or her tackle<sup>23</sup>, then payment of hire, except in certain specified cases<sup>24</sup>, is to cease until the ship is in an efficient state to resume her service<sup>25</sup>. If, on the due date for payment of hire, the vessel is off hire, the charterers' obligation to pay the next instalment of hire is suspended<sup>26</sup>.

If the shipowner, in breach of contract, deprives the charterer for a time of the use of the vessel, the charterer may deduct a sum equivalent to the hire for the time so lost; but this right to deduct does not extend to other breaches or default of the shipowner, for example damage to cargo arising from the negligence of the crew<sup>27</sup>.

A time charterparty sometimes provides that the amount of hire is to be adjusted if the vessel falls below or exceeds the performance guaranteed in respect of her speed or fuel consumption<sup>28</sup>, or that, in the event of a failure of a derrick or a winch, the hire is to be reduced for the period of such inefficiency<sup>29</sup>.

Where a charterparty confers on the charterers an express right to deduct certain items from the hire, for example in respect of the value of bunkers remaining on board at redelivery or in respect of disbursements incurred by the charterers for the shipowner's account, the amount to be deducted can only be an estimated sum<sup>30</sup>. An estimate can be justified only if it can be shown to have been made in good faith and on reasonable grounds<sup>31</sup>.

By virtue of the principle of equitable set-off, certain claims against hire may be made even where the contract does not expressly give the charterers the right to do so<sup>32</sup>.

The charterer is not entitled to make a deduction of hire where the master has failed to keep accurate logs and to disclose them to the charterer or has been a party to the creation of false documentation by the bunker supplier or there has been a breach of the shipowner's duty as a bailee of the bunkers to use them in accordance with the charterer's orders<sup>33</sup>. None of these breaches affects the use of the vessel<sup>34</sup>.

In the absence of agreement between the shipowner and the charterer regarding the amount of interest on unpaid hire, the shipowner has no remedy by way of a claim for general damages in respect of such interest if the amount due is paid late but before proceedings for its recovery have been commenced<sup>35</sup>. The shipowner may, however, be entitled to special damages if he can show, for example, that he has had to pay interest on an overdraft as a result of the charterer's late payment of hire, even though the amount is paid before the commencement of proceedings for its recovery<sup>36</sup>.

Where hire remains unpaid, the court may grant an application without notice for an interim injunction to restrain the charterers from removing any of their assets out of the jurisdiction<sup>37</sup>.

1 As to the distinction between a voyage charterparty and a time charterparty see PARAS 208, 209.

2 'Month' means calendar month: *Jolly v Young* (1794) 1 Esp 186; and see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 668, 670; **TIME** vol 97 (2010) PARAS 307-311. Where hire is made payable in proportion for part of a month, a fraction of a day must be reckoned as a whole day: *Angier Bros v Stewart Bros* (1884) Cab & El 357. Where there is a difference between local time at the port of delivery and that at the port of redelivery, the shipowner is entitled to claim hire only in respect of the actual period which has elapsed from the moment of delivery of the vessel: *Ove Skou v Rudolf A Oetker, The Arctic Skou* [1985] 2 Lloyd's Rep 478.

A clause sometimes provides that the hire may be increased or decreased if there is an alteration in the wages paid to the crew: see *W Bruns & Co of Hamburg v Standard Fruit and Steamship Co of New Orleans, The Brunsrode* [1976] 1 Lloyd's Rep 501, CA. Further, there may be a clause to the effect that hire will be reduced if the vessel cannot accommodate all the goods intended to be shipped: see *Oceanic Freighters Corp v MV Libyaville Reederei und Schifffahrts GmbH, The Libyaville* [1975] 1 Lloyd's Rep 537 (where there was a dispute as to the number of trailers which a 'roll-on roll-off' vessel could carry on her trailer deck). In time of war there may be provision for alternative rates of hire, according to whether the ship is 'trading neutral' or 'trading belligerent': see *Halcyon Steamship Co Ltd v Continental Grain Co* [1943] KB 355, [1943] 1 All ER 558, CA.

3 A full month's payment must be made in advance, even if the ship will in all probability be redelivered to the shipowner before the expiration of the month: *Tonnelier v Smith* (1897) 8 Asp MLC 327, CA (where the term provided for a proportionate payment for part of a month). Cf *Reindeer Steamship Co Ltd v Forslind & Son* (1908) 13 Com Cas 214, CA. Where the charterparty states that payment of hire is to be made 'without discount', it merely means that there is to be no discount for early payment: *Compania Sud Americana de Vapores v Shipmair BV, The Teno* [1977] 2 Lloyd's Rep 289 at 292 per Parker J. As to the time and mode of payment see *Tankexpress A/S v Compagnie Financière Belge des Petroles SA, The Petrofina* [1949] AC 76, [1948] 2 All ER 939, 82 Ll L Rep 43, HL (cited in PARA 254 note 7); *Awilco A/S v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652, [1981] 1 WLR 314, [1981] 1 Lloyd's Rep 371, HL (where the shipowners did not have an unconditional right to money transferred to their account by the charterers' bank). If hire paid in advance is not earned, the shipowner is not entitled to keep it against the following month's hire: *CA Stewart & Co v Phs Van Ommeren (London) Ltd* [1918] 2 KB 560, 14 Asp MLC 359, CA. Where a time charterparty provided that, if the ship was on a voyage at the end of the agreed period, this should be extended to enable her to complete her voyage, it was held that the term as to payment in advance applied to this extended period:

*French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494, 15 Asp MLC 358, HL.

4 See PARA 254. On withdrawal the shipowner is entitled to claim hire for the time during which the ship was actually in the charterer's service only: *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92. See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694, [1983] 2 All ER 763, [1983] 2 Lloyd's Rep 253, HL (no jurisdiction to relieve a charterer from forfeiture if the shipowner has withdrawn the vessel for non-payment of hire); *Western Bulk Carriers K/S v Li Hai Maritime Inc, The 'Li Hai'* [2005] EWHC 735 (Comm), [2005] 2 Lloyd's Rep 389 (content of withdrawal notice).

5 See eg *Aurora Borealis Compania Armadora SA and Buenamar Compania Naviera SA v Marine Midland Bank NA, The Maistros* [1984] 1 Lloyd's Rep 646.

6 *Thermistocles Navegacion SA v Langton, The Queen Frederica* [1978] 2 Lloyd's Rep 164, CA; *Aliakman Maritime Corp v Trans Ocean Continental Shipping Ltd and Frank Truman Export Ltd, The Aliakman Progress* [1978] 2 Lloyd's Rep 499, CA; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546.

7 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, [1977] 1 Lloyd's Rep 315, HL. Where the shipowners were, under the charterparty, at liberty to withdraw failing punctual and regular payment of hire 'or any breach', they were held not to be entitled to withdraw on breach of the charterer's obligation to pay extra insurance premiums: *Telfair Shipping Corp v Athos Shipping Co SA, Solidor Shipping Co Ltd, Horizon Finance Corp and AN Cominos, The Athos* [1983] 1 Lloyd's Rep 127, CA. See also *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios (No 2)* [1984] 2 Lloyd's Rep 235, HL (where it was held that the owner could only withdraw on breach of a similar clause if the effects of the non-monetary breach went to the root of the charterparty). See also *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship 'Jotunheim'* [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep 181.

8 *Steelwood Carriers Inc of Monrovia, Liberia v Evimeria Compania Naviera SA of Panama, The Agios Giorgis* [1976] 2 Lloyd's Rep 192; *Aegnoussiotis Shipping Corp of Monrovia v Kristian Jebbens Rederi of Bergen A/S, The Aegnoussiotis* [1977] 1 Lloyd's Rep 268; *International Bulk Carriers (Beirut) SARL v Evlogia Shipping Co SA and Marathon Shipping Co Ltd, The Mihalios Xilas* [1978] 2 Lloyd's Rep 186.

9 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850 at 872, [1977] 1 All ER 545 at 552, [1977] 1 Lloyd's Rep 315 at 321, HL, per Lord Wilberforce; *Gatoil Anstalt v Omennial Ltd, The Balder London* [1980] 2 Lloyd's Rep 489 (where the shipowner had not acted as quickly as possible, but, on the facts, had acted reasonably); *Tropwood AG of Zug v Jade Enterprises Ltd, The Tropwind* [1982] 1 Lloyd's Rep 232, CA (where clear notice of withdrawal was given); *Tradax Export SA v Dorada Compania Naviera SA, The Lutetian* [1982] 2 Lloyd's Rep 140 (where notice was given prematurely).

10 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850 at 872, [1977] 1 All ER 545 at 552, [1977] 1 Lloyd's Rep 315 at 321, HL, per Lord Wilberforce; *Western Bulk Carriers K/S v Li Hai Maritime Inc, The 'Li Hai'* [2005] EWHC 735 (Comm), [2005] 2 Lloyd's Rep 389. See also *Oceanic Freighters Corp v MV Libyaville Reederei and Schiffahrts GmbH, The Libyaville* [1975] 1 Lloyd's Rep 537. The charterparty may contain an 'anti-technicality' clause by which, where the payment of the hire has not been received by the due date, the shipowners must give the charterers a specified period in which to rectify the cause of the delay before the right to withdraw the vessel is exercised: *Italmare Shipping Co v Ocean Tanker Co Inc (No 2), The Rio Sun* [1982] 3 All ER 273, [1982] 1 Lloyd's Rep 404; *Tradax Export SA v Dorada Compania Naviera SA, The Lutetian* [1982] 2 Lloyd's Rep 140; *Afovos Shipping Co SA v R Pagnan and F Lli, The Afovos* [1983] 1 All ER 449, [1983] 1 WLR 195, [1983] 1 Lloyd's Rep 335, HL (where notice of withdrawal was served on the last day for payment); *Schelde Delta Shipping BV v Astarte Shipping Ltd, The Pamela* [1995] 2 Lloyd's Rep 249 (what matters is not when the notice is given by the owners but when its contents reach the attention of the charterers; it is not enough to inquire whether the particular charterer must have known from the surrounding circumstances what the notice was impliedly saying).

11 As to waiver of the right to withdraw see *Wulfsberg & Co v Weardale (Owners)* (1916) 13 Asp MLC 416, CA; *Modern Transport Co Ltd v Duneric Steamship Co* [1917] 1 KB 370, 13 Asp MLC 490, CA (where the submission of a dispute as to hire to arbitration was held to be a waiver of the right to withdraw for non-payment); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, [1977] 1 Lloyd's Rep 315, HL; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama, The Mihalios Xilas* [1979] 2 All ER 1044, [1979] 1 WLR 1018, [1979] 2 Lloyd's Rep 303, HL.

12 As to when the hire is not earned see *Gibbon v Mendez* (1818) 2 B & Ald 17 (where it was held that no hire was earned if the ship never reached her first port abroad, the charterparty providing for the first payment of hire within ten days after arrival at that port). See also *Mackrell v Simond* (1776) 2 Chit 666; *Smith v Wilson* (1807) 8 East 437. Where a time charterparty was frustrated by the outbreak of war, it was held that hire paid in advance could not be recovered under a clause providing for repayment of hire 'not earned': *Weidner, Hopkins & Co v Admiral Shipping Co Ltd* (1918) 145 LT Jo 192.

13 See *CA Stewart & Co v Phs Van Ommeren (London) Ltd* [1918] 2 KB 560, 14 Asp MLC 359, CA. An advance payment of hire which is not earned is recoverable as between a shipowner and a charterer, but not as between the charterer and a third party assignee: *Pan Ocean Shipping Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 All ER 470, [1994] 1 WLR 161, [1994] 1 Lloyd's Rep 365, HL.

14 *Havelock v Geddes* (1809) 10 East 555 (repairs); *Moorsom v Greaves* (1811) 2 Camp 627 (blockade); *Ripley v Scaife* (1826) 5 B & C 167 (repairs); *Inman Steamship Co Ltd v Bischoff* (1882) 7 App Cas 670, 5 Asp MLC 6, HL; *Hough & Co v Head* (1885) 54 LJQB 294 (where a term providing for cesser of hire was held not to apply to the particular cause of delay) (affd on other grounds 5 Asp MLC 505, CA); *Brown v Turner, Brightman & Co* [1912] AC 12, 12 Asp MLC 79, HL.

15 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 679.

16 *Aktieselskabet Lina v Turnbull & Co* 1907 SC 507; *Sea and Land Securities Ltd v William Dickinson & Co Ltd* [1942] 2 KB 65, [1942] 1 All ER 503, CA (where the ship was fitted with degaussing apparatus by agreement while awaiting berth; there was no term for cesser of hire and hire was payable). Where a charterparty provided that the steamer should be redelivered on the expiration of the charterparty in the same good order as when delivered to the charterers and the charterers tendered her for redelivery in a damaged condition, it was held that they were liable for the cost of repairs and damages for detention during repairs, but not for hire after the date on which they had tendered the ship for redelivery: *Wye Shipping Co Ltd v Compagnie du Chemin de Fer Paris-Orléans* [1922] 1 KB 617; and see *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, CA.

17 For an explanation of this principle and a discussion of the relevant authorities see PARA 245 et seq. See also **CONTRACT** vol 9(1) (Reissue) PARA 900. As there stated, the question whether a particular time charterparty is dissolved by frustration of the adventure depends on its terms and the circumstances in which it is made and on the character of the supervening event. While, therefore, the expositions of the principles of the doctrine of frustration which are to be found in the reported cases are of general application, a decision that in a particular case the charterparty was or was not dissolved can afford guidance in another case only in so far as the terms of the charterparties and the circumstances of the two cases are substantially the same. Subject to this observation, the following further decisions may be noted: *Elliott Steam Tug Co Ltd v Charles Duncan & Sons Ltd* (1918) 34 TLR 583; *Elliott Steam Tug Co Ltd v John Payne & Co* [1920] 2 KB 693, 15 Asp MLC 78; *Banck v Bromley & Son* (1920) 37 TLR 71; *Reederei Kirchner & Co v Hugo Stinnes GmbH* (1924) 18 Ll L Rep 417; *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787, [1958] 1 Lloyd's Rep 290.

18 For a case in which the charterparty expressly provided for the event of requisition see *RWJ Sutherland & Co v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (1920) 36 TLR 724, CA.

19 *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 13 Asp MLC 467, HL; applied in *Modern Transport Co Ltd v Duneric Steamship Co* [1917] 1 KB 370, 13 Asp MLC 490, CA. As to the rights of the shipowner and the charterer in hire paid by the requisitioning authority see *Chinese Mining and Engineering Co Ltd v Sale & Co* [1917] 2 KB 599, 14 Asp MLC 95; *Dominion Coal Co v Roberts* (1920) 36 TLR 837; *Dominion Coal Co Ltd v Maskinonge Steamship Co Ltd* [1922] 2 KB 132, 16 Asp MLC 8; *London-American Maritime Trading Co v Rio de Janeiro Tramway, Light and Power Co* [1917] 2 KB 611, 14 Asp MLC 101. As to the prerogative right of the Crown to requisition British ships see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 4.

20 *Lloyd Royal Belge SA v Stathatos* (1917) 34 TLR 70, CA.

21 *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494, 15 Asp MLC 358, HL. The question whether the action of the government amounts to a requisition has given rise to difficulty in some cases: see *France Fenwick & Co Ltd v R* [1927] 1 KB 458 (where the authorities are reviewed); distinguished in *Nicolaou v Minister of War Transport* [1944] 2 All ER 322. As to the adjustment of the rights and liabilities of the parties after the discharge of a contract by frustration see the Law Reform (Frustrated Contracts) Act 1943; **CONTRACT** vol 9(1) (Reissue) PARAS 913-919; and PARA 237.

22 The agreed maximum period could be far shorter: see *International Fina Services AG v Katrina Shipping Ltd and Tonen Tanker Kabushiki Kaisha, The Fina Samco* [1995] 2 Lloyd's Rep 344.

23 See eg *Burrell & Sons v F Green & Co* [1914] 1 KB 293, 12 Asp MLC 411; affd sub nom *Burrell & Sons v Hind, Rolph & Co* [1915] 1 KB 391, 12 Asp MLC 589, CA. Where the breakdown does not extend to the ship's tackle, hire will be payable in respect of the time occupied in discharging the cargo, even though, in consequence of the breakdown, no hire is due in respect of the time occupied on the voyage: *Hogarth v Miller, Bro & Co* [1891] AC 48, 7 Asp MLC 1, HL (where the ship was towed from Las Palmas to Harburg). Cf *Tynedale Steam Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* [1936] 1 All ER 389, 54 Ll L Rep 341, CA. In *Naeyaert v TB Stott & Co* (1919) 35 TLR 343 the charterparty contained a clause providing for cesser of hire in the event of a breakdown of machinery; there was a breakdown of machinery followed by a loss of the ship and it was held that the charterers were entitled to recover hire paid in advance in respect of the period between the

breakdown and the loss. In *SS Magnhild v McIntyre Bros & Co* [1921] 2 KB 97, 15 Asp MLC 230, CA, the charterparty provided for the cesser of hire in the event of loss of time from the deficiency of men or owners' stores, breakdown of machinery or damage to hull 'or other accident preventing the working of the steamer'; it was held, affirming the judgment of McCardiffe J, that the ejusdem generis rule was inapplicable to the words 'or other accident'. On this point cf *Adelaide Steamship Co Ltd v A-G* [1926] AC 172 at 180, 16 Asp MLC 579 at 581, HL, per Viscount Cave LC. See also *The Durham City* (1889) 14 PD 85, 6 Asp MLC 411; *Giertsen v Turnbull & Co* 1908 SC 1101 (followed in *Arild (Owner) v SA de Navigation Hovrani* [1923] 2 KB 141 (charterers liable for coal consumed during time off hire)); *The Roberta* (1937) 58 Ll L Rep 231. In *Royal Greek Government v Minister of Transport, The Ilissos* [1949] 1 KB 525, [1949] 1 All ER 171, 82 Ll L Rep 196, CA, it was held that the words 'deficiency of men' in an off-hire clause meant numerical insufficiency, and did not cover a refusal of the crew to sail except in convoy. See also *Radcliffe & Co v Compagnie Générale Transatlantique* (1918) 24 Com Cas 40, CA. As to accidents to cargo see *Denholme Ltd v Shipping Controller* (1921) 90 LjKB 856, 15 Asp MLC 277, CA; *Royal Greek Government v Minister of Transport* (1949) 83 Ll L Rep 228; *Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co Ltd, The 'Jalagouri'* [2000] 1 All ER (Comm) 700, [2000] 1 Lloyd's Rep 515, CA (delay occasioned by non-provision of security for removal of damaged cargo). See further *Court Line Ltd v Finelvet AG, The Jevington Court* [1966] 1 Lloyd's Rep 683 (where the vessel was refloated after grounding but was still able to perform the service required, ie to unload and reload the charterer's cargo; and it was held that hire was still payable); *Canadian Pacific (Bermuda) Ltd v Canadian Transport Co Ltd, The HR Macmillan* [1974] 1 Lloyd's Rep 311, CA (no breakdown of crane by reason of 'disablement'); *Mareva Navigation Co Ltd v Canaria Armadora SA, The Mareva AS* [1977] 1 Lloyd's Rep 368 (vessel capable of discharging from all her holds); *Compania Sud Americana de Vapores v Shipmair BV, The Teno* [1977] 2 Lloyd's Rep 289 (breakdown of vessel's ballast pipe-line system); *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corp, The Apollonius* [1978] 1 Lloyd's Rep 53 (vessel's speed reduced by encrustation of bottom by molluscs; held to be 'or other accident'); *Sidermar SpA v Apollo Corp, The Apollo* [1978] 1 Lloyd's Rep 200 (delay in granting of free pratique); *Actis Co Ltd v Sanko Steamship Co Ltd, The Aquacharm* [1982] 1 All ER 390, [1982] 1 WLR 119, [1982] 1 Lloyd's Rep 7, CA (vessel unable to pass through Panama Canal); *Western Sealanes Corp v Unimarine SA, The Pythia* [1982] 2 Lloyd's Rep 160 (vessel involved in collision); *Belcore Maritime Corp v Moretti Cereali SpA, The Mastro Giorgis* [1983] 2 Lloyd's Rep 66 (vessel arrested and so could not leave port; hire not payable); *Sanko Steamship Co Ltd v Fearnley and Eger A/S, The Manhattan Prince* [1985] 1 Lloyd's Rep 140 (vessel blockaded by International Workers' Federation but still capable of efficient physical working); *Navigas International Ltd v Trans-Offshore Inc, The Bridgestone Maru No 3* [1985] 2 Lloyd's Rep 62 (pump failing to comply with classification society's regulations because it was unfixed; working of vessel prevented); *CA Venezolana de Navegacion v Bank Line, The Roachbank* [1987] 2 Lloyd's Rep 498 (port authorities preventing vessel from entering port on account of her carrying Vietnamese refugees; full working of vessel not prevented; off-hire clauses did not apply); *SIG Bergesen DY A/S v Mobil Shipping and Transportation Co, The Berge Sund* [1992] 1 Lloyd's Rep 460 (where the hire clause was to cease for loss of time caused by the charterer's fault; the word 'fault' was held to mean conscious wrongdoing or negligence); *Century Textiles & Industry Ltd (Tia Century Shipping) v Tomoe Shipping Co (Singapore) Pte Ltd, The Aditya Vaibhav* [1993] 1 Lloyd's Rep 63 (tanks found not to be sufficiently clean); *Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty, The Doric Pride* [2006] EWCA Civ 599, [2006] 2 All ER (Comm) 188, [2006] 2 Lloyd's Rep 175 (vessel detained for inspection under anti-terrorism legislation).

24 Cf *Re Traae and Lennard & Sons Ltd* [1904] 2 KB 377, 9 Asp MLC 553, CA (where a special term provided that detention by ice was to be for the account of the charterer unless caused by a breakdown of the steamer, and it was held that the inability of the ship to reach her port of destination before it was closed by ice, owing to the necessity of repairs through damage on the voyage, was caused by breakdown, and, therefore, the cesser of the hire clause applied).

25 *Fraser and White v Bee* (1900) 17 TLR 101 (where pilotage was payable by the charterers, and it was held to be immaterial that the damage was due to the pilot's negligence). Cf *Beatson v Schank* (1803) 3 East 233. Hire will cease to be due for the whole period during which the ship is inefficient and not merely for the difference between 24 hours and the whole period of inefficiency: *Meade-King, Robinson & Co v Jacobs & Co* [1915] 2 KB 640, 13 Asp MLC 105, CA. It is immaterial that the inefficiency is due to damage suffered before the ship came on hire: *The Essex Envoy* (1929) 18 Asp MLC 54. Under a clause providing for cesser of hire 'until the ship be again in an efficient state to resume her service' the charterer is not entitled to wait until the ship has returned to the point at which she went off hire before resuming the payment of hire: *Thomas Smailes & Son v Evans and Reid Ltd* [1917] 2 KB 54, 14 Asp MLC 59 (where Bailhache J pointed out that the similar decision in *Vogemann v Zanzibar Steamship Co* (1902) 7 Com Cas 254, CA, was distinguishable as in the latter case the cesser of hire clause did not contain the words 'until she be again in an efficient state to resume her service'). See also *Adelaide Steamship Co Ltd v A-G* [1926] AC 172, 16 Asp MLC 579, HL. The charterparty may contain a clause stating that hire is to cease until the vessel again reaches the spot at which the breakdown occurred: *Eastern Mediterranean Maritime (Liechtenstein) Ltd v Unimarine SA, The Marika M* [1981] 2 Lloyd's Rep 622; *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd and Pansuiza Compania de Navegacion SA, Marine Transportation Co Ltd v Pansuiza Compania de Navegacion SA, The Hermosa* [1982] 1 Lloyd's Rep 570, CA. Where the ship had a defective propeller and was, therefore, unseaworthy at the date of the charterparty, and owing to this unseaworthiness became inefficient and remained so for so long as to frustrate the purpose of the charterparty, it was held that the charterers were entitled to cancel the charterparty and to recover the hire they had paid in advance for the period during which the ship was inefficient: *Snia Societa di Navigazione*

*Industria e Commercio v Suzuki & Co* (1924) 29 Com Cas 284, CA. Cf *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1961] 2 All ER 257, [1961] 1 Lloyd's Rep 159; affd [1962] 2 QB 26, [1962] 1 All ER 474, [1961] 2 Lloyd's Rep 478, CA (where a delay through unseaworthiness was not so great as to frustrate the purpose of the charterparty).

26 *Tradax Export SA v Dorada Compania Naviera SA, The Lutetian* [1982] 2 Lloyd's Rep 140 (where the vessel was in dry dock on the due date); *Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty, The Doric Pride* [2006] EWCA Civ 599, [2006] 2 All ER (Comm) 188, [2006] 2 Lloyd's Rep 175 (vessel detained for inspection under anti-terrorism legislation).

27 *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri and The Lorfri* [1978] QB 927, [1978] 3 All ER 1066, [1978] 2 Lloyd's Rep 132, CA; affd on another point [1979] AC 757, [1979] 1 All ER 307, [1979] 1 Lloyd's Rep 201, HL. See also *SL Sethia Liners Ltd v Naviagro Maritime Corpn, The Kostas Melas* [1981] 1 Lloyd's Rep 18 at 25 per Goff J. Cf *Compania Sud Americana de Vapores v Shipmair BV, The Teno* [1977] 2 Lloyd's Rep 289 (where it was held that the charterers could set off a claim for unliquidated damages for cargo shut out due to the breakdown in a ballast pipe-line).

28 *Showa Oil Tanker Co Ltd of Japan v Maravan SA of Caracas, The Larissa* [1983] 2 Lloyd's Rep 325; *Petroleo Brasileiro SA v Elounda Shipping Co, The Evanthis M* [1985] 2 Lloyd's Rep 154 (where the consumption of fuel was less while the vessel was being used for storage); *Didymi Corp v Atlantic Lines and Navigation Co Inc, The Didymi* [1988] 2 Lloyd's Rep 108, CA.

29 *Alexandros Shipping Co of Piraeus v MSC Mediterranean Shipping Co SA of Geneva, The Alexandros P* [1986] 1 Lloyd's Rep 421.

30 *SL Sethia Liners Ltd v Naviagro Corpn, The Kostas Melas* [1981] 1 Lloyd's Rep 18; *Tropwood AG of Zug v Jade Enterprises Ltd, The Tropwind* [1982] 1 Lloyd's Rep 232, CA; *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd, The Ypatia Halcoussi* [1985] 2 Lloyd's Rep 364 (where the charterers had entered into a compromise agreement concerning the deduction of hire).

31 *SL Sethia Liners Ltd v Naviagro Corpn, The Kostas Melas* [1981] 1 Lloyd's Rep 18; *Santiren Shipping Ltd v Unimarine SA, The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep 159.

32 *SL Sethia Liners Ltd v Naviagro Corpn, The Kostas Melas* [1981] 1 Lloyd's Rep 18; *Santiren Shipping Ltd v Unimarine SA, The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep 159.

33 *Leon Corp v Atlantic Lines and Navigation Co Inc, The Leon* [1985] 2 Lloyd's Rep 470.

34 *Leon Corp v Atlantic Lines and Navigation Co Inc, The Leon* [1985] 2 Lloyd's Rep 470.

35 *President of India v La Pintada Compania Naviera SA* [1985] AC 104, [1984] 2 All ER 773, [1984] 2 Lloyd's Rep 9, HL.

36 *President of India v La Pintada Compania Naviera SA* [1985] AC 104, [1984] 2 All ER 773, [1984] 2 Lloyd's Rep 9, HL.

37 *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, [1975] 2 Lloyd's Rep 137, CA; *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA. As to Mareva injunctions see PARA 240.

## UPDATE

### 256 Payment of hire under a time charterparty

NOTE 4--As to the approach of the court when awarding expenses to a shipowner where a ship is lawfully withdrawn following non-payment of hire by the charterers': see *ENE Kos v Petroleo Brasileiro SA (Petrobras)* [2009] EWHC 1843 (Comm), [2010] 1 All ER (Comm) 669.

NOTE 25--See *TS Lines Ltd v Delphis NV; Delphis NV v Ulrike F Kai Freese GmbH & Co KG, The TS Singapore* [2009] EWHC 678 (Comm), [2010] 1 All ER (Comm) 434 (vessel travelling in correct general direction, but not intending to go to the correct location deemed as off-hire).

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*(d) Terms as to the Cargo*

**257. Description of cargo.**

A voyage charterparty<sup>1</sup> usually contains a description of the cargo which is to be shipped<sup>2</sup>. The description may be framed in general terms, as, for example, where the cargo is described as 'wheat', or details may be given thus limiting the application of the general words of description, as, for example, where the cargo is described as 'timber' and it is further stated what the dimensions of the timber are to be. In either case it is a condition of the contract that the charterer is to ship a cargo which is in accordance with the description and is in a reasonable state for loading<sup>3</sup>. If, therefore, the cargo actually provided by the charterer does not, substantially at any rate, correspond with the description, the shipowner may refuse to accept it when tendered, as it is not the cargo which he contracted to carry<sup>4</sup>. If the master accepts it and the current rate of freight for such cargo would give a larger return to the shipowner than he would have received from the cargo specified in the charterparty, the charterer will, it seems, be taken to have impliedly agreed with the shipowner that the cargo should be carried at the current rate of freight for such cargo<sup>5</sup>, unless there are circumstances which rebut this inference<sup>6</sup>, in which case the shipowner will be entitled to recover by way of damages the freight which he would have received for a cargo of the description specified in the charterparty<sup>7</sup>.

1 As to the distinction between voyage and time charterparties see PARAS 208, 209.

2 See *Holman & Sons v Dasnières* (1886) 2 TLR 607, CA.

3 *Holman & Sons v Dasnières* (1886) 2 TLR 607, CA.

4 *Holman & Sons v Dasnières* (1886) 2 TLR 607, CA.

5 *Steven v Bromley & Son* [1919] 2 KB 722, 14 Asp MLC 455, CA.

6 *The Olanda, Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Co Ltd* [1919] 2 KB 728n, HL (where the facts showed that both parties mistakenly treated the cargo as being permitted by the charterparty).

7 *The Olanda, Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Co Ltd* [1919] 2 KB 728n, HL; and see *Capper v Forster* (1837) 3 Bing NC 938. See also PARA 458.

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**258. Option to select cargo.**

A voyage charterparty often gives the charterer an option to ship various kinds of cargo<sup>1</sup>, which may be described as, for example, 'wheat and/or<sup>2</sup> seed and/or grain'<sup>3</sup>. In this case the cargo tendered may be wholly composed of one of the specified kinds, or it may be a mixture of as many kinds as the charterer thinks fit, provided that the goods which make up the cargo correspond with the description in the charterparty<sup>4</sup>. Where the loading of one kind of cargo

becomes impossible, the charterer is not necessarily obliged to load one of the alternative cargoes<sup>5</sup>. The shipowner may not complain of the manner in which the option has been exercised and claim damages on the ground that, if the charterer had exercised the option differently, the freight payable would have been greater<sup>6</sup>. It is, therefore, not unusual to introduce a term limiting the exercise of the option and specifying, in the case of those goods which are less profitable to the shipowner, the maximum amount which may be shipped<sup>7</sup>.

1 As to the charterer's duty to provide a cargo see PARAS 423-432.

2 As to the effect of 'and/or' see *Stanton v Richardson* (1875) 3 Asp MLC 23 at 24, HL, per Lord Cairns LC; *Cuthbert v Cumming* (1855) 10 Exch 809 at 814 per Alderson B (affd 11 Exch 405, Ex Ch). It seems, however, that in this connection 'or' has the same effect as 'and/or': see *Moorsom v Page* (1814) 4 Camp 103.

3 Where the list of specific kinds of cargo is followed by general words such as 'or other produce', the context may show that freight is to be payable on the 'other' cargo at the rate which would yield the shipowner the same remuneration as he would have obtained had the cargo consisted of the specified kinds: see *Warren v Peabody* (1849) 8 CB 800 (following *Cockburn v Alexander* (1848) 6 CB 791); *Southampton Steam Colliery Co v Clarke* (1868) LR 4 Exch 73 at 78 per Kelly CB (affd (1870) LR 6 Exch 53, Ex Ch). The 'other' cargo must be such as is usually shipped from the loading port: see *Warren v Peabody* at 808 per Maule J. See also *Vanderspar & Co v Duncan & Co* (1891) 8 TLR 30, but that case can only be regarded as a decision on 'usage' applied to its own particular facts: *Leolga Compania de Navigacion v John Glynn & Son Ltd* [1953] 2 QB 374 at 381, [1953] 2 All ER 327 at 329, [1953] 2 Lloyd's Rep 47 at 53 per Pilcher J. Charterparties often provide that the quantity of cargo may not exceed what the ship can reasonably stow and carry. The cargo must not only comply with the express term, but it must also, it seems, be in its nature (*Stanton v Richardson* (1875) 3 Asp MLC 23, HL) and condition (*Holman & Sons v Dasnières* (1886) 2 TLR 607, CA) such as the shipowner can reasonably stow. Evidence of trade usage to explain the meaning of 'cargo' is, it seems, admissible: *Lewis v Marshall* (1844) 7 Man & G 729.

4 *Moorsom v Page* (1814) 4 Camp 103; *Southampton Steam Colliery Co v Clarke* (1868) LR 4 Exch 73; *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

5 *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL (where the charterer intended to load one kind of cargo; loading was prevented by an excepted cause, and it was held that there was no obligation to load other cargo); cf *South African Dispatch Line v Panamanian Steamship Niki* [1960] 1 QB 518, [1960] 1 All ER 285, [1959] 2 Lloyd's Rep 663, CA (fixed laytime charterparty; intended cargo unavailable; charterer must load other cargo).

6 *Moorsom v Page* (1814) 4 Camp 103; *Irving v Clegg* (1834) 1 Bing NC 53; *Southampton Steam Colliery Co v Clarke* (1870) LR 6 Exch 53, Ex Ch. As to broken stowage see PARAS 451.

7 See eg the clause in the charterparty in *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1962] 1 QB 42 at 48, [1961] 2 All ER 577 at 582, [1961] 1 Lloyd's Rep 385 at 390, CA.

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## 259. Amount of cargo.

A voyage charterparty usually contains a term relating to the quantity of cargo which is to be shipped<sup>1</sup>, as, in the absence of any such term, the charterer cannot be compelled to ship any particular quantity<sup>2</sup>. The term may specify the weight or measurement of the cargo and must be complied with substantially but not precisely<sup>3</sup>. It is, in practice, often modified by the introduction of qualifying words, for example 'say about' or 'more or less'<sup>4</sup>, or 'more or less at owners' option'<sup>5</sup>. The effect of these words may differ according to the context<sup>6</sup>. More usually the term provides that the charterer is to ship a full and complete cargo<sup>7</sup>, in which case, unless the capacity of the ship has been fraudulently misrepresented<sup>8</sup> or unless it is the subject of a condition<sup>9</sup>, the charterer must provide a cargo which will fill the whole of the cargo space in the ship<sup>10</sup>, but this obligation is subject to the operation of the de minimis rule<sup>11</sup>. The charterer may

not, however, be called upon or claim the right to fill those parts of the ship in which it is not usual to carry cargo<sup>12</sup>, even though it may be possible to do so<sup>13</sup>.

The charterer's duty is fulfilled provided that he presents the cargo prepared in the usual way for shipment<sup>14</sup>. He cannot be required to adopt unusual methods of packing in order to save space and increase the freight<sup>15</sup>, or to ship the cargo packed in any other than the usual packages<sup>16</sup> or, where the space occupied in proportion to weight varies according to the condition of the cargo, to tender it in any other than the normal condition of such cargoes at the season when it is shipped<sup>17</sup>. Where the cargo as shipped is a full and complete cargo, it is immaterial that there is a large space left which might have been filled if a different mode of packing had been adopted, or that more cargo could have been carried if the goods tendered had been more compressed<sup>18</sup>. The term may, however, provide that goods are to be shipped for broken stowage<sup>19</sup>, in which case the charterer is bound to fill any space which may be left after the specified cargo has been shipped<sup>20</sup>; but, if only a portion of the ship's cargo space is chartered, the shipowner is entitled to carry goods for his own profit in the remaining space<sup>21</sup>. He is also entitled to ship goods in place of ballast, provided that he does not encroach on the cargo space proper<sup>22</sup>.

1 Where the charterer has an option as to which of several kinds of cargo he will load, he fulfils his contract if he loads the specified quantity of any of the optional kinds, even though the result of his choice may be that the shipowner has to load more ballast and so earns less freight than he would have done if the charterer had chosen another kind of cargo: *Moorsom v Page* (1814) 4 Camp 103; *Irving v Clegg* (1834) 1 Bing NC 53.

2 *Thompson v Small* (1845) 1 CB 328 at 353 per Tindal CJ; and see *Lady James v East India Co* (1789) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 679.

3 *Harland and Wolff Ltd v J Burstall & Co* (1901) 9 Asp MLC 184 at 185 per Bigham J; applied in *Williams v Manisselian Frères* (1923) 17 Ll L Rep 72 at 73, CA. Cf *Shipton, Anderson & Co v Weil Bros & Co* [1912] 1 KB 574. Probably the quantity loaded must correspond with the quantity contracted for 'within those narrow limits of tolerance which the de minimis rule incorporates in every contract': *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1959] 1 QB 498 at 512, [1959] 1 All ER 502 at 506, [1959] 1 Lloyd's Rep 125 at 129, 130 per Diplock J; revsd on other grounds [1960] 2 QB 49, [1960] 1 All ER 759, [1960] 1 Lloyd's Rep 117, CA. As to the de minimis rule see *Margaritis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 2 QB 430, [1964] 3 All ER 333, [1964] 2 Lloyd's Rep 153, CA.

4 In *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1960] 2 QB 49, [1960] 1 All ER 759, [1960] 2 Lloyd's Rep 117, CA, where the cargo was to be 'not more than 10,450 tons and not less than 8,550 tons, quantity in owner's option, to be declared by the master' and the quantity declared was 'approximative total 10,400 tons', it was held that 'approximative' meant 'about' and allowed a limit of tolerance greater than that allowed by the de minimis rule, and wide enough to cover the actual deficiency of some 3.18%. See also *Jardine, Matheson & Co v Clyde Shipping Co* [1910] 1 KB 627, 11 Asp MLC 384 (where Hamilton J, following *Carlton Steamship Co v Castle Mail Packets Co* (1897) 2 Com Cas 173 (affd on another point [1897] 2 QB 485, 8 Asp MLC 325, CA), held that 'a cargo not less than 6,500 tons but not exceeding 7,000 tons' meant that the shipowner warranted that the ship would take 6,500 tons, but was entitled to demand as much as 7,000 tons of cargo if the proper carrying spaces would hold so much). A statement as to the amount of cargo which can be carried must be read as inclusive of dunnage (*Re Thomson & Co and Brocklebank Ltd* [1918] 1 KB 655, 14 Asp MLC 253), but exclusive of bunker coal (*The Resolven* (1892) 9 TLR 75 (where '2,000 tons or thereabouts' was held to mean within 5% of 2,000 tons)). As to dunnage see PARA 450. The damages claimed for failure to furnish a full cargo are usually known as 'dead freight': see PARA 460. As to the measure of damages see PARA 458 et seq.

5 *Northern Sales Ltd v The Giancarlo Zeta, The Giancarlo Zeta* [1966] 2 Lloyd's Rep 317, Can Ex Ct.

6 In *Miller v Borner & Co* [1900] 1 QB 691, 9 Asp MLC 31, DC, the charterparty was for 'a cargo of say about 2,800 tons'. The charterer loaded 2,840 tons but the ship's carrying capacity was 2,880 tons. The court held that, as the charterparty only required 'a cargo' and not (as in *Morris v Levison* (1876) 3 Asp MLC 171) a 'full and complete cargo', the charterer had fulfilled his contract, as the amount he had loaded was undeniably 'a cargo' and was of the quantity specified. Cf *Caffin v Aldridge* [1895] 2 QB 648, 8 Asp MLC 233, CA (where the words 'full and complete' were struck out and it was held that the charterer was not entitled to the full carrying capacity of the ship but only to enough space for the specified quantity of cargo); *Jardine, Matheson & Co v Clyde Shipping Co* [1910] 1 KB 627, 11 Asp MLC 384 (where, notwithstanding the omission of the words 'full and complete', it was held that the context showed that it was intended that the whole of the ship's proper carrying spaces should be filled). This decision was applied in *Anglo-Celtic Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* (1932) 43 Ll L Rep 295. Cf also *Borrowman v Drayton* (1876) 3 Asp MLC 303, CA (sale of 'a cargo' means the

sale of the entire load of a ship). The charterer may be given an option to load on the basis of the ship's deadweight capacity: *Balkans and Near East Shipping Agency v United Shipping Agencies Ltd* (1935) 53 Ll L Rep 180. The fact that the only workmen available are inefficient or negligent will not excuse the charterer for failing to fill up the ship: *Mikkelsen v Arcos Ltd* (1925) 16 Asp MLC 576. Where a charterparty was entered into for the transhipment of the cargo of another vessel, the quantity of which was overstated in the charterparty, it was held that freight was only payable on the quantity actually shipped: *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22. Evidence of usage will be admissible to explain the meaning of the words: see eg *Alcock v Leeuw & Co* (1883) Cab & El 98 (where, after hearing evidence of usage, the court held that under a charterparty which required the charterer to load empty petroleum barrels, 'as many as required by the master (say, about 5,000)', the master was entitled to demand up to 5,500 barrels).

7 *Cuthbert v Cumming* (1855) 11 Exch 405, Ex Ch (discussed in *Mikkelsen v Arcos Ltd* (1925) 16 Asp MLC 576); *Lawson v Burness* (1862) 1 H & C 396; *Furness v Tennant Sons & Co* (1892) 7 Asp MLC 179, CA. Where a full and complete cargo is not called for by the contract, the master's declaration as to the amount to be loaded does not convert the obligation into one to load that amount: *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 2 QB 430, [1964] 3 All ER 333, [1964] 2 Lloyd's Rep 153, CA.

8 *Hunter v Fry* (1819) 2 B & Ald 421. See also *Thomas v Clark and Todd* (1818) 2 Stark 450.

9 *Barker v Windle* (1856) 6 E & B 675, Ex Ch; cf *Norway (Owners) v Ashburner*, *The Norway* (1865) 3 Moo PCCNS 245. As to whether such statements are to be regarded as conditions see also PARA 242 note 4.

10 *Hunter v Fry* (1819) 2 B & Ald 421; *SS Heathfield Co v Rodenacher* (1896) 2 Com Cas 53, CA; cf *Barker v Windle* (1856) 6 E & B 675, Ex Ch; *Thomas v Clark and Todd* (1818) 2 Stark 450. See further PARA 424 et seq. As to the effect of a fire destroying cargo after shipment see PARA 447.

11 *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 2 QB 430, [1964] 3 All ER 333, [1964] 2 Lloyd's Rep 153 (where a cargo of 12,588 tons 4 cwt was held not commercially equivalent to 12,600 tons and was not in a commercial sense a full and complete cargo as the quantity was outside the limits of the de minimis rule).

12 *Mitcheson v Nicol* (1852) 7 Exch 929 (cabins); *Neill v Ridley* (1854) 9 Exch 677 (deck); *Jardine, Matheson & Co v Clyde Shipping Co* (1910) as reported in 15 Com Cas 193 at 200. Cf *Gould v Oliver* (1840) 2 Man & G 208. Freight is payable to the shipowner, if goods are so carried: *Mitcheson v Nicol*; *Ursula Bright Steamship Co v Ripley* (1903) 8 Com Cas 171, CA. Even where the contract to ship the particular goods has been made between the shipper and the charterer, the freight is payable to the shipowner and not to the charterer: *Neill v Ridley*. If, however, the charterer has been compelled by the shipowner to fill such spaces, and has filled them under protest, the charterer is entitled to recover the freight after payment: *Jardine, Matheson & Co v Clyde Shipping Co*.

13 Thus, he is not entitled to the use of the cabins for passengers: *Shaw, Savill & Co v Aitken, Lilburn & Co* (1883) Cab & El 195; applied in *Sociedad Anonima Comercial de Esportacion e Importacion (Louis Dreyfus & Cia) Lda v National Steamship Co Ltd* [1935] 2 KB 313, 18 Asp MLC 549 (where it was held that the shipowner was entitled to carry passengers notwithstanding that the charterparty gave the charterer the 'full reach and burthen of the steamer'). See also *Japy Frères & Co v RWJ Sutherland & Co* (1921) 15 Asp MLC 198, CA (where it was held that the shipowner was not obliged to remove permanent ballast which was part of the ship's structure, as the charterparty must be taken to relate to the ship as she was at the date of the contract, not at the date she was built). As to deck cargo see PARA 455.

14 *Benson v Schneider* (1817) 7 Taunt 272.

15 *Cuthbert v Cumming* (1855) 11 Exch 405, Ex Ch; cf *Haynes v Holliday* (1831) 7 Bing 587.

16 *Benson v Schneider* (1817) 7 Taunt 272.

17 *SS Isis Co Ltd v Bahr* [1900] AC 340, 9 Asp MLC 109, HL (wet wood pulp frozen).

18 *Cuthbert v Cumming* (1855) 11 Exch 405, Ex Ch; *Furness v Tennant Sons & Co* (1892) 7 Asp MLC 179, CA; *SS Isis Co Ltd v Bahr* [1900] AC 340, 9 Asp MLC 109, HL; *Angfartygs AB Halfdan v Price and Pierce Ltd* [1939] 3 All ER 672, 64 Ll L Rep 290, CA (where the charterer was held to be entitled to ship bundled timber by trade custom, although more could have been shipped if unbundled).

19 As to broken stowage see PARA 451.

20 *Cole v Meek* (1864) 15 CBNS 795.

21 *Caffin v Aldridge* [1895] 2 QB 648, 8 Asp MLC 233, CA.

22 *Towse v Henderson* (1850) 4 Exch 890.

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## 260. Dangerous goods.

In a time charterparty, the charterer is usually authorised to ship any lawful merchandise<sup>1</sup>, but a proviso is often added that this must not include petroleum or other dangerous cargo.

In the absence of any express provision as to the shipment of dangerous goods the position seems to be as follows, whether the charterparty is for a voyage or time. The shipowner may refuse to accept the goods if their shipment has been prohibited by law or if any statutory requirements as to packing or otherwise have not been complied with<sup>2</sup>. Apart from such objections he may, it seems, refuse to accept the goods if they are not tendered in a reasonably safe condition<sup>3</sup>.

If the charterparty describes the cargo in general terms without any proviso as to dangerous goods and the charterer tenders cargo which, to his knowledge, involves unusual danger or requires to be carried with special precautions, he is bound to give notice to the shipowner's employees of any facts he knows which indicate the unusual danger and of any precautions which should be observed in its carriage, at any rate if the shipowner's employees neither know nor ought reasonably to have known of these matters<sup>4</sup>. If he fails to give such notice, the charterer is liable for any damage proximately caused by this omission<sup>5</sup>.

1 'Lawful merchandise' means goods such as can be loaded without breach of the law in force at the port of loading, and also such as can be lawfully carried and discharged at the port to which the charterer has ordered the vessel to proceed: *Leolga Compania de Navigacion v John Glynn & Son Ltd* [1953] 2 QB 374, [1953] 2 All ER 327, [1953] 2 Lloyd's Rep 47.

2 As to the carriage of dangerous goods by sea, and the rules regulating such carriage, see eg the Merchant Shipping (Gas Carriers) Regulations 1994, SI 1994/2464 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 599); the Merchant Shipping (Reporting Requirements for Ships Carrying Dangerous or Polluting Goods) Regulations 1995, SI 1995/2498 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 659); the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997/2367 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657); and the Merchant Shipping (Carriage of Packaged Irradiated Nuclear Fuel etc) (INF Code) Regulations 2000, SI 2000/3216 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 658). See PARA 105 et seq; and as to the loading of dangerous goods see further PARA 436.

3 *Holman & Sons v Dasnières* (1886) 2 TLR 607, CA.

4 *Williams v East India Co* (1802) 3 East 192; *Mitchell, Cotts & Co v Steel Bros & Co Ltd* [1916] 2 KB 610 at 614, 13 Asp MLC 497 at 498. The rule applies not only to goods which are dangerous in the sense that they may cause damage (see eg *Micada Compania Naviera SA v Texim* [1968] 2 Lloyd's Rep 57 (iron ore concentrate with a high moisture content); *Heath Steele Mines Ltd v The Erwin Schroder* [1969] 1 Lloyd's Rep 370, Can Ex Ct (copper concentrate)), but also to goods the shipment of which may involve delay to the ship, eg because their discharge will not be permitted by the port authorities (*Mitchell, Cotts & Co v Steel Bros & Co Ltd*). This is the minimum duty of the charterer: *Mitchell, Cotts & Co v Steel Bros & Co Ltd*. Cf *Sebastian (Owners of Spanish SS) v De Vizcaya* [1920] 1 KB 332, 14 Asp MLC 568 (where the charterparty specified the cargo to be shipped and the shipowner was aware that its shipment involved a risk of delay). See also *Ministry of Food v Lamport and Holt Line Ltd* [1952] 2 Lloyd's Rep 371 (tallow) and *Atlantic Oil Carriers Ltd v British Petroleum Co Ltd, The Atlantic Duchess* [1957] 2 Lloyd's Rep 55 (butanised crude oil), in each of which it was held that no special notice was necessary. In *C Burley Ltd v Stepney Corpn* [1947] 1 All ER 507, it was held that the rule was inapplicable to the carriage of trade and other refuse in a barge. The same rule applies as between shipowner and consignor, whether under bills of lading or otherwise: see *Brass v Maitland* (1856) 6 E & B 470; *Farrant v Barnes* (1862) 11 CBNS 553; *Acatos v Burns* (1878) 3 Ex D 282, CA; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94, CA; *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, [1998] 1 All ER 495, HL. It seems to have been assumed in these cases that there is no material difference as regards

shipment of dangerous goods between the duties of a charterer, a shipper of goods under a bill of lading on a general ship and a consignor who entrusts goods to a common carrier, but, while it has not been necessary in any of the reported cases to decide the question whether any distinction is to be drawn between the duties of these persons, there are some indications in the judgments that their legal duties may be different, as their relations to the shipowner are clearly different: see *Bamfield v Goole and Sheffield Transport Co Ltd* at 101, 113, CA. The better view seems to be that the liability of the charterer or shipper does not depend on his knowledge of the dangerous character of the goods: see *Bamfield v Goole and Sheffield Transport Co Ltd*. This case does not appear to have been cited in *Mitchell, Cotts & Co v Steel Bros & Co Ltd* where Atkin J took the contrary view. For an illustration of the rule that the charterer will only be liable for damage proximately caused by his failure to give notice see *Alston v Herring* (1856) 11 Exch 822.

5 See note 4.

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### **261. Duties of shipowner.**

The shipowner must provide a ship capable of carrying the specified quantity<sup>1</sup> of cargo<sup>2</sup>. Where, however, the cargo supplied is so bulky that the specified quantity cannot be carried if proper methods of stowage are adopted, the owner may not be required to adopt an improper method for the purpose of enabling the whole cargo to be taken on board<sup>3</sup>.

1 As to tolerance see *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1960] 2 QB 49, [1960] 1 All ER 759, [1960] 1 Lloyd's Rep 117, CA (cited in PARA 259 note 4).

2 A guarantee of the ship's carrying capacity in general terms is not to be construed as applying to a particular kind of cargo: *Carnegie v Conner* (1889) 24 QBD 45, 6 Asp MLC 447, DC; and see PARA 242 note 6.

3 *Mackill v Wright Bros & Co* (1888) 14 App Cas 106, HL.

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### *(e) Terms as to Signing Bills of Lading*

### **262. Signing bills of lading.**

A charterparty often provides for the use of a specified form of bill of lading<sup>1</sup>. It is usually provided that the bill of lading is to be signed<sup>2</sup> with the qualification that the quality, condition and weight or quantity of the cargo shipped is unknown<sup>3</sup>. Sometimes the term is that the master is to give a clean bill of lading<sup>4</sup>, or that the master is to sign bills of lading as presented<sup>5</sup>.

The charterparty may provide that the bill of lading is to incorporate the terms and conditions of the charterparty<sup>6</sup>; and provision may be made for the number of sets of bills of lading which the master may be required to sign<sup>7</sup>, and for the signing of the bills of lading within a specified time<sup>8</sup>.

The charterer may be required by an express term<sup>9</sup> to indemnify the shipowner from all consequences or liabilities which may arise from the signing of bills of lading by the master<sup>10</sup>.

1 See eg *Garbis Maritime Corp v Philippine National Oil Co, The Garbis* [1982] 2 Lloyd's Rep 283 (where a clause in the charterparty read: 'The master shall, upon request, sign bills of lading in the form appearing below for all cargo shipped', and it was held that the master was justified in refusing to sign the bills of lading presented to him as they had uncompleted spaces in them); and see also *Sea Success Maritime Inc v African Maritime Carriers Ltd* [2005] EWHC 1542 (Comm), [2005] 2 Lloyd's Rep 692 (where a clause in the charterparty read: 'The vessel to use charterers' bills of lading or bills of lading approved by charterers and/or sub-charterers which to include New Both-To-Blame Collision Clause, New Jason Clause, Clause Paramount General, USA or Canadian, as applicable, P & I Bunkering Clause and Baltimore 1939 War Risks Clauses, during the period of this charter. Master to authorise, time by time, in writing charterers or their appointed agents to sign bills of lading on behalf of master in accordance with mate's receipts. Master has the right and must reject any cargo that are [sic] subject to clausing of the bs/1'). Under a time charterparty the charterer must, in the absence of a specific limitation in the charterparty, have an unfettered right to decide the type of bills of lading appropriate to the trade in which he is engaged, and to instruct the master to issue such bills: *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri and The Lorfri* [1979] AC 757, [1979] 1 All ER 307, [1979] 1 Lloyd's Rep 201, HL. As to bills of lading generally see PARA 313 et seq.

2 As to the persons who may sign bills of lading see PARA 328; and as to the effect of the master's signature, and as to the master's authority to sign, see PARAS 329-332.

3 As to the effect of this qualification see PARA 319.

4 The effect of this term cannot be regarded as settled. In *Restitution Steamship Co v Sir John Pirie & Co* (1889) 6 Asp MLC 428, Cave J seems to have thought that the term meant that the usual statement in the bills of lading that the goods were shipped in good order and condition should not be qualified in any way. The Court of Appeal (7 Asp MLC 11n, CA) thought it unnecessary to give a decision as to the meaning of the term, but the language of Lord Esher MR suggests that in his opinion the term only meant that the bill of lading should not contain any allegation that a sum was due to the shipowner on account of demurrage. This interpretation is not open to the objection (which may be urged against the view of Cave J) that it might require the master to give currency in the bills of lading to an unqualified statement that the goods were shipped in good order and condition which he knew to be false. The Court of Session considered the meaning of the term in *Arrospe v Barr* (1881) 8 R 602, but in that case the term did not occur in a charterparty but in a letter from the master to the charterer written after a dispute had arisen as to demurrage. The court held that in that context the term meant that no reference should be made in the bills of lading to the dispute as to demurrage. The judgments contain conflicting dicta as to the meaning of the term when it occurs in a charterparty. It may be added that as between shipowner and bill of lading holder, and between buyer and seller of goods, the term would probably bear the meaning attributed to it by Cave J. See also *The Skarp* [1935] P 134 at 143, 18 Asp MLC 576 at 579 per Langton J; and *New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd* [1917] 2 KB 664 at 671, 14 Asp MLC 131 at 135, CA, per Pickford LJ.

5 See *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553, [1984] 2 Lloyd's Rep 466; and PARA 359.

6 As to the effect of a clause in a bill of lading incorporating the conditions of the charterparty see PARA 361; and as to the effect of the incorporation in a charterparty of a provision expressly restricted to bills of lading see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL; and PARA 266 note 1.

7 As to sets of bills of lading see PARA 334.

8 Where the clause provided that the master should sign the bills of lading within a specified time 'or pay £10 for every day's delay as and for liquidated damages until the ship is totally lost or the cargo delivered', it was held that the £10 was a penalty and the charterers could only recover nominal damages as they had sustained no actual loss by the captain's refusal to sign in the specified form: *Rayner v Rederiakt Condor* [1895] 2 QB 289, 8 Asp MLC 43, applying *Jones v Hough* (1879) 5 Ex D 115, 4 Asp MLC 248, CA. Cf *The Princess* (1894) 7 Asp MLC 432. See also *A Coker & Co Ltd v Limerick Steamship Co Ltd* (1918) 87 LJB 767, 14 Asp MLC 287, HL (where the charterparty provided that freight should be payable on signing bills of lading in cash before sailing; the ship sank during loading and the bills of lading had been signed for that portion of the intended cargo which had not yet been loaded; it was held that the shipowner was entitled to recover freight proportionate to the quantity of cargo covered by the bills of lading which had been signed).

9 The implication of an obligation to indemnify is not automatic; it depends on the facts of each case and on the terms of the underlying contractual relationship: *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553, [1984] 2 Lloyd's Rep 466 (owner's agent required to sign bills of lading 'as presented'; indemnity implied); *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA (charterers presented inaccurate bills of lading for signature); *Boukadoura Maritime Corp v SA Marocaine de l'Industrie et du Raffinage, The Boukadoura* [1989] 1 Lloyd's Rep 393.

10 If, therefore, the charterparty contains a negligence clause, and the charterer presents bills of lading which do not contain such a clause, the charterer must indemnify the shipowner against any loss occasioned by the omission of the clause: *Milburn & Co v Jamaica Fruit Importing and Trading Co of London* [1900] 2 QB 540, 9 Asp MLC 122, CA. The term does not, however, apply where the loss is occasioned by the original unseaworthiness of the ship: *Park v Duncan & Son* (1898) 25 R 528.

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### **263. Terms as to freight.**

In the absence of an express term, the master may not be required to insert in the bill of lading a rate of freight less than that reserved by the charterparty<sup>1</sup>, and, where the charterer intends to sub-charter the ship or to employ her in the carriage of goods belonging to third persons, it is not unusual to provide that the master is to sign bills of lading at any rate of freight without prejudice to the charterparty<sup>2</sup>. The object of such a term is to facilitate the handling of the cargo by the issue of bills of lading direct to the shippers<sup>3</sup>. Under such a term it becomes necessary in the interests of the shipowner either to provide for the payment in advance of the difference, where the bill of lading freight is less than the chartered freight<sup>4</sup>, or to give him a lien for the chartered freight over all goods carried and over all freights payable to the charterer<sup>5</sup>.

1 *Hyde v Willis* (1812) 3 Camp 202. As to the authority of the master to sign bills of lading generally see PARAS 328 et seq, 357 et seq.

2 As to the effect of such a term see PARA 357; and as to the effect of a term that the master is to be the charterer's agent in signing bills of lading see *Harrison v Huddersfield Steamship Co Ltd* (1903) 19 TLR 386 (cited in PARA 357 note 8).

3 As to the effect of a bill of lading issued direct to the shipper see PARA 353.

4 See as in *Byrne v Schiller* (1871) LR 6 Exch 319, 1 Asp MLC 111, Ex Ch; *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA. Cf *Carr v Wallachian Petroleum Co Ltd* (1867) LR 2 CP 468, Ex Ch (where the charterers, being unable to supply a cargo, guaranteed a specified freight if the ship was employed elsewhere, and were held liable for the deficiency notwithstanding the loss of the ship); *Anderson, Anderson & Co v English and American Shipping Co Ltd* (1895) 1 Com Cas 85.

5 Such a term is not binding on third persons unless incorporated in the bill of lading: *Turner v Haji Goolam Mahomed Azam* [1904] AC 826, 9 Asp MLC 588, PC. Notice of the charterparty is not sufficient (*Chappel v Comfort* (1861) 10 CBNS 802) nor is a reference to the rate of freight fixed by it (*Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689; *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA). See also PARA 361.

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### **(f) Shipowner's Liability as a Common Carrier**

### **264. Liability as a common carrier.**

Before considering the terms usually inserted in charterparties relieving the shipowner from liability for loss of or damage to cargo, it is convenient to state what the shipowner's liability would be under a charterparty, not by way of demise, containing no such term<sup>1</sup>.

If goods are shipped in a general ship<sup>2</sup> without any express contract being made or under a contract to which the Hague-Visby Rules<sup>3</sup> do not apply, and which does not contain any terms relieving the shipowner from liability for loss of or damage to the goods<sup>4</sup>, he impliedly undertakes to carry them at his own absolute risk, the act of God<sup>5</sup> or of the Queen's enemies<sup>6</sup> or the inherent defect of the goods themselves<sup>7</sup> or the shipper's default<sup>8</sup> alone excepted<sup>9</sup>.

He thus incurs the same liability as a common carrier in respect of loss of or damage to the goods<sup>10</sup>. Further, in the absence of a term to the contrary, the shipowner impliedly undertakes that his ship is seaworthy, and that the voyage will be performed without deviation or delay<sup>11</sup>.

A shipowner who offers to carry the goods of all comers in a general ship or who runs a line of ships from port to port habitually carrying all goods brought to him is a common carrier<sup>12</sup>, that is to say, he not only has the appropriate responsibility for loss of or damage to the goods<sup>13</sup>, but is also liable to an action for refusing to carry in the ship or ships any reasonable shipment for which a reasonable freight is offered<sup>14</sup>.

Whether a lighterman who habitually undertakes to carry goods for a single shipper in one of his lighters without specifying the particular lighter is a common carrier is doubtful<sup>15</sup>, but it seems clear that he incurs the same responsibility as a common carrier for loss or damage in the absence of express exceptions<sup>16</sup>.

1 As to the shipper's liability under contracts, other than charterparties, containing terms relieving him from liability for loss of or damage to the cargo see PARA 323. Under a charterparty by demise (see PARAS 210-212) the charterer has possession of the ship and the master and crew are his servants. The shipowner is, therefore, not in possession of the cargo and cannot be liable to the charterer in respect of anything done or omitted after the charterer takes possession of the ship: *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL. Under a charterparty by demise containing a term that the ship is seaworthy the shipowner would doubtless be liable to the charterer for loss or damage due to unseaworthiness existing at the date of the charterparty; whether he would be liable for such loss or damage in the absence of an express condition that the ship was seaworthy does not appear to have been decided.

2 I.e. a ship advertised, usually by her owner, to carry goods for anyone wishing to ship them on the particular voyage on which she is bound. This liability applies to a barge used for a voyage by river (*Rich v Kneeland* (1613) Hob 17, Ex Ch) or coastwise (*Trent and Mersey Navigation v Wood* (1785) 3 Esp 127; cf *Dale v Hall* (1750) 1 Wils 281; *Hill v Scott* [1895] 2 QB 713, 8 Asp MLC 109, CA; *Oakley v Portsmouth and Ryde Steam Packet Co* (1856) 11 Exch 618), but it does not apply to a warehouseman who causes goods to be transported from ships to his warehouse making a sub-contract with a lighterman for the purpose (*Consolidated Tea and Lands Co v Oliver's Wharf* [1910] 2 KB 395). As to forwarding agents see PARA 216.

3 As to the Hague-Visby Rules and their application see PARA 367 et seq.

4 Such terms may be made by notice: *Phillips v Edwards* (1858) 3 H & N 813. Cf *Evans v Soule* (1813) 2 M & S 1 (carriage by inland waterways).

5 *Nugent v Smith* (1876) 3 Asp MLC 198, CA. See also *Amies v Stevens* (1718) 1 Stra 127. Cf *Smith v Shepherd* (1796) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 578n (where it was held that the act of God must be the immediate cause of the loss). As to the meaning of 'act of God' see PARA 268.

6 *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338 at 343, 2 Asp MLC 332 at 338 per Brett J.

7 *The Barcore* [1896] P 294, 8 Asp MLC 189. The shipowner is not protected where the goods would not have been affected but for his own default: *Lindsay & Son v Scholefield* (1897) 24 R 530 (where 'inherent deterioration' was expressly excepted).

8 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231. This includes persons for whom the shipper is responsible: *Royal Mail Steamship Co v MacIntyre Bros & Co* (1911) 16 Com Cas 231.

9 If, however, the loss or damage is due to a general average act, the shipowner is only liable for a contribution. As to general average see PARA 605 et seq.

10 *Nugent v Smith* (1875) 3 Asp MLC 87; revsd on another point (1876) 3 Asp MLC 198, CA. See also *Hill v Scott* [1895] 2 QB 371, 8 Asp MLC 46; affd [1895] 2 QB 713, 8 Asp MLC 46, CA; *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2004] 1 AC 715, [2003] UKHL 12, [2003] 2 All ER 785, [2003] 1 Lloyd's Rep 571. See further PARA 3 et seq.

11 As to the implied undertaking as to seaworthiness see PARA 418 et seq; and as to the implied undertakings as to deviation and delay see PARA 248. Where a ship is chartered and by reason of deviation the shipowner is precluded from relying on the exceptions in the charterparty, 'he must be treated as a common carrier': *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co* [1909] 2 KB 360 at 365, 11 Asp MLC 271 at 272 per Pickford J.

12 *Nugent v Smith* (1875) 3 Asp MLC 87 at 89-91 per Brett J; revsd on another point (1876) 3 Asp MLC 198, CA, where at 200 Cockburn CJ said that, as the ship there in question was one of a line of steamers plying habitually between given ports and carrying the goods of all comers as a general ship, it necessarily followed that the owners were common carriers. As to common carriers see PARA 3 et seq.

13 See note 10.

14 See *Nugent v Smith* (1875) 3 Asp MLC 87; revsd on another point (1876) 3 Asp MLC 198, CA (where the earlier authorities such as *Mors v Sluce* (1672) 1 Mod Rep 85 and *Barclay v Cuculla y Gana* (1784) 3 Doug KB 389 are discussed). Cf *Goff v Clinkard* (1750) 1 Wils 282n; and *Boucher v Lawson* (1735) Lee temp Hard 85.

15 In *Liver Alkali Co v Johnson* (1872) LR 7 Exch 267, 1 Asp MLC 380, the Court of Exchequer was of the opinion that in such a case the lighterman was a common carrier; on appeal (1874) LR 9 Exch 338 at 340, 2 Asp MLC 332 at 366, the majority of the Court of Exchequer Chamber refused to decide whether the defendant was a carrier so as to be liable to an action for not taking goods tendered to him. In *Liver Alkali Co v Johnson* at 343 and at 337 Brett J held that he was not, but see the criticism of Cockburn CJ in *Nugent v Smith* (1876) 3 Asp MLC 198 at 202, 203, CA. See also PARA 4 text and note 9.

16 *Liver Alkali Co v Johnson* (1872) LR 7 Exch 267, 1 Asp MLC 380; affd (1874) LR 9 Exch 338, 2 Asp MLC 332. As to the statutory limitations on the shipowner's liability see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042 et seq.

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### *(g) Exceptions Relieving the Shipowner*

#### **265. Usual exceptions relieving the shipowner.**

It is usual for a charterparty to contain an express term specifying certain perils as excepted from the contract<sup>1</sup>. The effect of this term is to relieve the shipowner from responsibility either for the safety of the goods or for the performance of the contract of carriage<sup>2</sup>, whenever loss or damage is occasioned to cargo or the performance of the contract is prevented<sup>3</sup> by reason of any of the specified perils<sup>4</sup>. The perils which are usually excepted from the contract are act of God, the Queen's enemies, restraints of princes and rulers, perils of the seas, inherent vice, strikes, fire, barratry, pirates, collisions, strandings and accidents of navigation. Leakage and breakage are also often excepted<sup>5</sup>.

A person cannot by reference to any term in the charterparty or to any notice exclude or restrict his liability for death or personal injury resulting from negligence<sup>6</sup>.

1 The implied undertaking of seaworthiness (see PARAS 418, 464 et seq) is not excluded by reason of the exceptions (*Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL, followed in *Gilroy Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL; *Tattersall v National Steamship Co* (1884) 12 QBD 297, 5 Asp MLC 206; *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413; *Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, 8 Asp MLC 65, CA), but it may be expressly modified (*The Laertes (Cargo Ex)* (1887) 12 PD 187, 6 Asp MLC

174). Sometimes the contract excludes liability except for damage due to certain specified causes: *East India Co v Tod* (1788) 1 Bro Parl Cas 405, HL.

2 If he deviates without justification, the shipowner is no longer performing the contract of carriage and the exceptions cease to apply: see PARA 248. For the express terms as to deviation which are usually included in the contract see PARA 250. The burden of proving that an exception applies rests on the shipowner: *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546, 2 Asp MLC 275.

3 Prevention by any other cause not excepted in the contract is insufficient: *The Patria* (1871) LR 3 A & E 436, 1 Asp MLC 71. It is the duty of the shipowner to repair the damage and proceed if possible, notwithstanding the happening of an excepted peril: *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA; and see PARA 480.

4 As to the application of the doctrine of proximate cause see PARA 494; and as to when the excepted perils begin to be operative see PARA 448.

5 It is impossible to deal in detail with all the varieties of exceptions which may be introduced to meet particular cases. Such exceptions as have been judicially considered, apart from those referred to in PARA 268 et seq, are dealt with in connection with the duties of the shipowner which they modify. As to the exceptions relieving the charterer see PARA 297 et seq.

6 See the Unfair Contract Terms Act 1977 Sch 1 para 2; and **CONTRACT** vol 9(1) (Reissue) PARA 828. The bar against the exclusion of liability for negligence applies even if, as is likely, the charterer is not a 'consumer' for the purposes of s 12: see **CONTRACT** vol 9(1) (Reissue) PARA 832. Where loss other than personal injury occurs, a clause excluding liability for negligence cannot be struck down using the 'reasonableness' test in s 11(1), (3) unless, as will rarely be the case, the charterer is a consumer for the purposes of that Act: see **CONTRACT** vol 9(1) (Reissue) PARA 831.

## UPDATE

### 265 Usual exceptions relieving the shipowner

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 266. Construction of exceptions.

Exceptions will be construed against the shipowner who relies on them, and, unless their language clearly covers the cause of loss or damage in question, they will not relieve him from liability<sup>1</sup>. In particular, in the absence of a term clearly negating or reducing his implied undertakings to take reasonable care, to provide a seaworthy ship and not to deviate, it will be assumed that the exceptions are not intended to apply to these undertakings. If it is shown that the excepted peril would not have caused the loss or damage but for the negligence of the shipowner or his employees or a breach of the implied undertaking to provide a seaworthy ship, or if there has been deviation, the shipowner will not be entitled to rely on the exception<sup>2</sup>. Terms are, however, often inserted relieving him from liability for loss or damage due to negligence<sup>3</sup> or unseaworthiness and giving the right to deviate<sup>4</sup>.

1 Where, however, the intention of the parties is clear, the court will give effect to it, however inapt the language in which that intention is expressed: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL (decided under the Hague Rules (see PARA 371

et seq) which were incorporated in a charterparty by reference to the United States Carriage of Goods by Sea Act 1936); and particularly the valuable summary of the principles on which the court proceeds in such cases by Viscount Simonds at 157-159, at 733, 734 and at 83; *Tor Line AB v Alltrans Group of Canada Ltd, The TFL Prosperity* [1984] 1 All ER 103, [1984] 1 WLR 48, [1984] 1 Lloyd's Rep 123, HL (clause in a 'Baltimex' charterparty purporting to exempt shipowners from liability for damage 'whatsoever and howsoever caused' not effective to exempt shipowners from liability for financial damage to charterers).

2 As to the implied undertakings see PARA 264 (undertaking to carry at own risk) PARAS 418, 419 (seaworthiness) and PARA 248 (deviation). Marine insurance policies commonly cover these perils and describe them in the same words: see **INSURANCE** vol 25 (2003 Reissue) PARA 215 et seq. The words have the same meaning whether they occur in a marine policy or a charterparty, but the legal effect of the words is different in the two cases. The negligence of the assured or his agents does not preclude him from recovering for a loss by perils of the sea or any other peril covered by a marine insurance policy, since there is no implied term in the contract of marine insurance that the assured and his servants shall exercise due care: see *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503 at 510, 6 Asp MLC 207 at 209, HL, per Lord Herschell and at 514 and at 211 per Lord Bramwell; *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 524, 6 Asp MLC 212 at 214, HL, per Lord Halsbury and at 526 and at 214 per Lord Watson. Deviation and unseaworthiness do affect an assured's right to recover on a marine policy for a loss by perils insured against: see **INSURANCE** vol 25 (2003 Reissue) PARA 245 et seq (seaworthiness) and PARA 321 et seq (deviation). Doubt has, however, been cast, on the basis of more modern authority, on the proposition that a carrier who has deviated cannot take advantage of exclusion clauses: see PARA 248 note 8.

3 A clause in a charterparty exempting a shipowner from liability for loss or damage arising out of 'errors of navigation' does not provide exemption in respect of negligent navigation: *Seven Seas Transportation Ltd v Pacifico Union Marina Corpn, The Oceanic Amity* [1984] 2 All ER 140, [1984] 1 Lloyd's Rep 588, CA, approving *Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA, The Emmanuel C* [1983] 1 All ER 686, [1983] 1 Lloyd's Rep 310.

4 See PARA 280 (negligence), PARA 422 (unseaworthiness) and PARA 248 (deviation).

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## 267. Burden of proof.

In an action for loss of or damage to cargo the claimant must give evidence showing that prima facie the loss or damage occurred while the goods were in the shipowner's custody as carrier<sup>1</sup>. The burden is then on the shipowner, if he is relying on an exception in the contract of affreightment, to show that the loss or damage was caused by one of the perils so excepted<sup>2</sup>. If he does this, he will escape liability unless the claimant establishes that the loss or damage would not have occurred but for some breach of one of the shipowner's implied undertakings which is not covered by any express term in the contract of affreightment<sup>3</sup>. If part of the damage is shown to be due to a breach of contract by the claimant, the burden of proof is on him to show how much of the damage was caused otherwise than by his breach of contract, failing which he can recover nominal damages only<sup>4</sup>.

1 *The Ida* (1875) 2 Asp MLC 551, PC; *The Glendarroch* [1894] P 226 at 231, 7 Asp MLC 420 at 421, CA, per Lord Esher MR.

2 *Beckford v Clerke* (1665) 1 Keb 830; *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503 at 512, 6 Asp MLC 207 at 210, HL.

3 *The Glendarroch* [1894] P 226, 7 Asp MLC 420, CA. The claimant must prove this affirmatively and not merely by way of conjecture: *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245 at 264. As to the burden of proof see also PARA 319 note 9.

4 *Ceylon Government v Chandris* [1965] 3 All ER 48, [1965] 2 Lloyd's Rep 204.

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## 268. Act of God.

Although the exception of loss or damage by act of God<sup>1</sup> is implied at common law<sup>2</sup>, it is generally inserted in the term relating to excepted perils, probably to prevent any possibility of the inference being drawn, from its omission from a list of excepted perils, that the parties did not intend to include it<sup>3</sup>. It denotes natural accidents, such as lightning, earthquake and tempest<sup>4</sup>. To exempt the shipowner, he must show that the accident was due to natural causes directly and exclusively, and not to human intervention<sup>5</sup>, and that it could not have been prevented by any amount of foresight, pains and care reasonably to be expected from him<sup>6</sup>.

1 As to act of God generally see **CONTRACT** vol 9(1) (Reissue) PARAS 906, 907.

2 *Nugent v Smith* (1876) 1 CPD 423, 3 Asp MLC 198, CA. See also PARA 16; **CONTRACT** vol 9(1) (Reissue) PARAS 906, 907; *Thompson v Brown* (1817) 7 Taunt 656. Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from (inter alia) act of God: see art IV r 2(d); and PARA 389.

3 As to the effect of an express provision in this way see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 182.

4 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 577. A leak caused by rats is not within the exception: *Dale v Hall* (1750) 1 Wils 281.

5 The exception does not apply where, although the loss is occasioned by an act of God, the real cause, without which the act of God would have been inoperative, was negligence: *Siordet v Hall* (1828) 4 Bing 607. In *Liver Alkali Co v Johnson* (1872) LR 7 Exch 267, 1 Asp MLC 380 (affd on different grounds (1874) LR 9 Exch 338, 2 Asp MLC 332, Ex Ch), running on a shoal without negligence owing to a fog was held not to be an act of God but a peril of navigation, presumably because the accident was not due exclusively to the fog but partly to the act of man, ie the steersman of the lighter; and in *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd* [1973] 2 Lloyd's Rep 469 the loss of the cargo could have been guarded against by the vessel's crew and the exercise of reasonable care and precautions.

6 *Nugent v Smith* (1876) 1 CPD 423 at 444, 3 Asp MLC 198 at 206, CA, per James LJ.

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## 269. The Queen's enemies.

The exception of loss or damage by the Queen's enemies is also implied at common law<sup>1</sup>, but is, in practice, always inserted by a term in the contract. It applies only to the acts of public enemies, that is to say hostile acts committed by the forces of a state at war with the United Kingdom<sup>2</sup>, or, if the ship chartered is a foreign ship, with the country to which the ship belongs<sup>3</sup>.

1 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 577. Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from (inter alia) acts of war or acts of public enemies: see art IV r 2(e), (f); and PARA 389. The expression 'the Queen's enemies' is not used in the Hague-Visby Rules.

2 It does not, therefore, apply to confiscation in time of peace: *Spence v Chodwick* (1847) 10 QB 517.

3 *Russell v Niemann* (1864) 17 CBNS 163; cf *Reid v Hoskins*, *Avery v Bowden* (1856) 6 E & B 953 at 962, Ex Ch (where a special term in a charterparty between two British subjects providing for what was to be done 'in case of war having commenced' was held not to apply to the commencement of war between two foreign states). In all probability it does not apply to the acts of pirates: *Russell v Niemann* (1864) 17 CBNS 163 at 175 per Byles J; cf *Forward v Pittard* (1785) 1 Term Rep 27 at 34 per Lord Mansfield CJ. See also *Becker, Gray & Co v London Assurance Corp* [1918] AC 101, 14 Asp MLC 156, HL (where a German captain, who had put into an Italian port to avoid capture, refused to deliver the cargo except on terms to which he was not entitled, and it was held not to be a loss by 'enemies' under a marine policy).

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## 270. Restraints of princes and rulers.

The exception of loss or damage by restraints of princes and rulers<sup>1</sup> includes every case in which the voyage is interrupted by the agents of a government<sup>2</sup> other than those carrying out the decisions of a judicial tribunal<sup>3</sup>. It applies, therefore, to seizure of the ship or cargo or of both by the government either of the United Kingdom or of a foreign country for state purposes<sup>4</sup>. It is not, however, necessary to prove an actual seizure<sup>5</sup>. Mere apprehension of interference by a government is not enough; there must be a restraint in existence, that is, a prohibition or other act of a government showing an intention to employ force against the ship or cargo or those in charge of them if the voyage is continued<sup>6</sup>.

The shipowner will be protected by the exception if the performance of the contract is rendered impossible by an embargo<sup>7</sup>, or by a prohibition against landing or forwarding<sup>8</sup> the cargo<sup>9</sup>, or otherwise by any intervention of the forces of the government concerned, such as, in the case of war breaking out between two friendly states, a blockade at the port of discharge, whereby it becomes useless to send the ship to the port of loading<sup>10</sup>, or a siege, by which it is rendered impossible to carry the cargo to its destination<sup>11</sup>.

The exception does not apply where performance becomes impossible by means of the act or decision of any court or judicial tribunal<sup>12</sup>; nor does it apply, even where the word 'people' is included, to the plundering of the cargo by a mob, as 'people' is to be construed in connection with the other words of the exception and means the supreme power of the country<sup>13</sup>.

A shipowner is not protected by the exception if the operation of the restraint is brought about by a breach of his implied undertakings to exercise due care and to provide a seaworthy ship, or occurs after a deviation<sup>14</sup>.

For a charterer to be protected by a restraint of princes clause, the language of the clause must be clearly worded to that effect<sup>15</sup>.

1 Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from (inter alia) arrest or restraint of princes, rulers or people, or seizure under legal process: see art IV r 2(g); and PARA 389.

2 *Russell v Niemann* (1864) 17 CBNS 163 at 175 per Byles J; and see *Bruce v Nicolopulo* (1855) 11 Exch 129; *Silver Coast Shipping Co Ltd v Union Nationale des Co-operatives Agricoles des Cereales, The Silver Sky* [1981] 2 Lloyd's Rep 95 (where a vessel was seized by political activists at a port in Angola). For a case in which the exception covered political disturbances or impediments as well as restraint of princes see *Smith and Service v Rosario Nitrate Co* [1894] 1 QB 174, 7 Asp MLC 417, CA; but see *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, [1938] 3 All ER 135, 19 Asp MLC 216 (cited in PARA 237 note 13); *Spanish Government v North of England Steamship Co Ltd* (1938) 61 Ll L Rep 44. To bring the case within the exception it must be shown that the restraint prevented the fulfilling of the contract, not merely that it made fulfilment more difficult or costly:

*Bolckow, Vaughan & Co Ltd v Compania Minera de Sierra Menera* (1916) 13 Asp MLC 533, CA; cf *Associated Portland Cement Manufacturers (1900) Ltd v William Cory & Son Ltd* (1915) 31 TLR 442; *Cazalet v Morris & Co* 1916 SC 952 (where it was doubted whether a shortage of railway trucks due to the fact that the government had taken control of the railway for military purposes was a restraint of princes). Requisition by the Admiralty *intra vires* is clearly a restraint of princes: *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 13 Asp MLC 467, HL; and see especially at 427 and at 477 per Lord Parker of Waddington. Cf *Modern Transport Co Ltd v Duneric Steamship Co* [1917] 1 KB 370 at 377, 13 Asp MLC 490 at 492, CA; *Russian Bank for Foreign Trade v Excess Insurance Co* [1918] 2 KB 123, 14 Asp MLC 316 (a marine insurance case), where Bailhache J held: (1) that the closing of the Dardanelles by the Turkish government during the 1914-18 war was a restraint of princes; and (2) that the requisition by the British Admiralty, being in his view *ultra vires*, was not such a restraint. The Court of Appeal ([1919] 1 KB 39, 14 Asp MLC 362) found it unnecessary to decide either point, but Scrutton LJ was inclined to think that an *ultra vires* requisition might well be a restraint of princes. A prohibition by a foreign government will be a restraint of princes, even if the ship is outside the jurisdiction of the government if the shipowner or his captain is a subject of the government in question and thus exposed to penalties if he disregards the prohibition: *Furness, Withy & Co v Rederiaktiebolaget Banco* [1917] 2 KB 873, 14 Asp MLC 137. 'Government' in this context should be construed in the sense in which an ordinary commercial person would use it; the fact that an authority is not recognised as a government by the United Kingdom government is not conclusive, and does not exclude other evidence: *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 552, [1956] 2 All ER 769, [1956] 2 Lloyd's Rep 97. Where the voyage is delayed or terminated by restraint of princes or other excepted peril without default of either party, neither has any claim against the other for any consequential loss: *The Lisa* (1924) 40 TLR 252, PC.

3 As to this exception see note 12.

4 *Crew, Widgery & Co v Great Western Steamship Co* [1887] WN 161.

5 See the cases cited in notes 6-14. Thus a declaration of war which brings the voyage within the common law rule against trading with the enemy is a restraint of princes. The shipowner is nonetheless restrained because he obeys the rule and abandons the voyage without waiting to be compelled to do so by the executive: *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, 13 Asp MLC 289, HL, applied in *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184, 14 Asp MLC 48 (marine insurance; as outbreak of war rendered voyage illegal, there was held to be a loss of freight by restraint of princes). Cf *Miller v Law Accident Insurance Co* [1903] 1 KB 712, 9 Asp MLC 386, CA.

6 *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, 13 Asp MLC 580, HL; cf *Brunner v Webster and Barraclough* (1900) 5 Com Cas 167 (where the shipowner acted on inaccurate information that import of the cargo would be prohibited). Where, however, the restraint is in existence, the shipowner is excused by the exception if he abandons the voyage because he reasonably fears that to continue it would bring the restraint into operation against him: *Anderson, Anderson & Co v San Roman (Owners), The San Roman* (1873) LR 5 PC 301, 1 Asp MLC 603; *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326, 8 Asp MLC 181. Cf *Becker, Gray & Co v London Assurance Corp* [1918] AC 101, 14 Asp MLC 156, HL (where the master's abandonment of the voyage for fear of capture was held not to be a restraint of princes within the meaning of a marine insurance policy, but that decision was based on the stringent application of the *causa proxima* rule in marine insurance). See also especially Lord Sumner's observations in *Becker, Gray & Co v London Assurance Corp* at 114 and at 159, 160, from which it appears that, in his view, a shipowner in corresponding circumstances would have been protected by an exception of restraint of princes in a contract of affreightment. For a further discussion of this point see *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, [1953] 2 All ER 1086, [1953] 2 Lloyd's Rep 294, CA (a marine insurance case).

7 *Rotch v Edie* (1795) 6 Term Rep 413; *Antco Shipping Ltd v Seabridge Shipping Ltd, The Furness Bridge* [1979] 3 All ER 186, [1979] 1 WLR 1103, [1977] 2 Lloyd's Rep 267, CA. Where provision was made in the charterparty for its cancellation if the Greek government commandeered the ship, a notice to the shipowner by the Greek government that all Greek vessels were required to proceed at once to Piraeus was a 'commandeering' within the meaning of the charterparty, which was, therefore, dissolved, even though the ship was never in fact used by the government and was set free after some days: *Capel v Souliidi* [1916] 1 KB 439; affd [1916] 2 KB 365, 13 Asp MLC 361, CA.

8 *East Asiatic Co Ltd v Tronto Steamship Co Ltd* (1915) 31 TLR 543.

9 *Aubert v Gray* (1862) 3 B & S 169 (marine insurance case, where there was a temporary embargo by the assured's own government; and the court reserved the question whether a seizure under the existing law of the assured's own country would be a restraint of princes). In *Miller v Law Accident Insurance Co* [1903] 1 KB 712, 9 Asp MLC 386, CA, it was decided that action under the existing law by a government which was not that of the assured was a restraint of princes. Where, however, both the law itself and the facts which render it applicable were in existence before the commencement of the voyage, the application of the law is not within the meaning of the exception restraint of princes: see *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774 (where the voyage was said, in a later case, to have been, to the knowledge of the shipowners, foredoomed to failure from the start: see *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA*

[1960] 2 QB 115 at 125, [1960] 2 All ER 55 at 58, [1960] 1 Lloyd's Rep 132, CA). There must be an element of compulsion in the action of the authorities. If they act, not in the execution of law or regulation, but spontaneously and for the benefit of all concerned, eg to avert a danger of fire, this is not a restraint of princes: *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 18 Asp MLC 19 at 22, CA, per Greer LJ (marine insurance case).

10 *Geipel v Smith* (1872) LR 7 QB 404, 1 Asp MLC 268; cf *Embiricos v Sydney Reid & Co* [1914] 3 KB 45, 12 Asp MLC 513 (cited in PARA 237 note 1). As soon as it has become clear that the restraint is likely to operate for so long as to frustrate the adventure, the charterer and the shipowner are both discharged from further performance, even if the contract had been partly performed before the restraint came into existence: cf *Becker, Gray & Co v London Assurance Corp* [1918] AC 101, 14 Asp MLC 156, HL. As to the application to charterparties of the Courts (Emergency Powers) Act 1917 s 3 (repealed), which relieved a contractor from liability for breach of contract due to the action of government departments, see *Gans Steamship Line v Celtic Shipping Co Ltd* (1918) 34 TLR 282. A contract to run a blockade is not, however, unlawful: *The Helen* (1865) LR 1 A & E 1, explaining *Medeiros v Hill* (1832) 8 Bing 231.

11 *Rodoconachi v Elliott* (1874) LR 9 CP 518, 2 Asp MLC 399, Ex Ch.

12 *Finlay v Liverpool and Great Western Steamship Co* (1870) 23 LT 251; *Crew, Widgery & Co v Great Western Steamship Co* [1887] WN 161. Where a ship or cargo is seized and afterwards condemned by a prize court, the decree of the prize court merely gives permanent effect to the seizure, and since that is (it is submitted) a restraint of princes, the subsequent decree of condemnation should be regarded as a completion of the previous restraint: *Stringer v English and Scottish Marine Insurance Co* (1870) LR 5 QB 599, Ex Ch (where there was a claim on a marine insurance policy, whereby the plaintiff was insured against 'takings at sea, arrests, restraints and detentions of all kings and people'; and the court held that the condemnation by the prize court came within one of these perils but did not specify which). It seems clear that such a seizure would now be regarded as a restraint of princes within the meaning of that exception in a contract of affreightment: see eg *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326, 8 Asp MLC 181. As to prize courts see **PRIZE** vol 36(2) (Reissue) PARA 847 et seq.

13 *Nesbitt v Lushington* (1792) 4 Term Rep 783.

14 *Dunn v Bucknall Bros* [1902] 2 KB 614, 9 Asp MLC 336, CA. This rule applies to all exceptions: see PARA 266. If the contract contains no exception of restraint of princes, the shipowner is liable even if there is no ground for the seizure: *Gosling v Higgins* (1808) 1 Camp 451; cf *The Newport* (1858) Sw 335. As to deviation see further PARA 248 et seq.

15 *Ellis Shipping Corp v Voest Alpine Intertrading, The Lefthero* [1992] 2 Lloyd's Rep 109, CA.

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## 271. Perils of the seas.

The exception of loss or damage by perils of the seas<sup>1</sup> covers losses of a marine character incident to a ship as such, that is, as a means of carriage by sea<sup>2</sup>. It is not confined to the violent action of the winds or waves<sup>3</sup> or to damage due to contact with sea water or occurring while the ship is afloat<sup>4</sup>. It does not, however, include accidents on rivers or canals<sup>5</sup>, or accidents which, although they occur at sea, are in no way due to the fact that the ship is at sea and might equally well be encountered on land<sup>6</sup>. As the phrase is 'perils of ' not 'perils on' the sea, it does not include every misfortune which may befall the ship or cargo on the sea or every loss or damage of which the sea is the immediate cause: thus, it does not include the natural and inevitable action of the winds and waves which results in wear and tear; there must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure<sup>7</sup>.

1 Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from (inter alia) perils, dangers and accidents of the sea or other navigable waters: see art IV r 2(c); and PARA 389.

2 *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484 at 492-493, 6 Asp MLC 200 at 203, HL, per Lord Bramwell (where he was concerned to define the phrase 'perils of the seas' as extended by the additional words 'all other perils, losses or misfortunes which might come to the hurt etc' of the ship; these additional words do not usually occur in contracts of affreightment, but it appears from the context that Lord Bramwell regarded this definition as applicable to the phrase 'perils of the seas' standing alone). In *Compania de Navegacion, Interior, SA v Fireman's Fund Insurance Co, The Wash Gray* (1928) 31 Ll L Rep 166 at 169 (a marine insurance case), the United States Supreme Court held that the phrase 'perils of the seas' must be interpreted with regard to the character of the ship in question where this was known to both parties to the contract, and that weather which might not amount to a 'peril of the seas' in the case of a large ocean-going steamship might fall within that expression in the case of a small tug. As to accidents of navigation see PARA 277.

3 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 527, 6 Asp MLC 212 at 215, HL, per Lord Bramwell; and see *The Stranna* [1937] P 130, [1937] 2 All ER 383, 19 Asp MLC 115; affd [1938] P 69, [1938] 1 All ER 458, 60 Ll L Rep 51, CA.

4 *Fletcher v Inglis* (1819) 2 B & Ald 315 (marine insurance; striking ground in graving dock); *Phillips v Barber* (1821) 5 B & Ald 161 (marine insurance; ship blown over in graving dock with two or three feet of water in it, to which she had been taken for repairs after discharging her cargo; not a loss by perils of the seas (but within the general words 'all other losses etc')), *Fletcher v Inglis* being distinguished on the ground that in that case the ship was in the ordinary course of her voyage when the damage happened. Cf *Thompson v Whitmore* (1810) 3 Taunt 227. In the following cases the damage was held to be a loss by perils of the seas: *Gabay v Lloyd* (1825) 3 B & C 793 (where cattle were injured by the rolling of the ship); *The Catharine Chalmers* (1874) 2 Asp MLC 598 (where casks leaked due to straining in bad weather); *The Thrunscoe* [1897] P 301, 8 Asp MLC 313, DC (where the cargo became overheated through the closing of ventilators); *The Stranna* [1938] P 69, [1938] 1 All ER 458, 60 Ll L Rep 51, CA (where part of the cargo was lost due to the ship listing during loading); *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55, [1940] 4 All ER 169, 67 Ll L Rep 549, PC (where the cargo was damaged through lack of ventilation); cf *Freedom (Owners) v Simmonds Hunt & Co Ltd, The Freedom* (1871) LR 3 PC 594, 1 Asp MLC 28 (where the cargo heated but the defendants failed to prove that the heating was due to the necessity of closing hatches, and they were held liable as they had failed to bring the damage within the exception of perils of the seas or inherent vice).

5 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 227. An exception of rivers is often added: see *Pyman v Burt* (1884) Cab & El 207.

6 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 524, 6 Asp MLC 212 at 213, HL, per Lord Halsbury LC. See also *Laveroni v Drury* (1852) 8 Exch 166; *Kay v Wheeler* (1867) LR 2 CP 302, Ex Ch (damage by rats); *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484, 6 Asp MLC 200, HL (marine insurance; damage to ship's machinery by omission to keep valve open), disapproving *West India Telegraph Co v Home and Colonial Insurance Co* (1880) 6 QBD 51, 4 Asp MLC 341, CA; *The Patria* (1871) LR 3 A & E 436, 1 Asp MLC 71 (outbreak of war); *Stott (Baltic) Steamers Ltd v Marten* [1916] 1 AC 304, 13 Asp MLC 200, HL (marine insurance; damage to ship by cargo falling during loading); cf *De Rothschild v Royal Mail Steam Packet Co* (1852) 7 Exch 734 ('dangers of the roads' held to include only dangers immediately caused by roads, as the overturning of the carriage, and not to cover loss by thieves in passing along roads). Lightning is not a peril of the sea, but an act of God: *Hamilton, Fraser & Co v Pandorf & Co* at 527 and at 215 per Lord Bramwell. Fire is not a peril of the sea (*Hamilton, Fraser & Co v Pandorf & Co* at 527 and at 215 per Lord Bramwell), nor does the term 'sea accident' include a fire at sea (*Oricon Waren-Handels GmbH v Intergraan NV* [1967] 2 Lloyd's Rep 82). As to acts of God see PARA 268.

7 *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503 at 509, 6 Asp MLC 207 at 209, HL, per Lord Herschell; *Charles Goodfellow Lumber Sales Ltd v Verreault, Hovington and Verreault Navigation Inc* [1971] 1 Lloyd's Rep 185, Can SC; *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgenson Shipping Ltd* [1973] 2 Lloyd's Rep 469. If, however, it is not one of the necessary incidents of the adventure, it may be a peril of the sea although not of an unforeseen character: see *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 528, 6 Asp MLC 212 at 215, HL.

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## 272. Effect of human act or omission.

Where loss or damage is caused by a peril of the sea, but the peril of the sea would not have caused the loss or damage but for some human act or omission, the legal consequences are as follows. If the act or omission constitutes a breach of the shipowner's implied undertakings to carry with due care and to provide a seaworthy ship, or if there has been a deviation, the shipowner is not entitled to rely on the exception<sup>1</sup> unless the contract of affreightment expressly provides that he may do so<sup>2</sup>. Where the act or omission is that of his employees or agents but does not constitute a breach of those implied undertakings, or is that of a third person and is not intended to cause the loss or damage in question, even though it may be negligent, the shipowner is entitled to rely on the exception.

For example, where the carrying ship founders as the result of a collision due to the negligence of another ship not belonging to the carrying shipowner<sup>3</sup>, he will be protected by the exception of perils of the seas<sup>4</sup>. Where the act or omission is wilful, the shipowner cannot rely on the exception if the act or omission is either his own or that of his employees or agents<sup>5</sup>. Where the wilful act or omission is that of any other person and is designed to bring about the loss or damage in question, it seems that the loss or damage must be regarded as caused by the wilful act or omission and not by a peril of the seas, even if the immediate antecedent of the loss or damage in point of time would be a peril of the seas if it had occurred fortuitously, as, for example, where the ship is scuttled or, perhaps, wilfully run aground<sup>6</sup>. Consequently, the shipowner cannot rely upon the exception in such a case<sup>7</sup>.

1 See PARA 266; *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284; *Leuw v Dudgeon* (1867) LR 3 CP 17n; *The Oquendo* (1877) 3 Asp MLC 558 (negligence); *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413; *McFadden & Co v Blue Star Line* [1905] 1 KB 697, 10 Asp MLC 55 (unseaworthiness). If the carrying shipowner or his agents contribute to the loss or damage to any extent by a breach of the implied undertakings, the carrying shipowner is responsible for the whole of the loss or damage although the wrongdoing of third persons may also have contributed to it: see *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1882) 9 QBD 118 at 124, 4 Asp MLC 523 at 525; varied without affecting this point (1883) 10 QBD 521, 5 Asp MLC 65, CA.

Doubt has, however, been cast, on the basis of more modern authority, on the proposition that a carrier who has deviated cannot take advantage of exclusion clauses: see PARA 248 note 8.

2 For a case in which the contract so provided see *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1882) 9 QBD 118, 4 Asp MLC 523; on appeal (1883) 10 QBD 521, 5 Asp MLC 65, CA; and see PARA 280.

3 *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL. This applies particularly if neither ship is to blame: see *Buller v Fisher* (1799) 3 Esp 67. Cf *Hagedorn v Whitmore* (1816) 1 Stark 157 (marine insurance; the carrying ship was taken in tow by one of His Majesty's ships and owing to the speed of the towing ship the ship in tow had to carry a press of sail and so shipped water and the cargo was damaged; it was held to be a loss by perils of the seas).

4 If those responsible for the negligent navigation of the other ship are the employees of the carrying shipowner, he will be liable in tort for any damage done to the cargo of the carrying ship: *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521, 5 Asp MLC 65, CA.

5 *The Chasca* (1875) LR 4 A & E 446, 2 Asp MLC 600. In the case of a wilful act or omission of his employee the shipowner may be protected by the exception of barratry: see PARA 275.

6 This appears to be the result of the decision in *P Samuel & Co Ltd v Dumas* [1924] AC 431, 16 Asp MLC 305, HL (Lord Sumner dissenting). Cf *Redman v Wilson* (1845) 14 M & W 476 (where a voluntary stranding to avoid sinking was held to be a loss by perils of the seas under a marine policy (but this is not so if the stranding is in the ordinary course of navigation: see PARA 277)). *P Samuel & Co Ltd v Dumas* was a marine insurance case, but 'perils of the seas' has the same meaning in a contract of marine insurance and a contract of affreightment: see *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL; and PARA 266 note 2. In *Pickering v Barkley* (1648) Sty 132 it was held that 'perils of the seas' covered pirates (see also *Barton v Wolliford* (1686) Comb 56), and in *Bondrett v Hentigg* (1816) Holt NP 149 that it covered wreckers. Confiscation by order of a court is not a loss by perils of the seas (*Spence v Chodwick*

(1847) 10 QB 517), nor is attachment of cargo under a bottomry bond given to raise funds to repair damage to the ship (*Benson v Duncan* (1849) 3 Exch 644, Ex Ch).

7 It follows from what is stated in the text that Lord Bramwell's definition 'a sea damage, occurring at sea and nobody's fault' (*Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 526, 6 Asp MLC 212 at 214, HL; and see *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503 at 526, 6 Asp MLC 207 at 210, HL), quoted from the judgment of Lopes LJ in *Pandorf & Co v Hamilton, Fraser & Co* (1885) 16 QBD 629 at 635, cannot be regarded as satisfactory. That definition was, however, said (see *Hamilton, Fraser & Co v Pandorf & Co* at 530 and at 216 per Lord Macnaghten) to be accurate as a summary of the particular circumstances in that case, ie where a rat had gnawed a hole in a pipe through which sea water had entered and damaged the cargo, and this was held to be a loss by perils of the seas. The decision in *Hamilton, Fraser & Co v Pandorf & Co* was applied in *Ingram and Royle Ltd v Services Maritimes du Tréport* [1913] 1 KB 538 at 543, 12 Asp MLC 295 at 296 per Scrutton J (revsd on another point [1914] 1 KB 541, 12 Asp MLC 387, CA), to the sinking of a ship owing to an explosion and fire caused by the wetting of cases of sodium saturated by petrol in rough weather. Scrutton J held that the loss was either by perils of the seas or by fire without deciding between the two, but he seems to have been clearly of opinion that the loss was within the meaning of the exception of perils of the seas.

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### **273. Inherent vice; inadequate packing.**

The shipowner is not liable for loss of or damage to the goods caused by inherent vice<sup>1</sup>. Thus, where loss or damage arises from decay or deterioration of the cargo, as when fruit becomes rotten or flour heats, and not from external causes, but from internal decomposition, he will not be liable<sup>2</sup>. Nor will he be liable for spontaneous combustion generated by a chemical change in the cargo, arising from its being loaded in a wet or damaged condition, or for damage caused by inadequate packing<sup>3</sup>.

1 The expression 'inherent vice' may be applied to anything which by reason of its own inherent qualities is lost without any negligence by anyone: *Greenshields, Cowie & Co v Stephens & Sons Ltd* [1908] AC 431 at 435, HL, per Lord Halsbury. Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from (inter alia) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods or insufficiency of packing: see art IV r 2(m), (n); and PARA 389.

2 See eg *Shaw, Savill and Albion Co Ltd v R Powley & Co Ltd* [1949] NZLR 668 (brandy); *Easwest Produce Co v SS Nordnes* [1956] Ex CR 328 (onions); *Wm Fergus Harris & Son Ltd v China Mutual Steam Navigation Co Ltd* [1959] 2 Lloyd's Rep 500 (Mayor's Court) (wet rot in timber due to inherent defect); *Albacora SRL v Westcott and Laurance Line Ltd* [1966] 2 Lloyd's Rep 53, HL (wet salted fish); *Jahn (Trading as CF Otto Weber) v Turnbull Scott Shipping Co Ltd, The Flowergate* [1967] 1 Lloyd's Rep 1 (cocoa); *Chris Foodstuffs (1963) Ltd v Nigerian National Shipping Line Ltd* [1967] 1 Lloyd's Rep 293, CA (coco yams); *Westcoast Food Brokers Ltd v The Ship Hoyanger, The Hoyanger* [1979] 2 Lloyd's Rep 79, Can Fed Ct (apples).

3 *GE Crippen and Associates Ltd v Vancouver Tug Boat Co Ltd* [1971] 2 Lloyd's Rep 207, Can Fed Ct (peat moss); *Nissan Automobile Co (Canada) Ltd v Owners of the Vessel Continental Shipper, The Continental Shipper* [1976] 2 Lloyd's Rep 234, Fed CA (uncrated cars); *The Lucky Wave* [1985] 1 Lloyd's Rep 80 (damage to the cargo of galvanised steel held not to be due to insufficiency of packing). However, in *David McNair & Co Ltd and David Oppenheimer Ltd and Associates v The Santa Malta* [1967] 2 Lloyd's Rep 391, Can Ex Ct, where a cargo of melons, garlic and onions was stowed in the same hold as a cargo of fishmeal and became tainted, it was held that the loss was due to bad stowage and ventilation, and not inherent vice. In *GE Crippen and Associates Ltd v Vancouver Tug Boat Co Ltd* the damage to a cargo of peat moss was held not to be due to the inherent defect of uneven compression, for this defect would not by itself have caused the damage if the cargo had not been stowed four pallets high and if dunnage had not been used. In *William D Branson and Tomas Alcazar SA v Jadranska Slobodna Plovidba (Adriatic Tramp Shipping), The Split* [1973] 2 Lloyd's Rep 535, Can Fed Ct, the loss of a cargo of melons packed in crates 17 feet high without air circulating in the hold was held to be due not to inherent defect but to improper stowage. In *Nissan Automobile Co (Canada) Ltd v Owners of the Vessel Continental Shipper, The Continental Shipper* the damage to uncrated cars was found to be due to their being

stowed too closely together and not to inherent vice; and in *Crelinsten Fruit Co and William D Branson Ltd v Maritime Fruit Carriers Co Ltd, The Lemoncore* [1975] 2 Lloyd's Rep 249, Can Fed Ct, the loss of a cargo of apples and pears carried in a refrigerated vessel was held not to be due to inherent vice but to bad stowage since it was a block stow without dunnage.

If the carrier succeeds in showing that the damage complained of was caused by the inherent quality or vice of the cargo itself, he will not fail because he is unable to name the particular quality or vice; the negation of other causes may establish inherent vice: see *FO Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1927) 137 LT 266, HL (where the carriers escaped liability for a bad out-turn of Tasmanian apples by proving internal breakdown). In *White & Son (Hull) Ltd v Hobsons Bay (Owners)* (1933) 47 Ll L Rep 207 at 210-211, DC, however, the carriers failed to discharge the onus of establishing inherent vice and were held liable in damages in respect of a cargo of apples found to be overripe on discharge.

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## 274. Fire.

The owner, part owner, charterer, manager or operator of a United Kingdom ship<sup>1</sup> is not liable for any loss or damage where any property on board the ship is lost or damaged by reason of fire<sup>2</sup> on board the ship<sup>3</sup>; but the liability of any such person for any loss or damage resulting from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result, is not so excluded<sup>4</sup>.

If, however, by the terms of his contract with the charterer he is responsible for the safety of the goods, either before they are put on board or after they leave the ship, and they are destroyed or damaged by fire while on the way to or from the ship, the statutory protection no longer applies<sup>5</sup>. Further, the shipowner is not protected by an exception against perils of the seas, as fire is not a peril of the seas<sup>6</sup>. If, therefore, he is to be fully protected, an express exception against fire is necessary<sup>7</sup>.

1 As to the meaning of 'United Kingdom ship' see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 230.

2 Damage by smoke and by water used to extinguish a fire is damage by reason of fire: *The Diamond* [1906] P 282, 10 Asp MLC 286.

3 See the Merchant Shipping Act 1995 s 186(1)(a), (5); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059. Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from (inter alia) fire, unless caused by the actual fault or privity of the carrier: see art IV r 2(b); and PARA 389. The provisions of the Hague-Visby Rules do not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of liability of owners of sea-going vessels (see art VIII; and PARA 399), the Merchant Shipping Act 1995 s 186 being declared for this purpose to be a provision relating to limitation of liability (see the Carriage of Goods by Sea Act 1971 s 6(4); and PARA 399).

4 See the Merchant Shipping Act 1995 s 186(3); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059.

5 *Morewood v Pollok* (1853) 1 E & B 743.

6 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 527, 6 Asp MLC 212 at 215, HL, per Lord Bramwell. The exception of perils of the seas might apply to an outbreak of fire in some exceptional cases, eg if the cargo heated to the point of actual ignition owing to the necessity of keeping ventilators shut in rough weather: see *The Thrunscoc* [1897] P 301, 8 Asp MLC 313, DC.

7 This exception does not protect the shipowner against liability to contribute towards a general average loss of cargo (*Schmidt v Royal Mail Steamship Co* (1876) 45 LJQB 646, 4 Asp MLC 217n, followed in *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216), or against a loss by fire to which the negligence of himself or his agents has contributed (*Re Polemis and Furness Withy & Co Ltd* [1921] 3 KB 560, 15 Asp MLC 398, CA). In view of *Re Polemis and Furness Withy & Co Ltd*, the dictum of Bramwell B in *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284 at 293 as to the exception of fire must be taken to be erroneous. *Re Polemis and Furness Withy & Co*

*Ltd* was disapproved by *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388, [1961] 1 All ER 404, [1961] 1 Lloyd's Rep 1, PC, on the question of the test of liability for negligence, but without affecting the question of the effect of negligence on an exception against fire.

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### 275. Barratry of the master and crew.

The exception of loss or damage by barratry includes every wrongful act wilfully committed by the master or crew<sup>1</sup> to the prejudice of the shipowner<sup>2</sup>. There is no barratry where the act is committed with the sanction or privity of the shipowner<sup>3</sup>. To be guilty of barratry the master must have deliberately violated his duty to his employer and acted against his better judgment<sup>4</sup>; an act of mere negligence<sup>5</sup> or mistake<sup>6</sup> does not amount to barratry. The master's motive is, however, immaterial, and it may equally be barratry whether he intends to benefit himself and deceive the shipowner<sup>7</sup>, or whether he seeks to advance the shipowner's interest<sup>8</sup>. A master is guilty of barratry where he deviates from his course for the purpose of smuggling goods for his own benefit<sup>9</sup> but a mere deviation, not on the face of it fraudulent or criminal, is not barratry<sup>10</sup>. He is also guilty where he employs the ship in trading with an enemy alien, even if he intends to hand over the profits to the shipowner<sup>11</sup>.

1 It has been held in the United States (Court of Appeals) that a mutinous seizure of the ship by her crew, in defiance of the master, is barratry: *Republic of China, China Merchants Steam Navigation Co Ltd and United States of America v National Union Fire Insurance Co of Pittsburgh, Pennsylvania, The Hai Hsuan* [1958] 1 Lloyd's Rep 351. There are some old English decisions to the same effect: see *Elton v Brogden* (1747) 2 Stra 1264; *Toulmin v Anderson* (1808) 1 Taunt 227; *Toulmin v Inglis* (1808) 1 Camp 421; *Hucks v Thornton* (1815) Holt NP 30; and see *Pipon v Cope* (1808) 1 Camp 434 (smuggling by crew); and **INSURANCE** vol 25 (2003 Reissue) PARA 342.

2 *Vallejo v Wheeler* (1774) 1 Cowp 143 at 154 per Lord Mansfield; *Nutt v Bourdieu* (1786) 1 Term Rep 323; *Earle v Rowcroft* (1806) 8 East 126; *Heyman v Parish* (1809) 2 Camp 149. Cf *The Chasca* (1875) LR 4 A & E 446, 2 Asp MLC 600; *Australasian Insurance Co v Jackson* (1875) 3 Asp MLC 26, PC; *Shell International Petroleum Co Ltd v Gibbs, The Salem* [1983] 2 AC 375, [1983] 1 All ER 745, [1983] 1 Lloyd's Rep 342, HL; the Marine Insurance Act 1906 s 30(2), Sch 1 r 11; and **INSURANCE** vol 25 (2003 Reissue) PARA 342.

3 *Nutt v Bourdieu* (1786) 1 Term Rep 323. This is clearly so when the officers and crew remain the employees of the shipowner under the charterparty. If the effect of the charterparty is to make them the employees of the charterer (eg under a 'bareboat' charter), it may be that it is the charterer's consent, and not the owner's, which is material in determining whether the loss is by barratry under a policy of marine insurance (see *Vallejo v Wheeler* (1774) 1 Cowp 143; *Soares v Thornton* (1817) 7 Taunt 627), but it seems that in either of these cases the charterer would not now be regarded as owner for this purpose: see **INSURANCE** vol 25 (2003 Reissue) PARA 343. There appears to be no authority on the question whether this principle applies to an exception of barratry in a contract of affreightment.

4 *Todd v Ritchie* (1816) 1 Stark 240. See also *Knight v Cambridge* (1724) 8 Mod Rep 230; *Robertson v Ewer* (1786) 1 Term Rep 127; *Mentz Decker & Co v Maritime Insurance Co* (1910) as reported in 11 Asp MLC 339 at 340, 341 per Hamilton J.

5 *Briscoe & Co v Powell & Co* (1905) 22 TLR 128 at 130 per Channell J; cf *Atkinson and Hewitt v Great Western Insurance Co* (1872) 27 LT 103. This is equally the case where such negligence is by statute to be deemed wilful default: *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600.

6 Cf **INSURANCE** vol 25 (2003 Reissue) PARA 342.

7 *Mentz Decker & Co v Maritime Insurance Co* (1910) as reported in 11 Asp MLC 339. See also *Ross v Hunter* (1790) 4 Term Rep 33; *Roscow v Corson* (1819) 8 Taunt 684.

- 8 *Earle v Rowcroft* (1806) 8 East 126.
- 9 *Vallejo v Wheeler* (1774) 1 Cowp 143; *Havelock v Hancill* (1789) 3 Term Rep 277.
- 10 *Stamma v Brown* (1742) 2 Stra 1173; *Phyn v Royal Exchange Assurance Co* (1798) 7 Term Rep 505.
- 11 *Earle v Rowcroft* (1806) 8 East 126.

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## 276. Pirates, robbers and thieves.

The word 'pirates'<sup>1</sup> must be interpreted in its popular sense and not as a technical term of English criminal law or international law<sup>2</sup>. It applies to persons who are plundering indiscriminately for private gain and are not operating only against the property of a particular state for a political end<sup>3</sup>. Wrongful seizure of the ship or cargo by such persons on the high seas will be within the exception<sup>4</sup>.

Where the exception includes the word 'robbers', the shipowner is only protected where violence has been used; he remains liable to the charterer where the loss is due to pilfering<sup>5</sup>.

Sometimes the exception is extended to include the word 'thieves'. Here, too, the shipowner may not be protected unless violence has been used<sup>6</sup>; nor is he protected, even where violence is used, unless he can show that the theft was committed by a stranger to the ship<sup>7</sup>. The shipowner is responsible for all persons belonging to the ship, whether as members of the crew or as passengers<sup>8</sup>, and for all persons employed by him on board the ship<sup>9</sup>. Even where the exception is so framed as to include thieves of whatever kind, whether on board or not, he remains responsible for all persons employed by him and is only excused when the thief, although lawfully on board, has no connection with the ship<sup>10</sup>.

1 It has been held that the acts of pirates are covered by the exception of perils of the seas (see PARA 272 note 6), but this is doubtful. Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from (inter alia) acts of public enemies (see art IV r 2(c); and PARA 389) which would presumably include acts of pirates.

2 See *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785, 11 Asp MLC 218, CA (a marine insurance case). Cf **INSURANCE** vol 25 (2003 Reissue) PARA 340.

3 *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 791, 11 Asp MLC 117 at 121 per Pickford J; approved on appeal [1909] 1 KB at 796-797, 11 Asp MLC 218 at 221, CA, per Vaughan Williams LJ. Cf *The Magellan Pirates* (1853) 1 Ecc & Ad 81 (where insurgents who seized a ship were held to be pirates because they seized the ships of foreign nations indiscriminately and the seizure was in no way connected with the insurrection). While seizure by the officers and crew or the passengers would be piracy by English criminal law (*R v Dawson* (1696) 13 State Tr 451, approved in *A-G for the Colony of Hong Kong v Kwok-a-Sing* (1873) LR 5 PC 179 at 199, 200; *Palmer v Naylor* (1854) 10 Exch 382), it is not clear that such persons would be pirates within the meaning of the exception (*Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 802, 11 Asp MLC 218 at 224, CA, per Kennedy LJ). Seizure by the officers and crew would be covered by the exception of barratry: see PARA 275.

4 In *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 799, 11 Asp MLC 218 at 223, CA, Vaughan Williams LJ expressed the view that seizure on a river within the territory of a state would not be piracy within the meaning of a policy of insurance; but in *Nesbitt v Lushington* (1792) 4 Term Rep 783 at 787, Lord Kenyon CJ held that a mob who invaded a ship from the shore in Ireland were pirates within the meaning of the policy.

5 *De Rothschild v Royal Mail Steam Packet Co* (1852) 7 Exch 734; *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546, 2 Asp MLC 275. As to the shipowner's duty to provide a strongroom for bullion see *Queensland National Bank v Peninsular and Oriental Steam Navigation Co* [1898] 1 QB 567, 8 Asp MLC 338, CA.

6 See **INSURANCE** vol 25 (2003 Reissue) PARA 340; *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546, 2 Asp MLC 275; *Steinman & Co v Angier Line* [1891] 1 QB 619 at 621, 7 Asp MLC 46 at 47, CA, per Bowen LJ.

7 *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546, 2 Asp MLC 275, followed in *Steinman & Co v Angier Line* [1891] 1 QB 619, 7 Asp MLC 46, CA.

8 *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546, 2 Asp MLC 275; cf *The Prinz Heinrich* (1897) 14 TLR 48.

9 *Steinman & Co v Angier Line* [1891] 1 QB 619, 7 Asp MLC 46, CA.

10 *Steinman & Co v Angier Line* [1891] 1 QB 619, 7 Asp MLC 46, CA (where the theft was committed by the stevedore's men, and it was held to be immaterial that the charterer appointed the stevedore who was paid by and employed by the shipowner); cf *Royal Mail Steamship Co v Macintyre Bros & Co* (1911) 16 Com Cas 231 (where the charterparty provided that the stevedore should be employed and paid by the charterer). Where the shipowner relies on this exception, he does not discharge the burden of proof which rests upon him if he only shows that there were opportunities for theft and that theft might be one way of accounting for non-delivery: *Andrew Mantoura & Sons v David* (1926) 32 Com Cas 1, PC.

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## 277. Collisions, strandings and accidents of navigation.

Where there is a collision<sup>1</sup>, the exception of 'loss or damage by collision, strandings and accidents of navigation'<sup>2</sup> does not protect the shipowner where the collision is attributable either wholly or in part to the negligence or default of his own master or crew<sup>3</sup>.

A ship is not 'stranded' within the meaning of the exception where she takes the ground in the ordinary course of navigation<sup>4</sup>, unless owing to the state of the ground there is some hidden danger the existence of which could not reasonably have been anticipated<sup>5</sup>. To bring the case within the exception, the stranding must be accidental<sup>6</sup>, as, for example, where the ship runs into a tidal harbour for shelter and takes the ground by reason of the tide being low<sup>7</sup>, but even here the shipowner will not be protected by the exception if the stranding is due to the negligence of the master<sup>8</sup>.

This exception is intended to add something to the protection given by the exception of perils of the seas, but the extent of the additional protection given has not been defined<sup>9</sup>. An act is nonetheless an 'accident' because it is attributable to the negligence or default of a stranger<sup>10</sup>. Where, however, the negligence or default is on the part of the master or crew, or the accident is due to unseaworthiness, the shipowner cannot rely on the exception<sup>11</sup>.

As the exception is limited to accidents of navigation, it applies only while the ship is being navigated in the course of her voyage, and ceases to be operative as soon as she is finally moored in dock with the intention that she is to remain there until her cargo is discharged<sup>12</sup>. It does not apply to accidents which take place before the voyage begins, such as accidents arising out of the stowage of the cargo<sup>13</sup>.

1 As to collisions generally see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 715 et seq.

2 This exception, although usually inserted, seems to be unnecessary where the contract contains an exception of perils of the seas, as the perils excepted are equally within that exception: *Martin v Crockatt* (1811) 14 East 465; *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL, overruling *Woodley v Mitchell* (1883) 11 QBD 47, 5 Asp MLC 71, CA; cf *Garston Sailing Ship Co Ltd v Hickie, Borman & Co* (1886) 18 QBD 17, 6 Asp MLC 71, CA; and see PARA 271.

3 *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521 at 531, 543, 5 Asp MLC 65 at 67, 70, CA (where the fact that the owner of the ship at fault was also the owner of the ship on which the goods covered by the exception were carried was held to be immaterial); *Grill v General Iron Screw Collier Co* (1868) LR 3 CP 476, Ex Ch. See also PARA 272. Exclusion of liability for errors of navigation does not cover negligent errors, liability for which the parties could exclude: *Seven Seas Transportation Ltd v Pacifico Union Marina Corpn, The Oceanic Amity* [1984] 2 All ER 140, [1984] 1 Lloyd's Rep 588, CA; *Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA, The Emmanuel C* [1983] 1 All ER 686, [1983] 1 Lloyd's Rep 310.

4 *Thompson v Whitmore* (1810) 3 Taunt 227; *Magnus v Buttemer* (1852) 11 CB 876 (marine insurance cases); cf *Redman v Wilson* (1845) 14 M & W 476 (cited in PARA 272 note 6).

5 *Letchford v Oldham* (1880) 5 QBD 538, CA.

6 As to the meaning of 'accidental' see the text and notes 8-11.

7 *Corcoran v Gurney* (1853) 1 E & B 456.

8 See PARA 266. As to the burden of proof of negligence see PARA 267.

9 See *Garston Sailing Ship Co Ltd v Hickie, Borman & Co* (1886) 18 QBD 17, 6 Asp MLC 71, CA; cf note 2.

10 See note 8.

11 In some of the earlier cases, eg *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284 at 293 per Lord Bramwell, it is said that the word 'accident' in the exception does not include damage to the cargo from the negligence of the master and crew. This way of expressing the position leads to the same legal result as that employed in the text, but the statement in the text seems to accord more closely with the language used by the House of Lords in *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL. As to the effect of unseaworthiness see *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413. This exception may be extended in its scope by a negligence clause: see PARAS 266, 280.

12 *The Accomac* (1890) 15 PD 208, 6 Asp MLC 579, CA, discussing *Laurie v Douglas* (1846) 15 M & W 746.

13 *Freedom (Owners) v Simmonds, Hunt & Co, The Freedom* (1871) LR 3 PC 594, 1 Asp MLC 28; *The Oquendo* (1877) 3 Asp MLC 558; cf *Hayn v Culliford* (1879) 4 CPD 182, 4 Asp MLC 128, CA; but see *The Southgate* [1893] P 329.

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## 278. Latent defects.

The exception of 'loss or damage by latent defects in or accidents to hull and/or machinery and/or boilers'<sup>1</sup> does not exclude the implied undertaking of seaworthiness<sup>2</sup>, as, for that purpose, special words must be inserted<sup>3</sup>. Nor does the exception apply where the shipowner is guilty of negligence<sup>4</sup>.

1 See *Mercantile Steamship Co v Tyser* (1881) 7 QBD 73 at 75, 5 Asp MLC 6n per Lord Coleridge CJ (marine insurance).

2 *Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, 8 Asp MLC 65, CA; *Tudor Accumulator Co Ltd v Oceanic Steam Navigation Co Ltd* (1924) 20 Ll L Rep 106.

3 *The Laertes (Cargo Ex)* (1887) 12 PD 187, 6 Asp MLC 174.

4 See PARA 277 note 11.

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### **279. Leakage and breakage.**

The exception of 'loss or damage by leakage or breakage' covers loss or damage arising from leakage or breakage of the goods which are the subject matter of the contract<sup>1</sup>, but not loss or damage caused to those goods by the leakage or breakage of other goods carried on board unless expressly so stated<sup>2</sup>. It does not protect the shipowner where there is negligence on the part of the shipowner or his employees which contributes to the leakage or breakage<sup>3</sup>. Where there is negligence, therefore, it is immaterial whether the loss or damage is attributable to the leakage or breakage of the goods themselves<sup>4</sup>, or of other parts of the cargo<sup>5</sup>.

1 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231.

2 *Thrft v Youle & Co* (1877) 2 CPD 432, 3 Asp MLC 357, DC; *Barrow v Williams & Co* (1890) 7 TLR 37 (rust).

3 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; cf *The Modena, Chiesman & Co v Modena (Owners)* (1911) 16 Com Cas 292; and see the cases there cited. Once leakage or breakage is proved to be the cause of the damage, the burden of proof of negligence is on the charterer: *Czech v General Steam Navigation Co* (1867) LR 3 CP 14; *Moes, Molière and Tromp v Leith and Amsterdam Shipping Co* (1867) 5 M 988, followed in *Horsley v Baxter Bros & Co* (1893) 20 R 333 (where the exception in question was 'sweat'); *Craig and Rose v Delargy* (1879) 6 R 1269; cf *Lindsay & Son v Scholefield* (1897) 24 R 530 (where the exception was 'inherent deterioration', and the shipowner was held liable because there was evidence that the goods were shipped in good condition; the shipowner failed to show that the damage was due to inherent deterioration rather than to his failure to load and discharge the goods in accordance with the charterparty).

4 *Phillips v Clark* (1857) 2 CBNS 156; *The Pearlmoor* [1904] P 286, 9 Asp MLC 540 (heating).

5 *The Nepoter* (1869) LR 2 A & E 375; cf *Czech v General Steam Navigation Co* (1867) LR 3 CP 14 (where goods were damaged by oil and the evidence was that the oil might have dripped from the ship's machinery; the defendants were held liable, notwithstanding an exception of leakage, breakage and damage, as they had failed to displace the inference that the damage was due to negligence).

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### **280. Negligence.**

As the exceptions in a charterparty<sup>1</sup> do not protect the shipowner where the peril which causes the loss is attributable to the negligence of his employees, it is usual for the charterparty to contain a negligence clause extending the scope of the exceptions to such negligence<sup>2</sup>.

A person cannot by reference to any term in any charterparty of a ship or hovercraft or to any notice exclude or restrict his liability for death or personal injury resulting from negligence<sup>3</sup>. In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence vis-a-vis a consumer<sup>4</sup> except in so far as the contract term satisfies the requirement of reasonableness<sup>5</sup>. Subject to this, a negligence clause in a charterparty is valid and

enforceable<sup>6</sup>, provided that it is clear and unambiguous in its terms<sup>7</sup>. It must expressly refer to negligence, since it is always strictly construed against the shipowner<sup>8</sup>. A clause will not, therefore, be held to protect him against the consequences of negligence merely because it is framed in terms so wide as to be capable of including negligence<sup>9</sup>.

A negligence clause does not exclude the implied undertaking that the ship is to be seaworthy<sup>10</sup>; nor does it protect the shipowner against the consequences of his personal negligence or default<sup>11</sup>. Moreover, it applies only to such acts of negligence as fall strictly within its scope<sup>12</sup>. Thus an exception as to 'negligence in navigation'<sup>13</sup> does not cover negligence in stowage<sup>14</sup> or, it seems, negligence after the voyage is ended, even if the cargo is not yet discharged<sup>15</sup>. The exception is often extended to 'negligence in the navigation'<sup>16</sup> or management of the ship<sup>17</sup>, and may be so framed as to cover the whole time that the ship is employed in the performance of the contract<sup>18</sup>, and to apply to all acts of negligence of whatever description<sup>19</sup>, including negligent stowage<sup>20</sup>. The exception does not, however, protect the shipowner where the negligence which causes the loss is attributable partly to his employees and partly to persons not within the exception<sup>21</sup>.

Negligence clauses vary considerably in their scope and language<sup>22</sup>, and are constantly being extended in consequence of judicial decisions<sup>23</sup>. Negligence is sometimes treated as a substantive peril and inserted in the list of exceptions<sup>24</sup>. More usually, a negligence clause is added to the list by way of qualification. Thus it may be provided that the specified perils are to be excepted even when occasioned by the negligence, default or error in judgment of the pilot<sup>25</sup>, master, mariners or other persons employed by the shipowner or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the shipowner or by the ship's manager<sup>26</sup>.

1 See PARAS 268-279.

2 In *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, 16 Asp MLC 351, HL, a third person participating in the performance of a contract of carriage, although not a party to it, was held entitled to the same protection from the exception clauses in the bills of lading as the original contracting party. There has, however, been a great diversity of opinion as to the true ratio decidendi of this case; it has been often distinguished and is probably best regarded as a decision on special facts: see *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, [1954] 2 Lloyd's Rep 267, CA (carriage of passengers); *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, sub nom *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep 365, HL; *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep 346, Aust HC; *Krawill Machinery Corp v Robert C Herd & Co Inc* [1959] 1 Lloyd's Rep 305, US Sup Ct.

3 See the Unfair Contract Terms Act 1977 ss 1(2), 2(1), Sch 1 para 2(b), (c); and **CONTRACT** vol 9(1) (Reissue) PARA 828. As to hovercraft generally see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 381 et seq.

4 See the Unfair Contract Terms Act 1977 s 12; and **CONTRACT** vol 9(1) (Reissue) PARA 832.

5 See the Unfair Contract Terms Act 1977 s 2(2), Sch 1 paras 2, 3; and **CONTRACT** vol 9(1) (Reissue) PARAS 822, 828. As to the requirement of reasonableness see further s 11(1), (3); and **CONTRACT** vol 9(1) (Reissue) PARA 831.

6 *The Cressington* [1891] P 152, 7 Asp MLC 27, DC; *Blackburn v Liverpool, Brazil and River Plate Steam Navigation Co* [1902] 1 KB 290, 9 Asp MLC 263; *Briscoe & Co v Powell & Co* (1905) 22 TLR 128; *Marriott v Yeoward Bros* [1909] 2 KB 987, 11 Asp MLC 306. See also *Alexander v Malcolmson* (1868) IR 2 CL 621; cf *Raynes v Ballantyne* (1898) 14 TLR 399, HL. As to negligence clauses in bills of lading which are subject to the Hague-Visby Rules see PARAS 395, 397.

The United States Act of Congress known as the Harter Act (Public Statutes No 105 of 1893), the provisions of which are similar to those of the Carriage of Goods by Sea Act 1971, has been considered in the following cases: *GE Dobell & Co v SS Rossmore Co Ltd* [1895] 2 QB 408, 8 Asp MLC 33, CA; *The Glenochil* [1896] P 10, 8 Asp MLC 218; *The Rodney* [1900] P 112, 9 Asp MLC 39, DC; *Rowson v Atlantic Transport Co* [1903] 2 KB 666, 9 Asp MLC 458, CA; *Elder, Dempster & Co v Dunn & Co* (1909) 11 Asp MLC 337, HL; *Anthony Hordern & Sons Ltd v Commonwealth and Dominion Line Ltd* [1917] 2 KB 420, 14 Asp MLC 51; *The Erik Boye* (1929) 18 Asp MLC 66, applying *McFadden v Blue Star Line* [1905] 1 KB 697, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55. The Harter Act was superseded as regards bills of lading for the carriage of goods by sea to or from ports of the United States of America in foreign trade by the Carriage of Goods by Sea Act 1936 (Public Statutes

No 521, 74 USC, Sess II), except in so far as it related to the liabilities of the carrier before loading and after discharge. The 1936 Act is designed to give the force of law to the Hague Rules, and certain of its provisions were considered in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL. It has been held, for the purposes of that Act, that a port in the Panama Canal Zone is a 'port in the United States of America': *Stafford Allen & Sons Ltd v Pacific Steam Navigation Co* [1956] 2 All ER 716, [1956] 1 WLR 629, [1956] 1 Lloyd's Rep 495, CA. As to the London lighterage clause see *Shawinigan Ltd v Vokins & Co Ltd* [1961] 3 All ER 396, [1961] 1 WLR 1206, [1961] 2 Lloyd's Rep 153.

7 *Mendl & Co v Ropner & Co* [1913] 1 KB 27, 12 Asp MLC 268. See *The Marionga Mari* (1922) 153 LT Jo 450 (where the bill of lading contained printed clauses which were ambiguous, but a special clause relating to onions had been stamped on the bill of lading, and was held to be clear in its terms and to protect the shipowner).

8 *Price & Co v Union Lighterage Co* [1904] 1 KB 412, CA; *The Pearlmoor* [1904] P 286, 9 Asp MLC 540; *Leuw v Dudgeon* (1867) LR 3 CP 17n. Thus, an exception of 'perils of the seas and accidents of navigation, provided the ship is seaworthy when she sails on the voyage' does not protect the shipowner from liability for the negligence of his employees: *Burnard and Algers Ltd v Player & Co* (1928) 31 Ll L Rep 281. Cf PARA 79; **CONTRACT** vol 9(1) (Reissue) PARA 674; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 178; **NEGLIGENCE** vol 78 (2010) PARA 74.

9 Thus, an exception of 'loss or damage capable of being covered by insurance' is not sufficient (*Moore v Harris* (1876) 1 App Cas 318, 3 Asp MLC 173, PC; *Price & Co v Union Lighterage Co* [1904] 1 KB 412, CA), unless negligence is referred to expressly (*Rosin and Turpentine Import Co v B Jacob & Sons* (1910) 11 Asp MLC 363, HL), or by necessary implication, eg by such a phrase as 'damage however caused which can be covered by insurance' (*Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, 12 Asp MLC 561, CA). An exception of 'any loss or damage ... arising from any cause whatsoever' has been held to include damage caused by the negligence of an employee of the defendants: see *AE Farr Ltd v The Admiralty* [1953] 2 All ER 512, [1953] 1 WLR 965, [1953] 2 Lloyd's Rep 173, applied in *Akerib v Booth Ltd* [1960] 1 All ER 481, [1960] 1 WLR 454 (revsd on another ground [1961] 1 All ER 380, [1961] 1 WLR 367, CA).

10 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL, followed in *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL; *Seville Sulphur and Copper Co v Colvils, Lowden & Co* (1888) 15 R 616 (the decision that the ship was in fact unseaworthy was not followed by the First Division in the subsequent case of *Cunningham v Colvils, Lowden & Co* (1888) 16 R 295). As to the implied undertaking of seaworthiness see PARAS 418, 464 et seq.

11 *City of Lincoln (Master and Owners) v Smith* [1904] AC 250, 9 Asp MLC 586, PC; cf *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521 at 539, 5 Asp MLC 65 at 69, CA, per Brett LJ. Where the owner is also master, an exception as to 'negligence of the master' covers his acts as master, but not his acts as owner: *Westport Coal Co v McPhail* [1898] 2 QB 130, 8 Asp MLC 378, CA.

12 *The Cressington* [1891] P 152, 7 Asp MLC 27, DC; *Rowson v Atlantic Transport Co* [1903] 2 KB 666, 9 Asp MLC 458, CA. The exception covers such acts of negligence, however reckless: *The Torbryan* [1903] P 194, 9 Asp MLC 450, CA; *Briscoe & Co v Powell & Co* (1905) 22 TLR 128.

13 Allowing water to run too low in the boiler is within an exception of 'error or negligence in navigation': see *Cunningham v Colvils, Lowden & Co* (1888) 16 R 295, not following the decision of fact in *Seville Sulphur and Copper Co v Colvils, Lowden & Co* (1888) 15 R 616; and see PARA 242 note 14.

14 *Hayn v Culliford* (1879) 4 Asp MLC 128, CA; *The Ferro* [1893] P 38, 7 Asp MLC 309; cf *Canada Shipping Co v British Shipowners' Mutual Protection Association* (1889) 23 QBD 342, 6 Asp MLC 422, CA. However, the exception apparently covers acts affecting or relating to the navigation of the ship, even though committed before the voyage begins: *The Southgate* [1893] P 329 (where the exception was of 'accidents of the sea ... and all other accidents of navigation even when occasioned by the negligence ...' of the shipowners' employees); cf *Good v London Steam-Ship Owners' Mutual Protecting Association* (1871) LR 6 CP 563; *The Warkworth* (1884) 9 PD 145, 5 Asp MLC 326, CA; *Carmichael v Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887) 19 QBD 242, 6 Asp MLC 184, CA, explained in *Canada Shipping Co v British Shipowners' Mutual Protection Association*; and see *The Carron Park* (1890) 15 PD 203, 6 Asp MLC 543.

15 *The Accomac* (1890) 15 PD 208, 6 Asp MLC 579, CA. In that case, however, the exception was of 'negligence in the navigation of the ship in the ordinary course of the voyage', and it is not clear that the decision would have been the same if the words in italics had not been included in the exception. See the comments on the decision in *The Glenochil* [1896] P 10, 8 Asp MLC 218.

16 See eg *President of India v West Coast Steamship Co, The Portland Trader* [1964] 2 Lloyd's Rep 443, US Ct App (where the vessel grounded on a reef due to the master's faulty navigation); *Aliakmon Maritime Corp v*

*Trans Ocean Continental Shipping Ltd and Frank Truman Export Ltd, The Aliakmon Progress* [1978] 2 Lloyd's Rep 499, CA (where the cargo was damaged when the vessel negligently struck a quay).

17 'Management' has no precise legal meaning and its application depends on the facts as appreciated by persons experienced in dealing with steamers: see *Re Suzuki & Co Ltd and T Benyon & Co Ltd* (1926) 17 Asp MLC 1 at 6, HL, per Viscount Sumner. It goes somewhat beyond, although perhaps not much beyond, 'navigation': *The Glenochil* [1896] P 10, 8 Asp MLC 218 per Jeune P, approved in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223, 32 Ll L Rep 91, HL, per Lord Hailsham and Lord Atkin. Thus, it covers failure to sound a water ballast tank before filling it up, and the fact that the negligence occurs during discharge of the cargo will not take it out of the exception, at any rate if the words 'during the ordinary course of the voyage' (or similar words) are not added (*The Glenochil*). See also *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1959] 1 QB 74, [1958] 3 All ER 261, [1958] 2 Lloyd's Rep 255 (affd [1960] 1 QB 536, [1960] 1 All ER 193, [1959] 2 Lloyd's Rep 553, CA; revsd [1961] AC 807, [1961] 1 All ER 495, [1961] 1 Lloyd's Rep 57, HL), following *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218; not following *CH Smith & Sons, Fellmongery Pty Ltd v Peninsular and Oriental Steam Navigation Co* (1938) 60 Ll L Rep 419 (failure to take soundings in hold may amount to neglect in management of ship). These three cases were all decided under the Carriage of Goods by Sea Act 1924 (repealed), as was *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander*: see PARA 367 et seq. A 'fault in the management' also includes a failure to get rid of water in the hold after a collision (*Leval & Co Inc v Colonial Steamships Ltd* [1961] 1 Lloyd's Rep 560, Can SC) and a failure to adjust the metacentric height of a vessel (*Georgia-Pacific Corp v Marilyn L Elvapore Inc, Evans Products Co and Retla Steamship Co, The Marilyn L* [1972] 1 Lloyd's Rep 418 (ED Va)). The negligent use of an iron rod to clear a waste pipe leading from the crew's washhouse is negligence in the management of the ship: *The Touraine* [1928] P 58, 17 Asp MLC 413, applying *The Rodney* [1900] P 112, 9 Asp MLC 39, DC. In *Bulgaria v Bunge & Co Ltd* (1933) 49 TLR 237, MacKinnon J expressed the view, obiter, that improper abandonment of the ship was within the exception. The meaning of the exception was examined by the House of Lords in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* where the authorities are reviewed.

The decisive test whether the negligence is in the management of the ship or merely in the care of the cargo seems to be whether the immediate or primary purpose of the operation in question is the safety or good order of the ship or the safety or good order of the cargo: see *The Glenochil* at 221 per Gorell Barnes J, cited by Lord Hailsham in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* at 231 and at 94. Thus, the exception does not cover bad stowage (*The Glenochil*) or failure to prevent pilfering of the cargo (*R F Brown and Co Ltd v T & J Harrison, Hourani v T & J Harrison* (1927) 17 Asp MLC 294, CA), nor does it cover failure to protect the cargo holds by tarpaulins when the hatches are removed for the purpose of repairing the ship (*Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander*). Nor does the exception cover failure to make proper use of the refrigerating machinery, at any rate where this machinery is not used for cooling the ship's provisions as well as the cargo: *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424, 17 Asp MLC 447, distinguishing *Rowson v Atlantic Transport Co* [1903] 2 KB 666, 9 Asp MLC 458, CA (where the Court of Appeal held that the negligent working of the refrigerating apparatus was within the exception because the apparatus was used to cool the ship's provisions as well as the cargo). See the comments of Wright J as to this decision in *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* at 443-444, 455. Unnecessary delay in port owing to apprehension of difficulty or danger in continuing the voyage is not within the exception (*The Renée Hyafil* (1916) 32 TLR 660, CA), nor is an erroneous decision by the master, while he is in port, as to the route he will take (*Lord (Owners) v Newsom Sons & Co Ltd* [1920] 1 KB 846, 15 Asp MLC 19). In *Toyosaki Kissen Kaisha v Société les Affréteurs Réunis* (1922) 27 Com Cas 157, 10 Ll L Rep 147, DC, it was held that the master's failure when he went ashore to give instructions that steam was to be kept up was not within the exception. This decision was discussed, and some doubt cast upon it, in *Re Suzuki & Co Ltd and T Benyon & Co Ltd* (1926) 17 Asp MLC 1, HL.

Further, the exception does not apply if the cargo is damaged as the result of the theft of a storm valve cover plate at a port of call (*Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd, The Chyebassa* [1967] 2 QB 250, [1966] 3 All ER 593, [1966] 2 Lloyd's Rep 193, CA), or where there has been a failure to secure the cargo on a barge to keep it from sliding and a failure to tether the barge (*Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd* [1973] 2 Lloyd's Rep 469, Can SC), or where there has been a failure to drain the fresh water system which might have caused the parting of a pipe (*International Produce Inc and Greenwich Mills Co v SS Frances Salman, Swedish Gulf Line AB and Companhia de Navegacao Maritima Netumar, The Frances Salman* [1975] 2 Lloyd's Rep 355 (SD NY)), or where there has been a failure to get away from a storm centre (*The Washington* [1976] 2 Lloyd's Rep 453, Can Fed Ct), or where there has been a surreptitious opening of a hatch by a member of the crew (*The Bulknes* [1979] 2 Lloyd's Rep 39).

18 *The Duero* (1869) LR 2 A & E 393; *Norman v Binnington* (1890) 25 QBD 475, 6 Asp MLC 528, DC; *The Carron Park* (1890) 15 PD 203, 6 Asp MLC 543; *De Clermont and Donner v General Steam Navigation Co* (1891) 7 TLR 187 at 188; *Smackman v General Steam Navigation Co* (1908) 11 Asp MLC 14, DC.

19 *Packwood v Union-Castle Mail Steamship Co* (1903) 20 TLR 59. Certain acts of negligence may, however, be expressly excluded from the scope of the exception: *Mendl & Co v Ropner & Co* [1913] 1 KB 27, 12 Asp MLC 268.

20 *Baerselman v Bailey* [1895] 2 QB 301, 8 Asp MLC 4, CA; *Wade & Sons Co Ltd v Cockerline & Co* (1905) 10 Com Cas 115, CA (followed in *C Wilh Svenssons Travaruaktiebolag v Cliffe Steamship Co* [1932] 1 KB 490, 18 Asp MLC 284); *The Torbryan* [1903] P 194, 9 Asp MLC 450, CA; and see *Bruce, Marriott & Co v Houlder Line Ltd* [1917] 1 KB 72, 13 Asp MLC 550, CA; *The White Rose, AB Helsingfors Steamship Co Ltd v Rederiaktiebolaget Rex* [1969] 3 All ER 374, [1969] 1 WLR 1098, [1969] 2 Lloyd's Rep 52.

21 *The Accomac* (1890) 15 PD 208, 6 Asp MLC 579, CA.

22 See the cases cited in notes 1-17.

23 Cf *Rathbone Bros & Co v D MacIver Sons & Co* [1903] 2 KB 378 at 388, 9 Asp MLC 467 at 471, CA, per Romer LJ.

24 *The Duero* (1869) LR 2 A & E 393; *Hayn v Culliford* (1879) 4 Asp MLC 128, CA; *The Accomac* (1890) 15 PD 208, 6 Asp MLC 579, CA; *The Carron Park* (1890) 15 PD 203, 6 Asp MLC 543.

25 As to pilotage see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 562 et seq.

26 *Wade & Sons Co Ltd v Cockerline & Co* (1905) 10 Com Cas 115, CA; cf *The Torbryan* [1903] P 194, 9 Asp MLC 450, CA; *The Cressington* [1891] P 152, 7 Asp MLC 27, DC.

## UPDATE

### 280 Negligence

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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#### 281. How far exceptions are mutual.

The question whether the exceptions in a charterparty protect the charterer as well as the shipowner depends on the construction of the charterparty taken as a whole, and a decision on one charterparty will only govern such other charterparties as are in a very similar form<sup>1</sup>. Exceptions are put into a charterparty prima facie for the benefit of a shipowner<sup>2</sup>, and, in the absence of language clearly indicating an intention that they should apply to the charterer, he cannot rely on them, and he is not excused from performing his part of the contract because his failure to do so is occasioned by a peril excepted in the charterparty<sup>3</sup>. More usually, in the terms dealing with the obligations imposed on the charterer, the charterparty defines the circumstances in which he is to be excused from the performance of them<sup>4</sup>.

1 *Aktieselskabet General Gordon v Cape Copper Co* (1921) 91 LJB 112, CA. This principle applies to all questions as to the effect of terms in a charterparty: see PARA 227. As to the shipowner's liability in the absence of exceptions see PARA 264.

2 *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 KB 172 at 212, 16 Asp MLC 501 at 513, CA, per Atkin LJ. See *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 1 KB 614 at 637 (where, in deciding that the charterer was entitled to rely on the exception clause, Bailhache J said 'unless a contrary

intention is expressed or is to be gathered from the form of the charterparty, exceptions are mutual when they are contained, as is the modern practice, in one of the numerous separate clauses of a charterparty and do not form part of a clause dealing solely with the obligation of the shipowner or charterer. Especially is that the case where, as here, there is only one set of exceptions and not, as in many modern charterparties, two sets, one appropriate to the charterer's and one to the shipowner's obligations'. The Court of Appeal ([1920] 2 KB 287, 15 Asp MLC 33, CA) affirmed the judgment of Bailhache J on other grounds and declined to deal with this point.

3 See *Braemount Steamship Co Ltd v Andrew Weir & Co* (1910) 11 Asp MLC 345; *Schele v Lumsden & Co* 1916 SC 709; *Cazalet v Morris & Co* 1916 SC 952; *Aktieselskabet General Gordon v Cape Copper Co* (1921) 91 LJKB 112, CA (where the history of the matter is reviewed by Scrutton LJ); *Williams v Manisselian Frères* (1923) 17 Ll L Rep 72, CA. Cf *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 KB 172, 16 Asp MLC 501, CA; *Barrie v Peruvian Corp*n (1896) 2 Com Cas 50 (followed, but doubted, in *Re Newman and Dale Steamship Co and British and South American Steamship Co* [1903] 1 KB 262, 9 Asp MLC 351); *Embiricos v Sydney Reid & Co* [1914] 3 KB 45 at 52, 12 Asp MLC 513 at 514 per Scrutton LJ (where the charterer was held protected). However, even if the exceptions clause is clearly mutual, it will not necessarily apply to the charterer's obligation to pay hire under a time charterparty for a period during which he was prevented from loading cargo at the port of his choice owing to a clause within the exceptions, at any rate if he could have obtained a cargo elsewhere: *Brown v Turner, Brightman & Co* [1912] AC 12, 12 Asp MLC 79, HL.

4 See PARA 297 et seq; and *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 1 KB 614 (on appeal [1920] 2 KB 287, 15 Asp MLC 33, CA).

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#### *(h) Terms as to Loading and Discharge*

#### **282. Custom of the port.**

The loading and discharge of a cargo are governed by the customs of the particular port concerned<sup>1</sup>, except where those customs are expressly excluded<sup>2</sup>, or are otherwise inconsistent with the terms of the charterparty<sup>3</sup>. Even if the clause as to loading or discharge expressly provides that these operations are to be performed in accordance with the custom of the port, the clause may contain other terms, as, for example, that the cargo is to be taken from alongside at the charterer's expense, which may show that the custom of the port is not intended to apply or is intended to be modified<sup>4</sup>.

1 See PARA 225; and **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694. See also *Blandy Bros & Co Ltd v Nello Simoni Ltd* [1963] 2 Lloyd's Rep 393, CA (where the shipowners failed to prove a custom of the port of Funchal that the shipper paid for bringing the cargo alongside and that the ship paid for the labour employed on board, ie in loading and stowing).

2 *Brenda Steamship Co v Green* [1900] 1 QB 518, 9 Asp MLC 55, CA.

3 See *Palgrave, Brown & Son Ltd v SS Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL; approving *Northmoore Steamship Co v Harland and Wolff Ltd* [1903] 2 IR 657, and the other cases cited in PARA 534 note 2. See, however, *Sameiling A/S v Grain Importers (Eire) Ltd* [1952] 2 All ER 315, [1952] 1 Lloyd's Rep 313 (where a custom of the port (Cork) was held to be not inconsistent with, but merely supplemental to, the shipowner's normal obligations).

4 *Palgrave, Brown & Son Ltd v SS Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL, disapproving *Stephens v Wintringham* (1898) 3 Com Cas 169. See also PARAS 545, 548.

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### 283. Express terms.

A charterparty usually provides that the cargo is to be brought to and taken from alongside at the charterer's risk and expense<sup>1</sup>. Where, however, it is necessary to employ boats for the purpose, the risk and expense of so doing may be imposed, by an express term, on the shipowner<sup>2</sup>. In the same way, the charterparty may extend the obligations of the charterer, and may require him to provide either wholly or in part for the shipment, stowage<sup>3</sup> or discharge of the cargo<sup>4</sup>. In this case he may be protected by a negligence clause against negligence, default or error in judgment of the persons employed by him<sup>5</sup>. When his responsibility ceases at the ship's side, he may be empowered to place an agent, usually called a supercargo, on board for the purpose of supervising his interests<sup>6</sup>. A provision for the cargo to be loaded, stowed, trimmed and discharged under the supervision 'and responsibility' of the master transfers the primary liability in relation to the operation of so doing to the shipowner<sup>7</sup>.

The charterparty may contain a term that the charterer is to pay all taxes due on the cargo and all taxes on freight at the port of loading<sup>8</sup>.

1 See *Palgrave, Brown & Son Ltd v SS Turid (Owners)* [1922] 1 AC 397, HL, sub nom *The Turid* 15 Asp MLC 538; and PARAS 440, 535.

2 *Nottebohn v Richter* (1886) 18 QBD 63, CA. Even if the charterparty provides that the transit from shore to ship is to be 'at ship's risk', the shipowner is entitled to rely on the exceptions in the charterparty as regards this transit: *Nottebohn v Richter*. Cf *Dampskebselskabet Skjoldborg and CK Hansen v Charles Calder & Co* (1911) 12 Asp MLC 156 (where the language of the clause showed that the exceptions were not intended to apply to this transit: see PARA 442).

3 See *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57 (parties are free to allocate the duty of storage to the charterers even where the Hague-Visby Rules are incorporated into the charterparty (see PARAS 372 note 6, 456)); and see also *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 All ER (Comm) 724, [1999] 1 Lloyd's Rep 848; and *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] EWHC 483 (Comm), [2006] 2 Lloyd's Rep 66.

4 As to the loading generally see PARA 402 et seq; and as to the effect of a stevedore being appointed by the charterer see PARA 457. See also *Chandris v Union of India* [1956] 1 All ER 358, [1956] 1 WLR 147, [1956] 1 Lloyd's Rep 11, CA (where there was a 'seaworthy trim' clause by which charterers were to pay the expense, at the first port of discharge, of putting the vessel in seaworthy trim for passage to the second port of discharge) (followed in *JC Carras & Sons (Shipbrokers) Ltd v President of India, The Argobeam* [1970] 1 Lloyd's Rep 282); *Skibs A/S Trolia and Skibs A/S Tautra v United Enterprises and Shipping (Pte) Ltd, The Tarva* [1973] 2 Lloyd's Rep 385 (Singapore HC) (where, on the true construction of the charterparty, the responsibility for heaving the cargo on board was that of the charterers, but in that operation they were to have the free use of the vessel's derricks, winches, gins and falls).

5 See PARA 453 text and note 5.

6 As to the position of a supercargo see *Davidson v Gwynne* (1810) 12 East 381 at 398.

7 *Alexandros Shipping Co of Piraeus v MSC Mediterranean Shipping Co SA of Geneva, The Alexandros P* [1986] 1 Lloyd's Rep 421; *AB Marintrans v Comet Shipping Co Ltd, The Shinjitsu Maru No 5* [1985] 1 Lloyd's Rep 568; *MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd, The Argonaut* [1985] 2 Lloyd's Rep 216.

8 See eg *Brovingtank A/S and I/S Brovig v Transcredit and Oil Tradeanstalt, The Gunda Brovig* [1982] 2 Lloyd's Rep 39, CA.

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(i) *Terms as to the Time for Loading and Discharge*

**284. Time for loading.**

A charterparty may provide that the cargo is to be loaded within a specified number of days, usually called 'lay days'<sup>1</sup>. This period begins when the vessel arrives<sup>2</sup> at the agreed loading port of berth and, according to the ordinary form of the term, written notice of readiness to load<sup>3</sup> is given to the charterer<sup>4</sup>. It may sometimes be provided that the period is not to begin before a certain date, unless the charterer begins loading sooner. It is a condition of the charterparty that the charterer is to tender a cargo within the specified period or within a reasonable period, if none is specified, and his failure to do so entitles the shipowner to treat the contract as at an end<sup>5</sup>, and also to sue for damages<sup>6</sup> except in certain exceptional cases<sup>7</sup>. Except in these cases and subject to any express terms of the charterparty, the cause of the charterer's failure is immaterial, whether it is attributable to his own default<sup>8</sup> or to circumstances beyond his control<sup>9</sup>. Failure to complete the loading, as distinct from tendering a cargo, within the specified period will not of itself entitle the shipowner to treat the contract as repudiated, but, in the absence of a term to the contrary, will entitle him to damages or demurrage<sup>10</sup> even if the failure is not due to the charterer's default<sup>11</sup>.

The charterparty may, however, contain exceptions applying to the charterer's duty to tender a cargo<sup>12</sup>, and will usually contain exceptions in favour of the charterer applying to the actual loading<sup>13</sup>.

Where the detention of the ship at the port of loading beyond the specified time is attributable to the default of the shipowner or of persons for whom he is responsible, the charterer is not liable to pay demurrage<sup>14</sup>.

1 See *Nielsen v Wait* (1885) 16 QBD 67 at 70, CA, per Lord Esher MR. Sometimes the period is expressed in hours. As to the construction of 'days' and other terms relating to time see PARA 288.

2 See PARAS 406-407.

3 As to the validity of a notice of readiness see PARAS 294, 416; and as to a special term fixing the commencement of the period at some other date see *France, Fenwick & Co Ltd v Philip Spackman & Sons* (1912) 12 Asp MLC 289.

4 See PARAS 294, 416. Cf *North River Freighters Ltd v HE President of India* [1956] 1 QB 333, [1956] 1 All ER 50, [1956] 2 Lloyd's Rep 668, CA (where there was a special clause putting the risk of time wasted in waiting for a berth on the charterer) (followed in *Roland-Linie Schiffahrt GmbH v Spillers Ltd* [1957] 1 QB 109, [1956] 3 All ER 383, [1956] 2 Lloyd's Rep 211); *Aldebaran Compania Maritima SA, Panama v Aussenhandel AG Zurich* [1977] AC 157, [1976] 2 All ER 963, [1977] 2 Lloyd's Rep 359, HL (overruling *Metals and Ropes Co Ltd v Filia Compania Lda, The Vastric* [1966] 2 Lloyd's Rep 219).

5 See PARAS 424-425, 433-434. In this connection the specified period includes not only the lay days but also days on demurrage: see PARA 289.

6 See PARA 424. As to the measure of damages see PARA 458 et seq.

7 As to these exceptional cases see PARA 426 et seq.

8 See PARAS 424, 443.

9 *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 619, 620, 4 Asp MLC 302 at 306, HL, per Lord Blackburn; and see PARA 424. The charterer is not bound to tender a cargo if the shipowner has already broken a condition precedent to the charterer's obligation to load: see PARA 426.

10 As to the difference between damages and demurrage see PARA 289.

11 See *Postlethwaite v Freeland* (1880) 5 App Cas 590 at 618, 4 Asp MLC 302 at 306, HL, per Lord Blackburn. As to demurrage see PARAS 287, 289 et seq.

12 See PARA 429.

13 See PARA 446.

14 See PARA 443.

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### 285. Time for discharge.

The term as to the discharge of the cargo may specify the number of days<sup>1</sup> within which the discharge is to take place<sup>2</sup>, or may fix it inferentially by providing that a given quantity of cargo is to be discharged per day<sup>3</sup>. This period begins when the vessel arrives<sup>4</sup> at the agreed discharge port or berth and, according to the ordinary form of the term, written notice of readiness to discharge is given to the charterer<sup>5</sup>. If the period is exceeded, the charterer must pay damages<sup>6</sup>, unless the cause of delay is expressly covered by some provision in the charterparty<sup>7</sup>, or the delay is attributable to some default on the part of the shipowner<sup>8</sup>. The fact that the delay is attributable to the fault of third persons over whom the charterer or shipowner has no control is immaterial<sup>9</sup>.

1 These days are also called 'lay days': see PARA 284.

2 As to the effect of such a term see also PARA 539. It is not as a rule necessary to give notice of readiness to unload: see PARA 526. The effect of the charterparty may be that the lay days begin before the charterer can unload the ship (see *Horsley Line Ltd v Roehling Bros* 1908 SC 866; *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis* [1962] 2 QB 416, [1960] 3 All ER 797, sub nom *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis, The Massalia (No 2)* [1960] 2 Lloyd's Rep 352 (time lost in waiting for berth to count as discharging time)); or that they do not begin until some time after the start of unloading (see *Pteroti Compania Naviera SA v National Coal Board* [1958] 1 QB 469, [1958] 1 All ER 603, [1958] 1 Lloyd's Rep 245).

3 See *Turner, Brightman & Co v Bannatyne & Sons Ltd* (1904) 10 Asp MLC 1, CA; *Scotson v Pegg* (1861) 6 H & N 295 (where a signed contract was made by the consignee); cf *Dobell v Watts, Ward & Co* (1891) 7 TLR 622, CA. See also *William Alexander & Sons v Aktieselskabet Dampskibet Hansa* [1920] AC 88, 14 Asp MLC 493, HL; *Van Nievelt Goudrian & Co, Stoomvaart Maatschappij v CH Forslind & Son* (1925) 16 Asp MLC 521, CA. Where the charterparty provides for the discharge of a given quantity of cargo 'per working day', days which by the custom of the port are not working days are excluded: *British and Mexican Shipping Co Ltd v Lockett Bros & Co Ltd* [1911] 1 KB 264, 11 Asp MLC 565, CA. See also *The Sandgate* [1930] P 30, 18 Asp MLC 83, CA ('at the average rate of 125 tons per working hatch per day'); *Compania de Navigacion Zita SA v Louis Dreyfus et Compagnie* [1953] 2 All ER 1359, [1953] 1 WLR 1399, [1953] 2 Lloyd's Rep 472 ('at an average rate of not less than 150 metric tons per available workable hatch per weather working day ... provided vessel can receive at this rate'); *VM Salgaoncar e Irmaos of Vasco de Gama v Goulandris Bros Ltd* [1954] 1 All ER 563, [1954] 1 WLR 481, [1954] 1 Lloyd's Rep 56 ('600 tons per day when vessel is in a berth and 350 tons whilst in stream'); *Lodza Compania de Navigacion SA v Government of Ceylon, The Theraios* [1971] 1 Lloyd's Rep 209, CA ('at the average rate of 120 metric tons per hatch per weather working day'); *Clerco Compania Naviera SA v Food Corp'n of India, The Savvas* [1982] 1 Lloyd's Rep 22, CA (where the cargo was to be discharged at the rate of 1,500 tons per day, and it was held that the calculation of laytime should be based on a full cargo before the vessel was lightened at the port of discharge); *Mosvolds Rederi A/S v Food Corp'n of India, The King Theras* [1984] 1 Lloyd's Rep 1, CA (calculation of laytime when four lightering vessels used); *President of India v Jebbens (UK) Ltd, The General Capinpin, Proteus and Free Wave* [1991] 1 Lloyd's Rep 1, HL (where a laytime clause provided for discharge at 'the average rate of 1,000 metric tonnes basis five or more available working hatches, pro rata if less number of hatches per weather working day', the reference to 'available working hatches' does not substitute a rate per hatch for an overall rate but imposes a qualification on it). In *Sun Shipping Co Ltd v Watson and Youell Shipping Agency* (1926) 24 Ll L Rep 28, part of the cargo was loaded up-river and part from lighters in the roads; the charterparty provided that the cargo should be loaded at the average rate of 450 units per day; it was held that the number of lay days in respect of the up-river cargo must

be arrived at by dividing the total quantity of cargo loaded up-river by 450, and a similar calculation must be made in respect of the lay days for the lighterage cargo, and that evidence of a custom to include the lighterage cargo in the dividend for the purpose of arriving at the lay days in respect of the up-river cargo contradicted the contract and was inadmissible. As to customs of the port generally see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694. The charterer is not entitled to the whole of the last day if the period, as calculated, includes only a fraction of it, and demurrage (see PARA 287) will begin to accrue from the termination of the permitted fraction of the last day: *Yeoman v R* [1904] 2 KB 429, CA; *Horsley Line Ltd v Roehling Bros* 1908 SC 866; but see *Houlder v Weir* [1905] 2 KB 267, 10 Asp MLC 81 (where *Yeoman v R* was distinguished).

4 See PARAS 293, 407.

5 See PARA 284.

6 *Bessey v Evans* (1815) 4 Camp 131; *Thiis v Byers* (1876) 1 QBD 244, 3 Asp MLC 147; *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA; *Kruuse v Drynan & Co* (1891) 18 R 1110 (distinguishing *Wyllie v Harrison & Co* (1885) 13 R 92); *Granite City Steamship Co Ltd v Ireland & Son* (1891) 19 R 124.

7 *Letricheux and David v Dunlop & Co, The Abertawe* (1891) 19 R 209; *The Alne Holme* [1893] P 173, 7 Asp MLC 344, DC; and see PARA 540. Where the cause of delay existed at the time of making the contract but was then unknown to either party, an exception of delay from any cause beyond the charterer's control was held to be effective: *SS Induna Co Ltd v British Phosphate Comrs* [1949] 2 KB 430, [1949] 1 All ER 522, 82 Ll L Rep 430. Swell is covered by an exception relieving the charterer from liability for delay caused to the vessel getting into berth for any reason whatsoever over which the charterer had no control: *Marocaine de l'Industrie du Raffinage SA v Notos Maritime Corpn, The Notos* [1987] 1 Lloyd's Rep 503, HL.

8 *Benson v Blunt* (1841) 1 QB 870; *Young v Moeller* (1855) 5 E & B 755, Ex Ch; *Erichsen v Barkworth* (1858) 3 H & N 894, Ex Ch; *Hansen v Donaldson & Sons* (1874) 1 R 1066, distinguished in *William Alexander & Sons v Aktieselskabet Dampskibet Hansa* [1920] AC 88, 14 Asp MLC 493, HL; *Thorsen v McDavall and Neilson, The Theodor Korner* (1892) 19 R 743. Cf *Moller v Jecks* (1865) 19 CBNS 332; *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592. CA (where the inability of the shipowner owing to a strike to unload the ship did not prevent the consignee from being responsible for the delay; applied in *Jenneson, Taylor & Co v Secretary of State for India in Council* [1916] 2 KB 702, 14 Asp MLC 41); *Leeds Shipping Co Ltd v Duncan Fox & Co Ltd* (1932) 37 Com Cas 213. The shipowner is not responsible where the delay is caused by the goods having been stowed under other goods: *Harman v Gandolph* (1815) Holt NP 35; and see the cases cited in note 9.

9 *Straker v Kidd & Co, Porteus v Watney* (1878) 3 QBD 223, 4 Asp MLC 34n; *Porteus v Watney* (1878) 3 QBD 223, 4 Asp MLC 34n (affd 3 QBD 534, 4 Asp MLC 34, CA, following *Leer v Yates* (1811) 3 Taunt 387 in preference to *Rogers v Hunter* (1827) 2 C & P 601, and *Dobson v Droop* (1830) 4 C & P 112. See also PARA 540.

## UPDATE

### 285 Time for discharge

NOTE 5--See *AET Inc Limited v Arcadia Petroleum Limited* [2009] EWHC 2337 (Comm), [2009] All ER (D) 98 (Oct).

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### 286. Customary dispatch.

Sometimes, instead of fixing a definite period for loading or unloading, the charterparty may provide merely that the cargo is to be loaded and discharged with customary dispatch.

The effect of this term is that the charterer has a reasonable time within which to perform his obligation either of loading a cargo or of taking delivery<sup>1</sup>, and, where the charterparty is silent as to the time for discharge, it is implied that a reasonable time will be allowed<sup>2</sup>. In considering what is a reasonable time, the actual circumstances of the particular case must be taken into

consideration<sup>3</sup>, and the charterer is not to be held responsible for delay attributable to circumstances beyond his control<sup>4</sup>. In this context 'default' of the charterer means breach of contract, not moral fault or negligence<sup>5</sup>.

1 See *Fowler v Knoop* (1878) 4 QBD 299, 4 Asp MLC 68, CA; *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; and PARAS 542, 543.

2 *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; *Hellenic Lines Ltd v Embassy of Pakistan* [1973] 1 Lloyd's Rep 363 (US 2nd Cir) (where in a freight contract governed by English law it was held that, where no time was fixed for the discharge of the cargo, a reasonable time was implied, and 'reasonable time' meant what was reasonable in the circumstances then existing). The same result follows if the words are 'deliver in the usual and customary manner': *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch. Where the words were 'to be discharged with customary dispatch *as fast as the steamer can deliver* during the ordinary working hours of the port of discharge, but according to the custom of the port', it was held that the addition of the words in italics did not oblige the charterers to do more than discharge in a reasonable time and that, having done this, they were not liable for demurrage although the ship was capable of discharging in a shorter time; nor did the fact that the charterparty provided that time for discharging should not count during the continuance of strikes, lock-outs or epidemics preventing discharge affect this result: *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL. Cf *Gilbert J McCaul & Co Ltd v JR Moodie & Co Ltd* [1961] 1 Lloyd's Rep 308 at 316. The same result followed where the charterparty provided that the cargo was to be discharged 'as fast as the steamer can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding': *Rickinson Sons & Co v Scottish Co-operative Wholesale Society, SS Arachne* 1918 SC 440. Where the charterparty clearly provided for discharge in a fixed time, the addition of the words 'according to the custom of the port' was held not to affect the charterer's unconditional obligation to discharge within that time, but to refer only to the manner of discharge: *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL; cf *Baird & Co v Price, Walker & Co* (1916) 86 LJB 935, 13 Asp MLC 448.

3 *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL. See also *Rodgers v Forresters* (1810) 2 Camp 483; *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *Castlegate Steamship Co Ltd v Dempsey* [1892] 1 QB 854, 7 Asp MLC 186, CA.

4 *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch; *Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA; *The Jaederen* [1892] P 351, 7 Asp MLC 260; *Lyle Shipping Co v Cardiff Corp* [1900] 2 QB 638, 9 Asp MLC 128, CA; *Bargate Steam Shipping Co v Penlee and St Ives Stone Quarries Ltd* (1921) 90 LJB 572, 15 Asp MLC 189. See also *J Stewart & Co v J Rank Ltd* (1920) 4 Ll L Rep 91 (where the principle was applied to a case in which the receivers undertook to perform the ship's part of discharging and were held not liable for delay which they could have prevented by acceding to the labourers' demand for higher pay). Cf *Kruuse v Drynan & Co* (1891) 18 R 1110 (distinguishing *Wyllie v Harrison & Co* (1885) 13 R 92) (where the defendants failed to prove that they had taken all reasonable steps to discharge speedily). *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n, 4 Asp MLC 118, CA, followed in *Tillett & Co v Cwm Avon Works Proprietors* (1886) 2 TLR 675, DC, must be regarded as no longer law: *Lyle Shipping Co v Cardiff Corp* [1900] 2 QB 638 at 645, 9 Asp MLC 128 at 133, CA, per AL Smith LJ. See also *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 609, 617, 4 Asp MLC 302 at 304, 306, HL, per Lord Blackburn; *Hick v Raymond and Reid* [1893] AC 22 at 32, 7 Asp MLC 233 at 235, HL, per Lord Watson.

5 *Reederij Amsterdam NV v President of India, The Amstelmolen* [1960] 2 Lloyd's Rep 82 at 94.

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## **287. Demurrage days and payment of dispatch money.**

At the expiry of the lay days<sup>1</sup>, the charterer may be allowed, by express term in the charterparty and in consideration of an additional payment called 'demurrage'<sup>2</sup>, a further number of days, known as 'demurrage days'. Sometimes no further time is expressly allowed, but it is simply provided that the charterer is to pay demurrage at the rate of so much a day for every day that the ship is detained beyond the lay days<sup>3</sup>. Conversely, it is often provided that the charterer is to be paid 'dispatch money' for days saved in loading or discharging<sup>4</sup>. It is,

therefore, important, for the purpose both of ascertaining when the lay days expire and the liability for demurrage begins and of calculating the amount of demurrage payable, to define what is meant by the word 'day' in a charterparty<sup>5</sup>. In practice, its meaning is usually made more or less clear by the insertion of qualifications<sup>6</sup>. Once a ship is on demurrage, the charterers are in continuing breach of contract and may claim exemption from liability to pay demurrage only under clearly worded exemption clauses to that effect<sup>7</sup>.

1 As to lay days see PARAS 284, 285.

2 See PARA 289 et seq. 'Demurrage' is also often, but inaccurately, used to denote the damages payable for detention of the ship beyond the agreed lay days: see PARA 290 note 1.

3 In such a case, if the ship is detained and remains after a reasonable time has expired, the shipowner may claim the specified rate only: *Western Steamship Co v Amaral Sutherland & Co* [1913] 3 KB 366, 12 Asp MLC 358 per Bray J; on appeal [1914] 3 KB 55, 12 Asp MLC 493, CA. The order under which Bray J had decided the point was set aside, the court expressing no opinion as to the correctness of his decision which was, however, followed in *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193, 14 Asp MLC 110, CA. Where demurrage is to be paid in foreign currency, the rate to be applied is that ruling at the date of payment: *George Vefflings Rederi A/S v President of India, The Bellami* [1979] 1 All ER 380, [1979] 1 WLR 59, [1979] 1 Lloyd's Rep 123, CA.

4 See PARA 296.

5 Time is always reckoned by days, and not by hours (*Hough v Athya & Son* (1879) 6 R 961), unless the contract expressly makes demurrage payable per hour (*Marshall v Bolckow* (1881) 6 QBD 231, DC); and see PARA 285 note 3. As to time generally see **TIME** vol 37 (2010) PARA 301 et seq.

6 See PARA 288.

7 *Nippon Yusen Kaisha v SA Marocaine de L'Industrie du Raffinage, The Tsukuba Maru* [1979] 1 Lloyd's Rep 459.

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## **288. Construction of terms relating to time.**

If used without any qualification, 'days' means consecutive days, including Sundays and holidays<sup>1</sup>, unless there is a custom of the port to the contrary<sup>2</sup>, or unless it is clear from the context that the parties intended a different meaning<sup>3</sup>. 'Running days' also means consecutive days, including Sundays and holidays, unless that meaning is excluded by a custom of the port or by the context<sup>4</sup>. In practice, it is usual to exclude Sundays and holidays, whether general or local, unless actually used for working<sup>5</sup>.

'Working days' excludes Sundays and general holidays<sup>6</sup>, but not days on which, owing to the state of the weather, it is impossible to work<sup>7</sup>, even, it seems, if it is not the custom of the port to count such days<sup>8</sup>. It is, therefore, not unusual to qualify the term and to provide that only 'weather working days' are to be counted<sup>9</sup>. Where this is done, the charterer is not responsible for delay caused by bad weather, but the state of the weather alone determines whether a day is a weather working day<sup>10</sup>. A day is a 'weather working day' unless the weather directly prevents the operation of loading or unloading<sup>11</sup>. If the number of hours customarily worked at a port is eight hours from, say, 08:00 hours to 17:00 hours, allowing one hour for meals, then that period constitutes the working day, and a 'weather working day' is a working day from which must be deducted any time when work was suspended owing to weather conditions<sup>12</sup>. Where a ship is chartered for the carriage of a cargo of coal, the term 'colliery working days' may be used for the purpose of defining the period within which the charterer is to provide a

cargo<sup>13</sup>, and means days which are ordinary working days at the colliery in normal circumstances, even though no work may, in fact, be done at the colliery on those days<sup>14</sup>.

In the absence of any term in the charterparty<sup>15</sup>, a day is reckoned as consisting of 24 consecutive hours<sup>16</sup>, counted from midnight to midnight<sup>17</sup>, and a fraction of a day counts as a day. In the absence of any provision or custom to the contrary, the charterer is, however, entitled to have a full working day for loading and discharging, that is, he is only bound to begin either operation at a reasonable hour. If the ship is tendered to him at a later hour than is reasonable or customary he is entitled to refuse to load or discharge on that day and, under a charterparty providing that the charterer is to have so many lay days for loading or discharging, that day will not count as a lay day<sup>18</sup>. It has been held that, if he does load or discharge on that day, he must be taken to have agreed to treat the day as a lay day, but this seems doubtful<sup>19</sup>. The parties may provide that, for the purposes of the charterparty, 'day' is to signify a conventional day, having no relation to an astronomical day or to the ordinary civil day<sup>20</sup>. The conventional day may be a period of 24 consecutive hours, commencing from a specified time<sup>21</sup>, or, where the language of the charterparty is so framed, as, for example, where the phrase used is 'working day of 24 hours', only the hours available for work are to be taken into consideration, and 24 of such hours, whether consecutive or not, are to be taken together and treated as a day<sup>22</sup>.

1 *Niemann v Moss* (1860) 6 Jur NS 775; and see *Laing v Hollway* (1878) 3 QBD 437, CA; and **TIME** vol 97 (2010) PARA 342.

2 *Cochran v Retberg* (1800) 3 Esp 121; *Nielsen v Wait* (1885) 16 QBD 67, 5 Asp MLC 553, CA. As to customs of the port see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694.

3 *Commercial Steamship Co v Boulton* (1875) LR 10 QB 346, 3 Asp MLC 111; cf *Niemann v Moss* (1860) 6 Jur NS 775.

4 *Niemann v Moss* (1860) 6 Jur NS 775; *Laing v Hollway* (1878) 3 QBD 437, CA.

5 *The Valhalla* (1908) Times, 27 July. Unless the term specially so provides, the mere fact that the excluded days are used does not imply an agreement that they should count as lay days: *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1908] AC 108, 11 Asp MLC 1, HL; and see *Houlder v Weir* [1905] 2 KB 267, 10 Asp MLC 81. In so far as they decide that such an agreement ought as a matter of law to be inferred from the mere use of the excluded days, *Whittall & Co v Rahtken's Shipping Co Ltd* [1907] 1 KB 783, 10 Asp MLC 471 and *Branckelow Steamship Co Ltd v Lamport and Holt* (1897) [1907] 1 KB 787n, 10 Asp MLC 472n must be taken to be overruled by *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd*. Nor are excluded days counted towards dispatch money: *The Glendevon* [1893] P 269, 7 Asp MLC 439, DC. As to the meaning of 'dispatch money' see PARA 296.

6 *Commercial Steamship Co v Boulton* (1875) LR 10 QB 346, 3 Asp MLC 111; *Nielsen v Wait* (1885) 16 QBD 67 at 71, 5 Asp MLC 553 at 556, CA; and see **TIME** vol 97 (2010) PARA 345. A Saturday half-holiday is not a holiday within the meaning of the phrase 'Sundays, general or local holidays ... excepted': *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL, applied in *Hain Steamship Co Ltd v Sociedad Anonima Comercial de Exportacion e Importacion* (1934) 49 LI L Rep 86. A day is a holiday if it is observed as such at the port in question even though it is not a national holiday: *Hain Steamship Co Ltd v Sociedad Anonima Comercial de Exportacion e Importacion* (1932) 18 Asp MLC 504. The usage of the particular trade involved must also be taken into account: *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL (where it was held that Saturday was a working day at Vancouver as it was not a holiday); *Chief Controller of Chartering of the Government of India v Central Gulf Steamship Corpn, The Mosfield* [1968] 2 Lloyd's Rep 173 (where Saturday in the port of Lake Charles, Louisiana, was held to be a working, although not a regular working, day); *Primula Compania Naviera SA v Finagrains Cie Commerciale Agricole et Financiere SA, The Point Clear* [1975] 2 Lloyd's Rep 243 (where Saturday in the port of Rotterdam counted as a lay day); *Tramp Shipping Corpn v Greenwich Marine Inc* [1975] 2 All ER 989, [1975] 1 WLR 1042, [1975] 2 Lloyd's Rep 314, CA (where it was held to be the custom for crane drivers, if requested to do so by the stevedore companies, to work in shifts for 24 hours a day). 'Non-working holiday' means a day on which the work of loading or discharging cannot be carried on without making payments substantially above the usual rates to the workmen or the public authorities: *Panagos Lyras (Owners) v Joint Danube and Black Sea Shipping Agencies of Braila* (1931) 40 LI L Rep 83.

7 *Thiis v Byers* (1876) 1 QBD 244, 3 Asp MLC 147; cf *Harper v M'Carthy* (1806) 2 Bos & PNR 258 (where the peculiar terms and nature of the contract (which was not one of affreightment) made this rule inapplicable).

8 *Holman v Peruvian Nitrate Co* (1878) 5 R 657. It seems that such days will be excluded where both parties are acquainted with the custom: *British and Mexican Shipping Co Ltd v Lockett Bros & Co Ltd* [1911] 1 KB 264, 11 Asp MLC 565, CA, distinguishing *Bennetts & Co v Brown* [1908] 1 KB 490, 11 Asp MLC 10. All these three cases related to 'surf days' at South American ports. In *Alvion Steamship Corp Panama v Galban Lobo Trading Co SA of Havana* [1955] 1 QB 430 at 441, [1954] 3 All ER 324 at 328, [1954] 2 Lloyd's Rep 309 at 315 (affd [1955] 1 QB 430 at 442, [1955] 1 All ER 457, [1955] 1 Lloyd's Rep 9, CA), McNair J considered that *Bennetts & Co v Brown* was inconsistent with, and impliedly overruled by, *British and Mexican Shipping Co Ltd v Lockett Bros & Co Ltd*. As to the length of a 'working day' see note 17.

9 *le* as in *Brancelow Steamship Co Ltd v Lamport and Holt* [1897] 1 QB 570; *Bennetts & Co v Brown* [1908] 1 KB 490, 11 Asp MLC 10; and *Dampskibsselskabet Botnia A/S v CP Bell & Co* [1932] 2 KB 569, 18 Asp MLC 307 (where it was held that in a port which was usually blocked with ice for part of the year a day on which ice prevented loading was not a 'weather working day'). Cf *Westfal-Larsen & Co Aktieselskabet v Russo-Norwegian Transport Co Ltd* (1931) 40 Ll L Rep 259. The charterparty may provide that a certain number of weather working days are allowed but that time between 17:00 hours on Friday and 08:00 hours on the following Monday is not to count unless so used: see *Sofial SA v Ove Skou Rederi, The Helle Skou* [1976] 2 Lloyd's Rep 205.

10 Thus periods when no work could be done owing to bad weather must be ignored in calculating lay time, even if no work was interrupted, or intended to be done, during that time: *Compania Naviera Azuero SA v British Oil and Cake Mills Ltd* [1957] 2 QB 293, [1957] 2 All ER 241, [1957] 1 Lloyd's Rep 312; *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL (where it was held that in case of intermittent bad weather preventing work an apportionment should be made, the proper apportionment being a question of fact).

11 *Compania Crystal de Vapores of Panama v Herman and Mohatta (India) Ltd* [1958] 2 QB 196, [1958] 2 All ER 508, [1958] 1 Lloyd's Rep 616 (where days during which the ship had to leave her berth owing to the risk of damage from bore tides were held to be weather working days); *Uglands Rederi A/S v The President of India, The Danita* [1976] 2 Lloyd's Rep 377 (where it was held that the phraseology in one of the clauses of the charterparty was not such as to involve a departure from the usual meaning of 'weather working days'). 'Weather permitting working day' means a working day which counts unless work is actually prevented by the weather: *Magnolia Shipping Co Ltd of Limassol v Joint Venture of the International Trading and Shipping Enterprises and Kinship Management Co Ltd of Brussels, The Camelia and Magnolia* [1978] 2 Lloyd's Rep 182; *Gebr Broere BV v Saras Chimica SpA* [1982] 2 Lloyd's Rep 436; *Dow Chemical (Nederland) BV v BP Tanker Co Ltd, The Vorras* [1983] 1 Lloyd's Rep 579, CA.

12 *Alvion Steamship Corp Panama v Galban Lobo Trading Co SA of Havana* [1955] 1 QB 430 at 442, [1955] 1 All ER 457, [1955] 1 Lloyd's Rep 9, CA (approving *Brancelow Steamship Co Ltd v Lamport and Holt* [1897] 1 QB 570 as regards the meaning of 'weather working day', but disapproving it as regards the method of computation); *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL, disapproving *Alvion Steamship Corp Panama v Galban Lobo Trading Co SA of Havana* in part. The removal of a vessel from the loading berth for reasons of safety (eg during bore tides) does not exclude the days while she is so removed from being weather working days for the purpose of the computation of lay time, vicissitudes during this period being prima facie at the risk of the charterers: *Compania Crystal de Vapores of Panama v Herman and Mohatta (India) Ltd* [1958] 2 QB 196, [1958] 2 All ER 508, [1958] 1 Lloyd's Rep 616. Hours customarily worked do not as a rule include overtime: *Maatschappij Zeevaart NV v M Friesacher Soehne* [1962] 2 All ER 511, [1962] 1 WLR 534, [1962] 1 Lloyd's Rep 52.

13 'Colliery working days' is not always used in connection with coal charterparties: see *Weir & Co v Pirie & Co* (1898) 3 Com Cas 263 (where no time was expressed); *Shamrock Steamship Co v Storey & Co* (1899) 8 Asp MLC 590, CA (where the time was expressed in running hours).

14 *Saxon Steamship Co v Union Steamship Co* (1900) 69 LJQB 907, 9 Asp MLC 114, HL, overruling *Clink v Hickie, Borman & Co* (1899) 4 Com Cas 292, CA.

15 See *Portolana Compania Naviera Ltd v Vitol SA Inc, The Afrapearl* [2004] EWCA Civ 864, [2004] 2 Lloyd's Rep 305, where the voyage charterparty contained the following term: 'If, however, delays occur and/or demurrage shall be incurred at ports of loading and/or discharge by reason of . . . breakdown of machinery or equipment in or about the plant of the charterer . . . or consignee of the cargo, such delays shall count as half laytime or, if on demurrage, the rate of demurrage shall be reduced by one half of the amount stated'.

16 *Laing v Hollway* (1878) 3 QBD 437, CA.

17 *The Katy* [1895] P 56, 7 Asp MLC 527, CA, disapproved on another point in *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1908] AC 108, 11 Asp MLC 1, HL. The length of time during which the charterer is entitled and bound to load or discharge during a working day depends on the custom of the port: *Nielsen v Wait* (1885) 16 QBD 67 at 71, 72, 5 Asp MLC 553 at 556, CA, per Lord Esher MR. In the absence of agreement to the

contrary the working day must be taken to end at midnight, the hours from midnight to the customary beginning of work being excluded: see *Mein v Ottmann* (1904) 6 F 276. Cf *Orpheus Steam Shipping Co v Bovill & Sons* (1916) 13 Asp MLC 404 (where the charterparty provided for a working day of 24 hours).

18 *The Katy* [1895] P 56, 7 Asp MLC 527, CA. The rule has no application if the provision is that the cargo is to be loaded or discharged at the rate of a given quantity per day; in such a case, if the period for loading or discharging calculated at the specified rate comprises a fraction of a day, the charterer must complete the operation within the fractional period and is not entitled to the whole day: *Yeoman v R* [1904] 2 KB 429, CA.

19 It was so held in *The Katy* [1895] P 56, 7 Asp MLC 527, CA, but, as pointed out by Scrutton LJ in *Verren v Anglo-Dutch Brick Co (1927) Ltd* (1929) 34 Ll L Rep 210, CA, this seems hardly consistent with the view expressed by the House of Lords in *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1908] AC 108, 11 Asp MLC 1, HL. In *Commercial Steamship Co v Boulton* (1875) LR 10 QB 346, 3 Asp MLC 111 (followed in *Hough v Athya & Son* (1879) 6 R 961) it was held that, if the charterer unloaded or loaded during a fraction of a day, that fraction counted as a whole day. This decision also seems of doubtful validity having regard to *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd*. In *Verren v Anglo-Dutch Brick Co (1927) Ltd* the charterparty provided that the cargo should be loaded and discharged together within five reversible working days *time to commence from the first high water at or off the loading or discharging berth*. It was agreed by counsel that the effect of the words in italics was that time counted against the charterers from the first high tide even though they would not then have a fair working day left. Scrutton LJ doubted the correctness of this view but expressed no final opinion on this point. See also *Branckelov Steamship Co Ltd v Lamport and Holt* [1897] 1 QB 570.

20 *Watson Bros v Mysore Manganese Co Ltd* (1910) 11 Asp MLC 364 per Hamilton J.

21 *Turnbull Scott & Co v Cruickshank & Co* (1904) 7 F 265; *Leonis Steamship Co v Joseph Rank Ltd* (1908) 11 Asp MLC 142; cf *Mein v Ottman* (1904) 6 F 276 (where a working day within the meaning of the charterparty was held to be a period of 12 and not 24 hours from 06:00 hours).

22 *Forest Steamship Co v Iberian Iron Ore Co* (1899) 9 Asp MLC 1, HL; *Watson Bros v Mysore Manganese Co Ltd* (1910) 11 Asp MLC 364.

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### *(j) Terms as to Demurrage and Damages for Detention*

#### **289. Charterer's right to demurrage days.**

The specification of lay days and demurrage days<sup>1</sup> in the charterparty is equivalent to a contract on the part of the charterer that he will not delay the ship for a further period<sup>2</sup>, and also to a contract on the part of the shipowner that during those days the ship is to be at the charterer's disposal<sup>3</sup>. The charterer has, therefore, the right to make use of both the lay days and any demurrage days agreed in the charterparty for the due performance of his obligation either to load or to discharge, and it would seem that he commits no breach of contract in detaining the ship until the expiry of the demurrage days<sup>4</sup>. If the charterparty does not specify the number of lay days, demurrage, where provided for, will become payable at the expiry of a reasonable time<sup>5</sup>, and will continue to be payable, if the charterparty does not specify the number of demurrage days, as long as the ship is detained by the charterer<sup>6</sup>.

However, detention after the lay days or after the demurrage days, where either are specified, and, in other cases, detention after the expiration of a reasonable time for loading or discharging, constitutes a breach of contract on the part of the charterer. In respect of this breach of contract the charterer is liable for any damage actually suffered by the shipowner in consequence of the delay and not merely for the agreed rate of demurrage<sup>7</sup>, which will only be applicable to a claim for damages for the actual detention of the ship<sup>8</sup>.

The detention does not, however, entitle the shipowner to treat the contract as repudiated and sail away forthwith; it seems that he may only do this if the charterer's conduct is such as to show that he does not intend to perform the charterparty, or if the detention lasts so long as to frustrate the commercial purpose of the adventure<sup>9</sup>.

1 As to lay days see PARAS 284-285; and as to demurrage days see PARA 287.

2 *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 618, 4 Asp MLC 302 at 306, HL, per Lord Blackburn. The term applies only to the time allowed at the ports mentioned in the term: *Stevenson v York* (1790) 2 Chit 570; *Marshall v De la Torre* (1795) 1 Esp 367 (in both these cases delay at intermediate ports was not covered); *Alcock v Taylor* (1836) 2 Har & W 58 (where delay at the port of discharge was excluded); *Sweeting v Darthez* (1854) 14 CB 538 (where the term applied to the loading and intermediate ports, but not to the port of discharge).

3 *Dimech v Corlett* (1858) 12 Moo PCC 199 at 231; *Lilly & Co v DM Stevenson & Co* (1895) 22 R 278; *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491. There may, however, be a special term empowering the shipowner to carry on the goods beyond their destination, if in the master's opinion discharge cannot be effected without undue delay: *Searle v Lund* (1904) 9 Asp MLC 557, CA (where it was held that the shipowner was liable in damages for the overcarriage, since any delay if the goods had not been overcarried in discharging at their proper destination would have been attributable to his agent's default at the previous port).

4 Some of the observations of Atkin LJ in *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352 at 363, 17 Asp MLC 144 at 148, CA, particularly the statement that 'demurrage days are days on which the charterer is in breach' are not in harmony with the proposition in the text, which is retained from previous editions of this work. There were no demurrage days in the charterparty which Atkin LJ was considering, and it would appear that by 'demurrage days' he meant days on which the ship in question was on demurrage and did not necessarily intend his observations to apply to a case where extra time was not allowed by the express terms of a charterparty as days on demurrage: see *Aktieselskabet Reidar v Arcos Ltd* at 359-360 and at 147 per Bankes LJ. See also *Randall v Lynch* (1809) 2 Camp 352 at 357; *Dimech v Corlett* (1858) 12 Moo PCC 199 at 231; *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491; cf *Cazalet v Morris & Co* 1916 SC 952 (where the charterparty provided for a rate of demurrage but not for days on demurrage, and it was held that, as the discharging was not completed within the lay days, the charterer had committed a breach of contract for which he was liable in damages, and that the shipowner was entitled to minimise his damages by discharging into lighters and to recover the expense thus incurred from the charterers). The liability to pay demurrage depends upon the detention of the ship and not upon the conduct of the charterer: *Porteus v Watney* (1878) 3 QBD 534, 4 Asp MLC 34, CA. Unless protected by an express exception, he is only excused where the detention is by the default of the shipowner: *Benson v Blunt* (1841) 1 QB 870; *Bradley v Goddard* (1863) 3 F & F 638. The shipowner is not in default merely because he is unable to deliver (*Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA); the cause of his inability must be within his control (*Hansen v Donaldson & Sons* (1874) 1 R 1066); and see PARA 540. See also *Dias Compania Naviera SA v Louis Dreyfus Corp* [1978] 1 All ER 724, [1978] 1 WLR 261, [1978] 1 Lloyd's Rep 325, HL (where time spent on the fumigation of cargo in accordance with an option in the charterparty was included in the calculation of demurrage because fumigation took place after the expiry of lay time); *Shipping Developments Corp v V/O Sojuzneftexport, The Delian Spirit* [1972] 1 QB 103, [1971] 2 All ER 1060, [1971] 1 Lloyd's Rep 506, CA (where a charterer who was guilty of a breach of obligation under the charterparty causing delay was entitled to apply his lay time to diminish or extinguish the owners' claim).

5 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL; and see PARAS 542, 543. The same principle applies when the ship is detained at a port not covered by the term: *Sweeting v Darthez* (1854) 14 CB 538.

6 *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491. See also *Lilly & Co v DM Stevenson & Co* (1895) 22 R 278.

7 Eg he is liable for damages for loss of freight owing to failure to load a specified summer cargo which the delay has rendered it unlawful to load: *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352, 17 Asp MLC 144, CA, explaining Lord Trayner's observations in *Lilly & Co v DM Stevenson & Co* (1895) 22 R 278, and distinguishing *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193, 14 Asp MLC 110, CA. Where the charterer loads at a faster rate than that prescribed by the charterparty, he is not entitled to detain the ship after the completion of loading during the days he has in hand: *Nolisement (Owners) v Bunge and Born* [1917] 1 KB 160, 13 Asp MLC 524. The charterer is not, however, obliged to load in a lesser time than the laytime, even if this is possible; consequently, so long as loading has not been completed, the charterer is entitled to delay the vessel's sailing until the expiration of the laytime: *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd*

[1965] 2 QB 430, [1964] 3 All ER 333, [1964] 2 Lloyd's Rep 153, CA; *Novorossisk Shipping Co v Neopetro Co Ltd, The Ulyanovsk* [1990] 1 Lloyd's Rep 425.

8 Even as regards the actual detention, it seems that the agreed sum for demurrage will only be the prima facie measure of damage and either party may show that the actual damage was more or less than this sum: see *Moorsom v Bell* (1811) 2 Camp 616; cf *Randall v Lynch* (1809) 2 Camp 352.

9 See *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193 at 201, 14 Asp MLC 110 at 115, CA, per Scrutton LJ, criticising the view expressed by Bray J in *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491 (following Lord Trayner's observations in *Lilly & Co v DM Stevenson & Co* (1895) 22 R 278), that the shipowner is entitled to sail away when a reasonable time has elapsed after the expiration of the lay days. If the shipowner in fact stays after he would have been entitled to withdraw and the ship is loaded, he may only claim demurrage at the specified rate: *Western Steamship Co v Amaral Sutherland & Co* [1913] 3 KB 366, 12 Asp MLC 358, set aside on appeal ([1914] 3 KB 55, 12 Asp MLC 493, CA), but followed in *Inverkip Steamship Co Ltd v Bunge & Co*. Where the shipowner, although entitled by the charterers' breach of contract to treat the contract as at an end, affirmed it, his right to damages was governed by the demurrage clause: *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, [1950] 1 All ER 768, 83 Ll L Rep 385 (following *Inverkip Steamship Co Ltd v Bunge & Co*); revsd on another point [1951] 1 KB 255, [1950] 2 All ER 618, 84 Ll L Rep 347, CA.

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## 290. When demurrage is payable.

Demurrage in the strict sense of the word<sup>1</sup> is payable only where there is an express term to that effect<sup>2</sup>. In the absence of any such term the shipowner is not entitled to claim demurrage as such<sup>3</sup>, nor is the charterer justified in detaining the ship beyond the expiry of the time allowed by the charterparty for loading or discharging, as the case may be<sup>4</sup>. If, therefore, he detains her for any further time, he is guilty of a breach of contract, and is liable to pay damages for her detention as soon as the lay days expire<sup>5</sup>.

The distinction between demurrage and damages for detention is that the first is liquidated and the second unliquidated damages: the first consequently requires no proof as to the actual extent of the charterer's loss, while the second does<sup>6</sup>. Demurrage being liquidated damages, no damages are recoverable for delay in payment of demurrage as there is no cause of action for late payment of damages<sup>7</sup>.

1 In popular use 'demurrage' covers damages for detention: *Lockhart v Falk* (1875) LR 10 Exch 132, 3 Asp MLC 8; approved in *Great Western Rly Co v Phillips & Co Ltd* [1908] AC 101 at 107, HL, per Lord Macnaghten.

2 *Compania Naviera Termar SA v Tradax Export SA* [1965] 2 Lloyd's Rep 79, CA. See also *Alcock v Taylor* (1836) 2 Har & W 58 (where the term applied only to the loading); cf *Evans v Forster* (1830) 1 B & Ad 118. The shipowner may in his turn contract to pay a specified sum per day if he is responsible for the ship's delay: *Seeger v Duthie* (1860) 8 CBNS 45; affd 8 CBNS 45, Ex Ch. Cf *Jones v Hough* (1879) 5 Ex D 115, 4 Asp MLC 248, CA (penalty for refusing to sign bills of lading). The contract may be so worded as to apply to delay during the voyage only, and not to delay in starting: *Valente v Gibbs* (1859) 6 CBNS 270.

3 *Stevenson v York* (1790) 2 Chit 570; *Marshall v De la Torre* (1795) 1 Esp 367; *Randall v Lynch* (1810) 12 East 179; cf *Horn v Bensusan* (1841) 9 C & P 709; *Cropton v Pickernell* (1847) 16 M & W 829.

4 Where, however, the delay occurs at the port of loading, the ship is not entitled to leave the moment the time for loading expires: see PARA 289. As to landing the cargo at the port of discharge see PARAS 520-521.

5 *Lockhart v Falk* (1875) LR 10 Exch 132, 3 Asp MLC 8. See also *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch; *Clink v Radford & Co* [1891] 1 QB 625, 7 Asp MLC 10, CA; *Dunlop & Sons v Balfour, Williamson & Co* [1892] 1 QB 507, 7 Asp MLC 181, CA. Cf *Kish v Cory* (1875) LR 10 QB 553, 2 Asp MLC 593, Ex Ch; *The Angerona* (1814) 1 Dods 382; and PARAS 448, 539.

6 *Odfjell Seachem A/S v Continentale des Petroles et d'Investissements* [2004] EWHC 2929 (Comm), [2005] 1 All ER (Comm) 421, [2005] 1 Lloyd's Rep 275; *Moor Line Ltd v Distillers Co Ltd* 1912 SC 514. However, charterparties sometimes impose strict and short deadlines for the presentation of documentary evidence for demurrage claims, and such deadlines will not apply to a claim for damages for detention: see *Waterfront Shipping Co Ltd v Trafigura AG, The Sabrewing* [2007] EWHC 2482 (Comm), [2008] 1 All ER (Comm) 958, [2008] 1 Lloyd's Rep 286.

7 *President of India v Lips Maritime Corpn, The Lips* [1988] AC 395, [1987] 3 All ER 110, [1987] 2 Lloyd's Rep 311, HL.

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### 291. Days saved.

Where the charterparty specifies the number of lay days to be allowed for loading and discharge respectively, the charterer is not at liberty to take into account any days saved at the port of loading, and to add them to the lay days allowed for discharge so as to escape liability for demurrage at the port of discharge<sup>1</sup>, unless he is expressly permitted to do so by the terms of the charterparty<sup>2</sup>. In those cases the days are often described as 'reversible'; thus, where the charterparty specifies that 'loading and discharging time shall be reversible', the total number of days of the particular quality specified for loading and discharging must be compared with the total number of days of that quality used in loading and discharging, to find whether any dispatch money or demurrage is payable<sup>3</sup>.

1 *Marshall v Bolckow* (1881) 6 QBD 231, DC; *Avon Steamship Co v Leask & Co* (1890) 18 R 280.

2 *Molière Steamship Co Ltd v Naylor, Benzon & Co* (1897) 2 Com Cas 92. If the charterer has elected to be paid dispatch money (see PARA 296) at the port of loading, he cannot afterwards add the days in respect of which he has been paid to the days allowed for unloading for the purpose of avoiding demurrage at the port of discharge: *Oakville Steamship Co v Holmes* (1899) 5 Com Cas 48. Cf *Rowland and Marwood's Steamship Co Ltd v Nilson, Sons & Co* (1897) 2 Com Cas 198 (where a power to average for purposes of demurrage did not enable the time saved in loading to be added to the time saved in discharging for the purposes of dispatch money). See also *Societa Ligure di Armamenti v Joint Danube and Black Sea Shipping Agencies of Braila* (1931) 39 Ll L Rep 167 (where it was held that under the 'Dancon' charterparty time spent in waiting for orders and time spent in loading were to be added together for the purpose of calculating demurrage); *Rederi Aktiebolaget Transatlantic v Compagnie Française des Phosphates de l'Océanie* (1926) 26 Ll L Rep 253, CA (exception of Sundays and holidays and bad weather); applied in *Compania Naviera Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, sub nom *Union of India v Compania Naviera Aeolus, SA* [1962] 2 Lloyd's Rep 175, HL.

3 *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL; and see *Verren v Anglo-Dutch Brick Co (1927) Ltd* (1929) 45 TLR 556, 34 Ll L Rep 210, CA (discussed in PARA 288 note 19). In *Alma Shipping Co SA v VM Salgaoncar E Irmaos Lda* [1954] 2 QB 94, [1954] 2 All ER 92, [1954] 1 Lloyd's Rep 220 (following *Watson Bros v Mysore Mangnese Co Ltd* (1910) 11 Asp MLC 364, and distinguishing *Molière Steamship Co Ltd v Naylor, Benzon & Co* (1897) 2 Com Cas 92) three different methods of calculation under a 'reversible lay days' clause were considered.

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### 292. When demurrage ceases.

The liability for demurrage ceases as soon as the charterer has fully performed his obligation of providing or removing the cargo, and he is not responsible for any further delay not attributable to his default<sup>1</sup>. Thus, if, after the ship has been fully loaded and her clearances obtained<sup>2</sup>, she is unable to sail owing to bad weather, or is driven back to the port of loading, after sailing, by a storm, the shipowner's claim for demurrage does not continue or revive, as the case may be<sup>3</sup>.

The liability for demurrage is not, however, suspended where the loading is interrupted by an excepted peril<sup>4</sup>, unless the term expressly so provides<sup>5</sup>. Even if, by reason of a collision or otherwise, the ship is rendered unavailable for loading, or is compelled to leave the port, demurrage is payable for the period while she is under repair or while she is absent<sup>6</sup>, provided that these events are not due to the voluntary act of the shipowner or to default on his part<sup>7</sup>.

The charterparty sometimes expressly provides that time is not to count against laytime when spent or lost as a result of a breach of its terms by the shipowner<sup>8</sup>.

1 *Barret v Dutton* (1815) 4 Camp 333; *Smith v Wilson* (1817) 6 M & S 78; cf *General Steam Navigation Co v Slipper* (1862) 11 CBNS 493. If the ship comes on demurrage at the first of two loading ports, she does not continue on demurrage during the voyage to the second loading port: *Belyuton (Owners) v Theodosiani & Co* (1924) 158 LT Jo 65.

2 Where by the regulation or custom obtaining in the port it is the duty of the shipowner to obtain clearances, the charterer is not liable for delay due to the temporary impossibility of obtaining them: *Barret v Dutton* (1815) 4 Camp 333.

3 *Jamieson & Co v Laurie* (1796) 6 Bro Parl Cas 474, HL; *Pringle v Mollett* (1840) 6 M & W 80; cf *Lannoy v Werry* (1717) 4 Bro Parl Cas 630; *Connor v Smythe* (1814) 5 Taunt 654; *Rederi Akt Byigia v Anglo-Soviet Shipping Co* (1932) 38 Com Cas 142.

4 *Saxon Steamship Co v Union Steamship Co* (1900) 69 LJQB 907, 9 Asp MLC 114, HL.

5 *Lilly & Co v DM Stevenson & Co* (1895) 22 R 278; *Compania Naviera Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, sub nom *Union of India v Compania Naviera Aeolus, SA* [1962] 2 Lloyd's Rep 175, HL; *Dias Compania Naviera SA v Louis Dreyfus Corp* [1978] 1 All ER 724, [1978] 1 WLR 261, [1978] 1 Lloyd's Rep 325, HL; *Nippon Yusen Kaisha v SA Marocaine de L'Industrie du Raffinage, The Tsukuba Maru* [1979] 1 Lloyd's Rep 459; *Food Corp of India v Carras Shipping Co Ltd, The Delian Leto* [1983] 2 Lloyd's Rep 496; *Sametiet M/T Johs Stove v Istanbul Petrol Rafinerisi A/S, The Johs Stove* [1984] 1 Lloyd's Rep 38; *Islamic Republic of Iran Shipping Lines v Royal Bank of Scotland plc, The Anna Ch* [1987] 1 Lloyd's Rep 266; *Superfos Chartering A/S v NBR (London) Ltd, The Saturnia* [1987] 2 Lloyd's Rep 43, CA; *Marc Rich & Co Ltd v Tourloti Compania Naviera SA, The Kalliope A* [1988] 2 Lloyd's Rep 101, CA.

6 *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 KB 172, 16 Asp MLC 501, CA, applying *William Alexander & Sons v Aktieselskabet Dampskibet Hansa* [1920] AC 88, 14 Asp MLC 493, HL, and explaining *Tyne and Blyth Shipping Co v Leech, Harrison and Forwood* [1900] 2 QB 12. See also *Compania Crystal de Vapores of Panama v Herman and Mohatta (India) Ltd* [1958] 2 QB 196, [1958] 2 All ER 508, [1958] 1 Lloyd's Rep 616 (ship compelled to leave berth temporarily owing to threat of damage from bore tides).

7 Eg, if the shipowner removes the ship for his own convenience so that she is not available for loading, he cannot recover demurrage for the period during which she is unavailable, at any rate where he cannot show that the charterer could not have loaded during the period in question (*Re Ropner Shipping Co Ltd and Cleaves Western Valleys Anthracite Collieries Ltd* [1927] 1 KB 879, 17 Asp MLC 245, CA; *Stolt Tankers Inc v Landmark Chemicals SA* [2002] 1 Lloyd's Rep 786); or where the master's action in leaving a port during an air-raid is unjustified, the master having yielded to pressure from the crew (*Gem Shipping Co of Monrovia v Babanaft (Lebanon) SARL, The Fontevivo* [1975] 1 Lloyd's Rep 339); or if she negligently grounds and so cannot reach her berth (*Blue Anchor Line Ltd v Alfred C Toepfer International GmbH, The Union Amsterdam* [1982] 2 Lloyd's Rep 432).

8 *Mobil Shipping and Transportation Co v Shell Eastern Petroleum (Pte) Ltd, The Mobil Courage* [1987] 2 Lloyd's Rep 655.

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### **293. Arrival of the ship at charterer's disposal.**

Time does not begin to run against the charterer until the ship has been placed at his disposal<sup>1</sup>. She is not at his disposal until she has reached the place named in the charterparty as the place where she is to take in or deliver her cargo, as the case may be, and until she is ready to do so<sup>2</sup>. When these conditions are satisfied, she is said to be an 'arrived ship'<sup>3</sup>. Where the place is merely designated in general terms, as, for example, by the name of a port, difficult questions arise as to when the ship can be said to have 'arrived', within the meaning of the charterparty, at that port<sup>4</sup>. Even where a particular dock is specified, similar questions may arise<sup>5</sup>. It is, therefore, not unusual to insert an express term that the ship is to load or discharge at a particular berth, in which case she must be actually alongside the berth before the lay days begin to run<sup>6</sup>.

1 *Nelson v Dahl* (1879) 12 ChD 568 at 581, 4 Asp MLC 172 at 177, CA, per Brett LJ; *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA; *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA.

2 *Nelson v Dahl* (1879) 12 ChD 568, 4 Asp MLC 172, CA. See also *Bastifell v Lloyd* (1862) 1 H & C 388; and PARAS 407, 523. As to the distinction between waiting time and discharging time see *Gilbert J McCaul & Co Ltd v JR Moodie & Co Ltd* [1961] 1 Lloyd's Rep 308 at 317; and as to notice of readiness to load see PARA 294.

3 As to arrived ships see further PARA 407.

4 See PARAS 407 et seq, 523.

5 See note 4.

6 *Strahan v Gabriel* (1879) cited in 12 ChD 589; *Murphy v Coffin* (1883) 12 QBD 87, 5 Asp MLC 531n, DC; cf *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA (which decision appears to overrule *The Carisbrook* (1890) 15 PD 98, 6 Asp MLC 507). See also PARAS 410, 411, 524. Cf *Plata (Owners) v Ford & Co* [1917] 2 KB 593, 14 Asp MLC 93; and PARA 406 note 1.

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### **294. Written notice of readiness.**

Voyage charterparties do not always contain an express term as to notice of readiness to load or discharge<sup>1</sup>, but in practice a term is usually inserted<sup>2</sup> providing for the giving of a written notice that the ship is ready to load or discharge, as the case may be<sup>3</sup>. For a notice of readiness to be effective, the vessel must, at the time the notice is given<sup>4</sup>, be ready without delay to receive or discharge the cargo<sup>5</sup> in all respects bar preliminary and routine formalities, such formalities not including cleaning and fumigation of holds<sup>6</sup>. Thus, a notice is not effective if given in the knowledge that the vessel is not actually ready<sup>7</sup> or if it simply states that the vessel will be ready at a future time<sup>8</sup>.

The term may provide that time is to run from the giving of such notice after arrival, whether the ship has reached her berth or not<sup>9</sup> or notwithstanding that the ship is not ready<sup>10</sup>.

Where a notice of readiness is given before the vessel is actually ready to load or discharge, as the case may be, laytime runs as follows. In the period prior to the commencement of loading or discharge, laytime only runs from the giving of a valid notice given when the vessel is actually ready<sup>11</sup>. If loading or discharge had commenced, however, then laytime runs either from a valid notice given prior to the commencement of loading or discharge or, if no such valid notice was given, from the time at which the charterparty expressly states that laytime will run<sup>12</sup>.

Where the notice of readiness is accepted by the charterer without qualification, the charterer cannot then deny the validity of the notice, unless the acceptance was induced by the fraudulent or negligent<sup>13</sup> misrepresentation of the shipowner that the vessel was actually ready.

1 *Fairbridge v Pace* (1844) 1 Car & Kir 317; *Stanton v Austin* (1872) LR 7 CO 651.

2 See PARA 284.

3 As to notice in the absence of any term see PARA 416; as to delay caused by rules made by shore labourers see *Northfield Steamship Co v Compagnie L'Union des Gaz* [1912] 1 KB 434, 12 Asp MLC 87, CA; and as to delay caused by failure of a colliery to produce specified coal see *Arden Steamship Co Ltd v William Mathwin & Son* 1912 SC 211. Where the charterparty provided for loading at several ports and for the lay days to commence on the day following notice of readiness to load, it was held that it was only necessary to give notice of readiness at the first loading port, and that the time for loading ran against the charterers at a subsequent port of loading during the whole day on which the master gave them a second notice of readiness: *Burnett Steamship Co Ltd v Olivier & Co Ltd* (1934) 48 Ll L Rep 238. In *Pteroti Compania Naviera SA v National Coal Board* [1958] 1 QB 469, [1958] 1 All ER 603, [1958] 1 Lloyd's Rep 245, it was held, on the construction of the contract, that lay time did not begin to run until 24 hours after notice of readiness was given, notwithstanding that unloading had in fact begun before notice was given. See also *Christensen v Hindustan Steel Ltd* [1971] 2 All ER 811, [1971] 1 WLR 1369, [1971] 1 Lloyd's Rep 395 (where, on the true construction of the charterparty, notice of anticipated readiness did not suffice).

4 *Christensen v Hindustan Steel Ltd* [1971] 2 All ER 811, [1971] 1 WLR 1369, [1971] 1 Lloyd's Rep 395.

5 *Unifert International SARL v Panous Shipping Co Inc, The Virginia M* [1989] 1 Lloyd's Rep 603.

6 *Compania de Naviera Nedelka SA v Tradax Internacional SA, The Tres Flores* [1974] QB 264, [1973] 3 All ER 967, [1973] 2 Lloyd's Rep 247, CA.

7 *Cobelfret NV v Cyclades Shipping Co Ltd, The Linardos* [1994] 1 Lloyd's Rep 28.

8 *Christensen v Hindustan Steel Ltd* [1971] 2 All ER 811, [1971] 1 WLR 1369, [1971] 1 Lloyd's Rep 395; *Compania de Naviera Nedelka SA v Tradax Internacional SA, The Tres Flores* [1974] QB 264, [1973] 3 All ER 967, [1973] 2 Lloyd's Rep 247, CA.

9 See *Charlton Steamship Co Ltd v TW Allen & Sons Ltd* (1921) 38 TLR 70. In *North River Freighters Ltd v HE President of India* [1956] 1 QB 333, [1956] 1 All ER 50, [1956] 2 Lloyd's Rep 668, CA, effect was given to a term that time lost in waiting for a berth was to count as loading time, notwithstanding that no notice of readiness had been given. See also *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis* [1962] 2 QB 416, [1960] 3 All ER 797, sub nom *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis, The Massalia (No 2)* [1960] 2 Lloyd's Rep 352. Where a charterparty provides that time lost in waiting for a berth is to count as laytime, then, in the computation of the time lost waiting for a berth, there are to be excluded all periods which would have been left out in the computation of permitted laytime used up if the vessel had actually been in berth: *Aldebaran Compania Maritima SA Panama v Aussenhandel AG Zurich* [1977] AC 157, [1976] 2 All ER 963, [1976] 2 Lloyd's Rep 359, HL. The shipowner is entitled to rely on the phrase 'whether in berth or not' where no berth is available eg because of port congestion, but he is not so entitled where a berth is available and mere bad weather prevents the ship from proceeding there: *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd, The Kyzikos* [1989] AC 1264, [1988] 3 All ER 745, [1989] 1 Lloyd's Rep 1, HL.

10 *Cobelfret NV v Cyclades Shipping Co Ltd, The Linardos* [1994] 1 Lloyd's Rep 28; *United Nations Food and Agriculture Organisation--World Food Programme v Caspian Navigation Inc, The Jay Ganesh* [1994] 2 Lloyd's Rep 358.

11 See *Transgrain Shipping BV v Global Transporte Oceanico SA, The Mexico I* [1990] 1 Lloyd's Rep 507 at 513, CA, per Mustill LJ ('I find it impossible to say that the taking of this wrong step (an invalid NOR) is somehow to be deemed as the taking of a right step'). *The Mexico I* disapproved the judgment of Diplock J in *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis* [1962] 2 QB 416, [1960] 3 All ER 797, sub nom

*Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis, The Massalia (No 2)* [1960] 2 Lloyd's Rep 352, where it was held that, as soon as a vessel became ready to load, an originally invalid notice of readiness became valid and laytime started to run from the moment when the vessel was ready. The charterparty may expressly reverse the position set out in *The Mexico I* by stipulating that laytime will start whether the vessel is ready or not: such a clause would, however, be subject to an implied term that the NOR must have been given in good faith: see *Cobelfret NV v Cyclades Shipping Co Ltd, The Linardos* [1994] 1 Lloyd's Rep 28. See also *Galaxy Energy International Ltd v Novorossiysk Shipping Co, The Petr Schmidt* [1998] 2 Lloyd's Rep 1 (a notice of readiness tendered later than the hours specified for tender in the charterparty became effective at the next hour specified).

12 *Glencore Grain Ltd v Flacker Shipping Ltd, The Happy Day* [2002] EWCA Civ 1068, [2002] 2 All ER (Comm 896), [2002] 2 Lloyd's Rep 487.

13 *Surrey Shipping Co Ltd v Compagnie Continentale (France) SA, The Shackelford* [1978] 2 Lloyd's Rep 154, CA (where the notice of readiness had been accepted by the receivers even though it was premature); see also *Tidebrook Marine Corp v Vitol SA of Geneva, The Front Commander* [2006] EWCA Civ 944, [2006] 2 All ER (Comm) 813, [2006] 2 Lloyd's Rep 251; *Sofial SA v Ove Skou Rederi, The Helle Skou* [1976] 2 Lloyd's Rep 205.

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## 295. Meaning of 'in turn'.

Sometimes the charterparty provides that the ship is to be loaded or discharged 'in turn' or 'in regular turn', in which case the ship must take her turn with other ships in due order, and time does not begin to run against the charterer until her turn arrives unless the context indicates that time should run notwithstanding that her turn had not yet arrived<sup>1</sup>. He is not, therefore, responsible for any delay arising from the ship having to wait for her turn in the ordinary course<sup>2</sup>, but only for such delay as is attributable to his own default<sup>3</sup>, as, for example, where the ship loses her turn owing to the fact that he is not ready to deliver or receive the cargo<sup>4</sup>. Where, however, the ship loses her turn in consequence of a default on the part of the shipowner, any loss occasioned by the delay falls on the shipowner and not on the charterer<sup>5</sup>.

The meaning of 'in turn' varies according to the usage of the port unless the context shows that the usage was not intended to apply<sup>6</sup>. By the usage of a particular port<sup>7</sup> ships may be entitled to take their turn in order of arrival<sup>8</sup> or in order of readiness<sup>9</sup>; and one kind of cargo may be loaded before another<sup>10</sup>. If there is only one person at the port from whom the cargo can be obtained<sup>11</sup>, or to whom it can be delivered<sup>12</sup>, the practice followed by him will bind the shipowner as being the custom of the port. When, however, there are several persons available, the practice of the person actually chosen, where differing from the custom of the port, will not excuse a delay which would not have happened if the charterer had chosen a person whose practice accorded with the custom of the port<sup>13</sup>.

1 *United States Shipping Board v Frank C Strick & Co Ltd* [1926] AC 545, 17 Asp MLC 40, HL (Lord Sumner and Viscount Haldane dissenting) (where the authorities are reviewed by Viscount Cave LC); cf *Moor Line Ltd v Manganexport GmbH* [1936] 2 All ER 404, 55 Ll L Rep 114 (where the charterparty provided for loading in regular turn but also contained a provision that time was to count from a certain hour 'whether in berth or not', and the charterer was held liable for the period during which the ship was waiting her turn).

2 *United States Shipping Board v Frank C Strick & Co Ltd* [1926] AC 545, 17 Asp MLC 40, HL, approving *Robertson v Jackson* (1845) 2 CB 412; *The Cordelia* [1909] P 27, 11 Asp MLC 202. The charterer is responsible for any delay arising from the fact that the practice of the person loading or unloading the ship differs from that in ordinary use in the port: *Lawson v Burness* (1862) 1 H & C 396.

3 *Jones v Adamson* (1876) 3 Asp MLC 253, DC (where the charterer was also held liable for a further delay caused by bad weather); *Elliott v Lord* (1883) 5 Asp MLC 63, PC.

4 *Cawthorn v Trickett* (1864) 15 CBNS 754.

5 *Taylor v Clay* (1846) 9 QB 713; and see *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 KB 172 at 205, 16 Asp MLC 501 at 511, CA, per Atkin LJ, explaining *Tyne and Blyth Shipping Co v Leech, Harrison and Forwood* [1900] 2 QB 12.

6 As to the usages of ports, known as customs of the port, see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694.

7 See PARA 545. The custom is binding on the shipowner, even if unknown to him: *Robertson v Jackson* (1845) 2 CB 412; *King v Hinde* (1883) 12 LR Ir 113; cf *Leidemann v Schultz* (1853) 14 CB 38 (where it was held that evidence of the usage of the port was wrongly rejected).

8 *King v Hinde* (1883) 12 LR Ir 113.

9 *Lawson v Burness* (1862) 1 H & C 396.

10 *Leidemann v Schultz* (1853) 14 CB 38.

11 *King v Hinde* (1883) 12 LR Ir 113; *Temple, Thomson and Clarke v Runnalls* (1902) 18 TLR 822, CA; cf *Clacevich v Hutcheson & Co* (1887) 15 R 11.

12 *Robertson v Jackson* (1845) 2 CB 412.

13 *Hudson v Clementson* (1856) 18 CB 213; *Lawson v Burness* (1862) 1 H & C 396.

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## 296. Dispatch money.

As the charterer is entitled to the whole of the lay days for the purpose of loading or discharging his cargo<sup>1</sup>, it is not unusual for the charterparty to contain a term providing for the payment of what is called 'dispatch money' by the shipowner to the charterer for any time saved either in loading or discharging<sup>2</sup>. As in the case of demurrage<sup>3</sup>, dispatch money is payable at a given rate per day or hour saved<sup>4</sup>. In reckoning the time saved, the language of the particular term must be taken into account<sup>5</sup>. Unless there is something in the contract to show the contrary, the charterer is entitled to be credited with the whole of the time saved; if dispatch money is payable per hour, he counts every hour saved, whether a working hour or not, so that a day saved amounts to 24 hours for the purpose of dispatch money<sup>6</sup>.

Similarly, every day saved counts, whether or not it is a day excepted from the lay days by the charterparty<sup>7</sup>, such as a Sunday or a holiday<sup>8</sup>, unless on the construction of the charterparty it appears to have been the intention of the parties that such excepted days were not to be counted for this purpose<sup>9</sup>. The effect of a provision in the charterparty that dispatch money is to be payable for all working time saved is to exclude from the time saved Sundays and holidays and, possibly, rainy days<sup>10</sup>.

1 See PARA 289.

2 Dispatch money may be made payable only in respect of time in discharging: *Rowland and Marwood's Steamship Co Ltd v Nilson, Sons & Co* (1897) 2 Com Cas 198. As to the meaning of 'time saved' see *Laing v Hollway* (1878) 3 QBD 437, CA; *Nelson & Sons Ltd v Nelson Line Liverpool Ltd* [1907] 2 KB 705 at 724, 10 Asp MLC 544 at 555, 556, CA, per Buckley LJ (revsd without reference to this point [1908] AC 108, 11 Asp MLC 1, HL); *Re Royal Mail Steam Packet Co Ltd and River Plate Steamship Co Ltd* [1910] 1 KB 600, 11 Asp MLC 372; *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL. A charterer who

completes loading before the expiry of the lay days but thereafter detains the ship by failing to present bills of lading for signature will be entitled to dispatch money although he may be liable for damages for detention of the ship: *Nolisement (Owners) v Bunge and Born* [1917] 1 KB 160, 13 Asp MLC 524. If the charterparty provides that dispatch money is to be paid 'before steamer sails' and the charterers present an erroneous time sheet and are paid the amount appearing from it to be due, they may correct the error and recover a further amount after the sailing of the steamer, subject to any question of estoppel or settled account: *Hain Steamship Co Ltd v Sociedad Anonima Commercial de Exportacion e Importacion* (1932) 43 Ll L Rep 136. Where a charterparty provided that the ship should load at an Argentine port and that certain sums, expressed in sterling, should be paid for dispatch money before the steamer sailed, it was held that, if payment in Argentine currency were tendered and accepted at the loading port, sterling must be converted into Argentine currency at the current rate of the day and not a conventional rate prescribed by a decree of the Argentine government which, in the opinion of the House of Lords, was not intended to apply to international transactions: *Atlantic Shipping and Trading Co v Louis Dreyfus & Co (No 2)* (1922) 15 Asp MLC 570, HL. In *President of India v Moor Line Ltd* [1958] 2 Lloyd's Rep 205, Aust HC, it was held that a charterer was not entitled to dispatch money for time which, although not in fact saved, would have been saved but for the shipowners' inability to obtain labour.

3 See PARAS 287, 289 et seq.

4 Both dispatch money and demurrage may be included in the same clause (*Laing v Hollway* (1878) 3 QBD 437, CA; *Nelson & Sons Ltd v Nelson Line Liverpool Ltd* [1907] 2 KB 705, 10 Asp MLC 544, CA (revsd without reference to this point [1908] AC 108, 11 Asp MLC 1, HL); *Re Royal Mail Steam Packet Co Ltd and River Plate Steamship Co Ltd* [1910] 1 KB 600, 11 Asp MLC 372), or they may be dealt with in separate clauses (*The Glendevon* [1893] P 269, 7 Asp MLC 439, DC). The amount of dispatch money payable is often fixed at one-half the demurrage rate: see eg *Fury Shipping Co Ltd v State Trading Corp of India Ltd, The Atlantic Sun* [1972] 1 Lloyd's Rep 509.

5 See the cases cited in notes 6, 7.

6 *Laing v Hollway* (1878) 3 QBD 437, CA; but see note 10.

7 *Re Royal Mail Steam Packet Co Ltd and River Plate Steamship Co Ltd* [1910] 1 KB 600, 11 Asp MLC 372; *Mawson Shipping Co Ltd v Beyer* [1914] 1 KB 304, 12 Asp MLC 423.

8 If work is done on an excepted day, that day does not become a lay day unless there is an agreement to that effect, which is not to be implied from the mere fact of working on that day by consent; dispatch money is, therefore, payable as on the original period: *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1908] AC 108, 11 Asp MLC 1, HL. As to the meaning of 'holiday' see PARA 288 note 6.

9 *The Glendevon* [1893] P 269, 7 Asp MLC 439, DC; *Nelson & Sons Ltd v Nelson Line Liverpool Ltd* [1907] 2 KB 705, 10 Asp MLC 544, CA. It should be noted, however, that in this case Fletcher Moulton LJ dissented from the majority and disapproved of *The Glendevon* whilst in *Re Royal Mail Steam Packet Co Ltd and River Plate Steamship Co Ltd* [1910] 1 KB 600, 11 Asp MLC 372, Bray J expressed his agreement with the reasoning of Fletcher Moulton LJ. There was no appeal to the House of Lords from the decision of the Court of Appeal on the appeal from the judgment on a special case stated by the arbitrator which was heard by the Court of Appeal at the same time as the appeal in *Nelson & Sons v Nelson Line Liverpool Ltd*. Only the decision of the Court of Appeal in the action was appealed to the House of Lords, and it is the decision of the House in this appeal which is cited in note 8. See also *Bulk Transport Corp v Sissy Steamship Co Ltd, The Archipelagos and Delfi* [1979] 2 Lloyd's Rep 289.

10 *Thomasson Shipping Co Ltd v Henry W Peabody & Co of London Ltd* [1959] 2 Lloyd's Rep 296, applying *Alvion Steamship Corp Panama v Galban Lobo Trading Co SA of Havana* [1955] 1 QB 430, [1955] 1 All ER 457, [1955] 1 Lloyd's Rep 9, CA. In *Thomasson Shipping Co Ltd v Henry W Peabody & Co of London Ltd* dispatch money was payable for all working time saved in loading and discharging at the rate of £100 per day, or pro rata for part of a day saved. The working time saved amounted to a little over 76 hours, and the shipowners contended that that figure should be divided by 24 to find the number of days, while the charterers contended that it should be divided by eight and two-thirds (the working day), and the charterers' contention was upheld by McNair J. Cf the text and note 6.

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### (k) Exceptions Relieving the Charterer

## 297. Scope of exceptions.

It is usual for the charterer to protect himself by an express term against the consequences of delay in the performance of his obligations. Sometimes the exceptions which relieve the shipowner from responsibility are made equally available for the charterer<sup>1</sup>. More often the terms which define the charterer's obligations do not impose on him an absolute duty to fulfil them, but exempt him from liability where his failure to do so is occasioned by certain specified events, which are thus excepted from the charterparty.

The term in its ordinary form provides that any time lost, whether in the loading or in the discharge, in consequence of the happening of an excepted event, is not to be counted, unless actually used. The extent of this protection may be limited by a proviso that no deduction of time is to be allowed if the ship is already on demurrage when the event happens<sup>2</sup>, or if the charterer fails to give due notice of its happening to the master or shipowner. Where the event takes place at the port of loading and prevents the charterer from loading a cargo, the term may provide that the charterparty is to become null and void, except as regards any cargo already shipped. The charterer is thus relieved from the obligation to supply any further cargo. Sometimes, however, a proviso is inserted that the charterparty is not to become null and void if part of the cargo has already been shipped<sup>3</sup>.

1 *Bruce v Nicolopulo* (1855) 11 Exch 129; *Brown v Turner, Brightman & Co* [1912] AC 12, 12 Asp MLC 79, HL. As to whether the ordinary exceptions in a charterparty protect the charterer see PARA 281.

2 See *Compania Naviera Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, sub nom *Union of India v Compania Naviera Aeolus, SA* [1962] 2 Lloyd's Rep 175, HL; *Dias Compania Naviera SA v Louis Dreyfus Corp* [1978] 1 All ER 724, [1978] 1 WLR 261, [1978] 1 Lloyd's Rep 325, HL; *Nippon Yusen Kaisha v SA Marocaine de L'Industrie du Raffinage, The Tsukuba Maru* [1979] 1 Lloyd's Rep 459; *The Mozart* [1985] 1 Lloyd's Rep 239; *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd, The Apostolis (No 2)* [1999] 2 Lloyd's Rep 292. Even without such a proviso, exceptions which would protect a charterer during lay days will not protect him when the ship is on demurrage in the absence of an express term: see *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352 at 363, 17 Asp MLC 144 at 148, CA, per Atkin LJ; and PARAS 431-432.

3 *Steel, Young & Co v Grand Canary Coaling Co* (1904) 9 Asp MLC 584, HL. As to where the delay is such as wholly to frustrate the adventure see PARA 429.

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## 298. Construction of exceptions.

Any term relieving the charterer from responsibility being inserted for his benefit must be construed against him<sup>1</sup>, and the words used must be taken in their obvious meaning<sup>2</sup>. Where, however, the words are ambiguous, the meaning must be gathered from the surrounding circumstances to which the charterparty was intended to apply<sup>3</sup>. The burden of proving that the term is operative in any particular case rests on the charterer<sup>4</sup>. It is not sufficient to show that an excepted event happened and as a matter of fact prevented the charterer from fulfilling his obligation in the way which he had chosen<sup>5</sup>; he must show either that the way he had chosen was the only practicable way of performing his obligation<sup>6</sup>, and that it was not, according to known commercial usage, possible to perform it in any other way<sup>7</sup>, or, if other ways of performing it were available, that the event would have affected them all<sup>8</sup>.

1 See generally PARA 276; and *Hudson v Ede* (1867) LR 2 QB 566 at 578 per Blackburn J; *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL; distinguished in *Allerton Sailing Ship Co Ltd v Falk* (1888) 6 Asp MLC 287; and see PARA 429. For the general principles of construction see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 178-179.

2 *Hudson v Ede* (1867) LR 2 QB 566; and see PARA 228. As to the exclusion of liability for negligence see PARA 280. Exclusion of liability arising in contract is also restricted by statute, but only in favour of a person dealing as consumer: see the Unfair Contract Terms Act 1977 ss 1(2), 3, Sch 1 para 2; PARAS 265, 280; and **CONTRACT** vol 12(1) (Reissue) PARA 828.

3 *Hudson v Ede* (1867) LR 2 QB 566 (distinguished in *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA, and in *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL); *Allerton Sailing Ship Co Ltd v Falk* (1888) 6 Asp MLC 287 (distinguishing *Grant & Co v Coverdale, Todd & Co*); *Re an Arbitration between Lockie and Craggs & Son* (1901) 9 Asp MLC 296, with which cf *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA; *Portolana Compania Naviera Ltd v Vitol SA Inc* [2004] EWCA Civ 864, [2004] 2 All ER (Comm) 578, [2004] 2 Lloyd's Rep 305.

4 *The Village Belle* (1874) 2 Asp MLC 228.

5 *The Village Belle* (1874) 2 Asp MLC 228; *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA; *Stephens v Harris* (1887) 57 LJQB 203, CA; *Granite City Steamship Co Ltd v Ireland & Son* (1891) 19 R 124; *Gardiner v Macfarlane, M'Crindell & Co* (1893) 20 R 414; *Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA; *Dampskibsselskabet Svendborg v Love and Stewart Ltd* 1915 SC 543 (affd on other grounds (1916) 53 SLR 574, HL); *The Mozart* [1985] 1 Lloyd's Rep 239 (charterparty required charterers to give due notice of stoppage to the master or shipowner before deduction of time allowed; the requirement was held not to impose a duty on the charterers to inform the master of facts of which he was already aware); applied in *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd, The Apostolis (No 2)* [1999] 2 Lloyd's Rep 292.

6 *Hudson v Ede* (1867) LR 2 QB 566, applied in *Stephens v Harris* (1887) 57 LJQB 203, CA; cf *Granite City Steamship Co Ltd v Ireland & Son* (1891) 19 R 124. If the charterer has ordered the ship, in accordance with the charterparty, to proceed to a particular port for discharge, the subsequent outbreak of a strike at that port does not preclude him from claiming the protection of a strike clause, and he is not bound to stop the ship or name another port (*Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA; and see also *Frontier International Shipping Corp v Swissmarine Corp Inc, The Cape Equinox* [2004] EWHC 8 (Comm), [2005] 1 All ER (Comm) 528, [2005] 1 Lloyd's Rep 390); moreover 'there is no settled rule of construction that a specific exception, such as strikes or war, cannot be relied upon if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port' (*Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1960] 1 QB 439 at 495, [1959] 3 All ER 434 at 457, [1959] 2 Lloyd's Rep 229 at 253 per McNair J; affd [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL). Cf *Bunge y Born Lda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799, 16 Asp MLC 545, HL.

7 *Allerton Sailing Ship Co Ltd v Falk* (1888) 6 Asp MLC 287, distinguishing *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL.

8 *The Village Belle* (1874) 2 Asp MLC 228; cf *Bruce v Nicolopulo* (1885) 11 Exch 129.

## UPDATE

### 298-299 Construction of exceptions, Principal exceptions; in general

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 299. Principal exceptions; in general.

The principal exceptions<sup>1</sup> which are inserted for the special protection of the charterer are:

- 30 (1) strikes and lock-outs<sup>2</sup>;
- 31 (2) riots and civil commotions<sup>3</sup>;
- 32 (3) accidents beyond the charterer's control<sup>4</sup>;
- 33 (4) ice, frost, fog and storm<sup>5</sup>;
- 34 (5) war<sup>6</sup>.

A negligence clause is sometimes inserted exempting the charterer from responsibility for any negligence, default or error in judgment of trimmers or stevedores employed in loading or discharging the cargo<sup>7</sup>.

The exceptions clause sometimes provides that no deduction of time is to be allowed unless due notice of a stoppage by an excepted cause is given by the master<sup>8</sup>.

1 It is impossible to deal in detail with all exceptions which may be employed. Exceptions which have been judicially considered are referred to in PARAS 300-303 or are referred to in dealing with the duties of the charterer which are modified by their insertion in the contract. As to 'detention by railways' see *Letricheux and David v James Dunlop & Co, The Abertawe* (1891) 19 R 209; cf *Granite City Steamship Co v Ireland & Son* (1891) 19 R 124; *Bunge y Born Lda Sociedad Anonima Commercial Financiere y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799, 16 Asp MLC 545, HL. The charterer as well as the shipowner will be precluded from relying on the exception if the negligence of himself or his agents contributed to his inability to fulfil his obligations: *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560, 15 Asp MLC 398, CA; and see PARA 274 note 7. Where the Admiralty requisitioned a ship on the terms of a wartime charterparty, which provided that the Admiralty should be liable for war risks but not for marine risks, it was held that it was liable to repay the shipowners the amount by which an award for salvage services to the ship had been increased by reason of the fact that the ship was in danger of drifting on to a minefield: *Pyman Steamship Co v Admiralty Comrs* [1919] 1 KB 49, 14 Asp MLC 364, CA. As to an exception of 'force majeure, or any other hindrance of whatsoever nature beyond the charterers' control' see *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL.

2 See PARA 300.

3 These words have presumably the same meaning as in an insurance policy: see **INSURANCE** vol 25 (2003 Reissue) PARAS 596, 597.

4 See PARA 301.

5 See PARA 302.

6 See PARA 303.

7 See *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560, 15 Asp MLC 398, CA (where the charterers were liable for the negligence of the stevedores, there being no exception covering their negligence). For a discussion of the meaning of a provision that the charterers are to redeliver the vessel in the same good order as when delivered to them 'fair wear and tear excepted' see *Chellev Navigation Co Ltd v AR Appelquist Kolimport AG* (1933) 38 Com Cas 218. As to negligence clauses under the Unfair Contract Terms Act 1977 see PARA 280.

8 *The Mozart* [1985] 1 Lloyd's Rep 239 (charterer failing to give notice of loss of time caused by the breakdown of a stacker reclaimer); *Valla Giovanni & Co SpA v Gebr Van Weelde Scheepvaartkantoor BV, The Chanda* [1985] 1 Lloyd's Rep 563 (stoppage of loading due to floods; the question was whether the notice given by the charterers' agents was valid).

## UPDATE

### 298-299 Construction of exceptions, Principal exceptions; in general

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 300. Strikes and lock-outs.

One of the exceptions which is inserted for the protection of the charterer is in respect of strikes<sup>1</sup> and lock-outs. The phrase 'strikes and lock-outs' implies a labour dispute<sup>2</sup>; it does not, therefore, cover the case where workmen abandon their work through fear of an epidemic<sup>3</sup>, or where the employer dismisses them because he has no work for them<sup>4</sup>. A strike has been defined as 'a general concerted refusal by workmen to work in consequence of an alleged grievance'<sup>5</sup>, and includes a 'sympathetic' strike<sup>6</sup>. The exception may be limited to workmen essential to the loading or discharge of the cargo<sup>7</sup>; it may extend to workmen connected with the supply of the cargo<sup>8</sup>, or it may be framed in general terms<sup>9</sup>. It does not usually apply to workmen in the employment of the shipper or receiver of the cargo if, by the use of reasonable diligence, he could have procured other suitable labour<sup>10</sup>. The 'Centrocon' strike clause exempted charterers from demurrage where the ship was unable to berth owing to the berth being occupied by other ships delayed by a strike<sup>11</sup>.

1 As to the effect of a strike on the charterer's obligations in the absence of an express exception see PARA 541; and as to the effect of a strike clause upon the payment of hire under a time charter see *Brown v Turner, Brightman & Co* [1912] AC 12, 12 Asp MLC 79, HL. For a strike clause (in a bill of lading) intended to protect the shipowners see *Wiles & Co Ltd v Ocean Steamship Co Ltd* (1912) 107 LT 825. Where the charterparty provided that the parties mutually exempted each other from all liability for time lost through strikes, that provision did not prevent time for loading from running against the charterer during a strike of engineers, although the strike prevented the shipowner from obtaining the necessary engineers for the voyage and rendered it uncertain whether the ship would be able to sail within a reasonable time; the doctrine of frustration of the adventure was held inapplicable: *Ropner & Co v Ronnebeck* (1914) 13 Asp MLC 47. Cf *The Penelope* [1928] P 180, 17 Asp MLC 486 (where the charterparty was held to be frustrated by the 1926 coal strike). As to frustration of charterparties generally see PARA 237. In *Dampskibsselskabet Svendborg v Love and Stewart Ltd* 1915 SC 543 (affd on other grounds (1916) 53 SLR 574, HL) it was held that an exception of 'strike of any class of workmen essential to the discharge' was inapplicable to a strike of men employed to unload the cargo at the receiver's yard, which was a quarter of a mile from the ship's discharging berth. Where a charterparty permitted the loading of a variety of different cargoes and the loading of one was prevented by a strike, a strike clause was held to excuse delay only for such time as was necessary for the charterer to provide another cargo: *South African Dispatch Line v Panamanian Steamship Niki* [1960] 1 QB 518, [1960] 1 All ER 285, [1959] 2 Lloyd's Rep 663, CA; but see *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL (loading of intended cargo prevented by strike; no obligation to load alternative cargo), distinguishing *Brightman & Co v Bunge y Born Lda Sociedad* [1924] 2 KB 619, 16 Asp MLC 423, CA. Where the ship is already on demurrage when the strike occurs, the charterers cannot avail themselves of the strike clause because the principle 'once on demurrage always on demurrage' applies: *Superfos Chartering A/S v NBR (London) Ltd, The Saturnia* [1987] 2 Lloyd's Rep 43, CA; and see also *Frontier International Shipping Corp v Swissmarine Corp Inc, The Cape Equinox* [2004] EWHC 8 (Comm), [2005] 1 All ER (Comm) 528, [2005] 1 Lloyd's Rep 390.

2 *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA; *Horsley Line Ltd v Roechling Bros* 1908 SC 866; cf *Gordon Steamship Co Ltd v Moxey Savon & Co Ltd* (1913) 12 Asp MLC 339. Where the exception concludes with the phrase 'or any other cause beyond the charterer's control', an unauthorised holiday taken by the workmen will be covered: *Re Allison & Co and Richards* (1904) 20 TLR 584, CA.

3 *Stephens v Harris* (1887) 6 Asp MLC 192, DC (affd without deciding this point 57 LJQB 203, CA); *Mudie & Co v Strick* (1909) 11 Asp MLC 235 (not affected on this point by the order for a new trial made 14 Com Cas 227, CA). The exception may, however, be framed in terms sufficiently wide to cover the case: *Beatson v Schank*

(1803) 3 East 233. A concerted refusal to sail owing to fear of submarines was held to be a 'strike' in *Williams Bros (Hull) Ltd v WH Naamlooze Vennootschap Berghuys Kolenhandel* (1915) 86 LJBK 334, 21 Com Cas 253.

4 *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA.

5 *Williams Bros (Hull) Ltd v WH Naamlooze Vennootschap Berghuys Kolenhandel* (1915) 86 LJBK 334 at 335, 21 Com Cas 253 at 257 per Sankey J.

6 *J Vermaas' Scheepvaartbedrijf NV v Association Technique de l'Importation Charbonnière, The Laga* [1966] 1 Lloyd's Rep 582 at 590 per McNair J; *Tramp Shipping Corp v Greenwich Marine Inc* [1975] 2 All ER 989, [1975] 1 WLR 1042, [1975] 2 Lloyd's Rep 314 at 317, CA, per Lord Denning MR.

7 *Reid v Lee & Sons* (1901) 17 TLR 771; *Langham Steamship Co Ltd v Gallagher* (1911) 12 Asp MLC 109; *Caltex Oil (Australia) Pty Ltd v Howard Smith Industries Pty Ltd, The Howard Smith* [1973] 1 Lloyd's Rep 544 (NSW) (where the charterparty stated that the demurrage rate would be reduced for time lost 'through strike action by tugboat crews or pilots'). Where the exception refers to a general strike, eg of lightermen, it is sufficient if there is a general strike among a particular class of lightermen, even if other classes of lightermen do not strike, provided that the charterer is prevented from fulfilling his contract: *Aktieselskabet Shakespeare v Ekman & Co* (1902) 18 TLR 605, CA.

8 *Petersen v Dunn & Co* (1895) 43 WR 349; *Lilly & Co v Stevenson & Co* (1895) 22 R 278.

9 *The Alne Holme* [1893] P 173, 7 Asp MLC 344; *Petersen v Dunn & Co* (1895) 43 WR 349; *London and Northern Steamship Co Ltd v Central Argentine Rly Ltd* (1913) 12 Asp MLC 303. A strike of workmen unconnected with the ship or cargo in any way is not within the exception, even if its ultimate effect is to delay the ship: *Gardiner v Macfarlane, M'Crindell & Co* (1893) 20 R 414. See also *Granite City Steamship Co v Ireland & Son* (1891) 19 R 124. If the delay is caused by a strike covered by the exception, it is immaterial that the strike has already ended before the arrival of the ship: *Leonis Steamship Co Ltd v Rank Ltd* (1908) 13 Com Cas 161 (affd 13 Com Cas 295, CA); followed in *Moor Line Ltd v Distillers Co* 1912 SC 514, and followed, as to the meaning of 'obstruction', in *Reardon Smith Line Ltd v East Asiatic Co Ltd* [1938] 4 All ER 107, 19 Asp MLC 235; and *Reederij Amsterdam NV v President of India, The Amstelmolen* [1961] 2 Lloyd's Rep 1, CA. Cf *Gordon Steamship Co Ltd v Moxey Savon & Co Ltd* (1913) 12 Asp MLC 339; and *Central Argentine Rly Ltd v Marwood* [1915] AC 981, 13 Asp MLC 153, HL, applying *London and Northern Steamship Co Ltd v Central Argentine Rly Ltd*; *Westoll v Lindsay* 1916 SC 782, and distinguishing *Moor Line Ltd v Distillers Co*. A refusal to work part of the day may be held to be a strike even if such a refusal is not in breach of contract: *Tramp Shipping Corp v Greenwich Marine Inc* [1975] 2 All ER 989, [1975] 1 WLR 1042, [1975] 2 Lloyd's Rep 314, CA.

10 *Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA.

11 *Reederij Amsterdam NV v President of India, The Amstelmolen* [1961] 2 Lloyd's Rep 1, CA. See also *Compania Naviera Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, sub nom *Union of India v Compania Naviera Aeolus, SA* [1962] 2 Lloyd's Rep 175, HL (where a Centrocon strike clause incorporated in a bill of lading exempted receivers of goods from demurrage during delay).

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### 301. Accidents beyond the charterer's control.

The exception of accidents<sup>1</sup> beyond the charterer's control applies only to what is strictly an accident, and not to something which is one of the ordinary operations of nature, such as, for example, a fall of snow<sup>2</sup>, nor to events which could reasonably have been ascertained before the charterparty was signed<sup>3</sup>.

1 Another word used is 'causes'. In *Hibernian Steamship Co Ltd v Suttons Ltd* (1912) 47 ILT 39, default of a railway company to provide wagons was held to be within the words 'or any cause beyond the personal control of the charterers'; and in *SA Marocaine de l'Industrie du Raffinage v Notos Maritime Corp, The Notos* [1987] 1 Lloyd's Rep 503, HL, where a vessel was delayed by 'swell' in reaching her berth, the charterer was excused because the reason was 'one over which he had no control'. The phrase may also take the form 'unavoidable

accidents and hindrances': *Crawford and Rowat v Wilson Sons & Co* (1896) 12 TLR 170, CA (where the phrase was held to apply to rebellion). Whatever its form, the phrase is usually employed in conjunction with a list of exceptions, and the ejusdem generis rule will usually apply (*Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA; *SS Knutsford Ltd v Tillmanns & Co* [1908] AC 406, 11 Asp MLC 105, HL; *Mudie & Co v Strick* (1909) 11 Asp MLC 235; *Thorman v Dowgate Steamship Co* [1910] 1 KB 410, 11 Asp MLC 481; *Abchurch Steamship Co v Stinnes* 1911 SC 1010), unless the context shows that it was intended to exclude the rule, eg by the use of the word 'whatsoever' (*Larsen v Sylvester & Co* [1908] AC 295, 11 Asp MLC 78, HL; *Jenkins v L Walford (London) Ltd* (1917) 87 LJB 136; *Hadjipateras v S Weigall & Co* (1918) 34 TLR 360). Cf *Glasgow Navigation Co v Iron Ore Co* 1909 SC 1414; *Arden Steamship Co Ltd v William Mathwin & Son* 1912 SC 211; *France, Fenwick & Co Ltd v Philip Spackman & Sons* (1912) 12 Asp MLC 289; *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175, 16 Asp MLC 28, HL.

2 *Fenwick v Schmalz* (1868) LR 3 CP 313. Where the exception was of 'hindrances beyond the charterer's control', the fact that owing to an increased demand for coal the supplier of the coal cargo failed to deliver the cargo to the charterer was not within the exception: *Gardiner v Macfarlane, M'Crindell & Co* (1893) 20 R 414.

3 *The Angelia, Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 2 All ER 144, [1973] 1 WLR 210, [1972] 2 Lloyd's Rep 154 (lack of transport already existing).

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### 302. Ice, frost, fog or storm.

The charterer is not protected against the perils of ice, frost, fog or storm, unless they are specially excepted<sup>1</sup>, and, even where they are specially excepted, the charterer cannot avail himself of the special exemption clause, if, for example, he has undertaken to provide ice-breaker assistance<sup>2</sup> and has failed to do so<sup>3</sup>.

1 *Fenwick v Schmalz* (1868) LR 3 CP 313. As to the scope of such an exception see *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL, distinguished in *Allerton Sailing Ship Co Ltd v Falk* (1888) 6 Asp MLC 287. See also *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA; *Matheos (Owners) v Louis Dreyfus & Co* [1925] AC 654, 16 Asp MLC 486, HL.

2 A clause has sometimes been inserted to the effect that the charterer undertakes to provide ice-breaker assistance to enable the vessel to reach and leave the loading port; and it has been decided: (1) that the effect of the clause was that the charterer had entered into an absolute undertaking that ice-breaker assistance should be provided, and that, if it was not provided, the charterer would be liable for a breach of this undertaking even if he had taken all reasonable steps to procure it; (2) that the ice-breaker assistance must be continued for as long as was necessary and must be adequate to the needs of the chartered ship; and (3) that the charterer would be liable for any detention of the ship caused by the departure of the ice-breaker or by the fact that the chartered ship was included in a convoy which contained too many ships to be dealt with by the ice-breakers provided: *Ugleexport Charkow v SS Anastasia (Owners), Russian Wood Agency Ltd v Dampskibsselskabet Heimdal* (1934) 18 Asp MLC 482, HL.

3 *Danneburg v White Sea Timber Trust Ltd* (1935) 18 Asp MLC 542, CA; cf *Britain Steamship Co Ltd v Donogol of Charkoff* (1932) 44 Ll L Rep 123 (where the clause on which the charterers were held entitled to rely was not an exception clause). The charterers were held liable owing to the ships convoyed being too many for the ice-breakers provided in *Steam Akties v Arcos Ltd* (1933) 47 Ll L Rep 159, CA, applied in *Dux A/S v Arcos Ltd, Standard A/S v Arcos Ltd* (1935) 52 Ll L Rep 250. See also *Rendal A/S v Arcos Ltd* (1935) 52 Ll L Rep 254; affd on other grounds (namely insufficient notice of claim) [1936] 1 All ER 623, 54 Ll L Rep 309, CA, but decision of Court of Appeal on the question of notice revsd and judgment of Goddard J restored [1937] 3 All ER 577, 58 Ll L Rep 287, HL. The decision of the House of Lords (*Ugleexport Charkow v Anastasia (Owners)*) (1934) 18 Asp MLC 482, HL) was expounded and applied by Scrutton LJ, who delivered the judgment of the Court of Appeal, in *Andrea Sanguineti, Fu Davide of Genoa v Ugleexport of Moscow* (1934) 39 Com Cas 248, CA (where the matter was remitted to the arbitrator for further findings in the light of the observations of Scrutton LJ).

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### 303. War.

Where the outbreak of war renders performance of the charterparty illegal<sup>1</sup>, the charterer is discharged from the obligation of performing his contract<sup>2</sup>.

1 *Esposito v Bowden* (1857) 7 E & B 763, Ex Ch. See also *Avery v Bowden* (1856) 6 E & B 953 at 962, Ex Ch; cf *Duncan v Köster, The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214. As to illegality see PARA 233.

2 This result follows whether or not there is an express provision on the point in the charterparty: see PARA 428.

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#### (l) Cesser of Liability Clauses

### 304. Effect of cesser clause.

A charterparty usually contains a term (a 'cesser clause'), providing that the charterer's liability under the charterparty is to cease as soon as the cargo is shipped<sup>1</sup>. Such a term is valid<sup>2</sup>, but its effect varies according to the language in which it is framed<sup>3</sup>. Whatever form the term may take, the exemption as regards future liabilities arising after the loading appears to be absolute<sup>4</sup>. As regards antecedent liabilities, the cesser of liability depends on the wording of the clause. The clause may expressly deal with such liabilities; it may provide that the liability in respect of them is to continue<sup>5</sup> or to cease, either absolutely<sup>6</sup>, or conditionally on their discharge.

There is usually no express reference to antecedent liabilities, and the extent of the exemption then depends upon the construction to be placed on the particular term used<sup>7</sup>. If it is clear from the words of the term that all liabilities under the charterparty, antecedent as well as future, are to cease on loading, the exemption is equally absolute in the case of antecedent liabilities as in the case of future liabilities<sup>8</sup>. If, however, the words used are open to a different interpretation, the charterer's liability as to antecedent breaches of the charterparty will cease only in so far as an equivalent is given to the shipowner<sup>9</sup> in the shape of a remedy available against the consignee<sup>10</sup>. The cesser clause will, therefore, be construed as inapplicable to the particular breach complained of if the effect of a different construction would be to leave the shipowner unprotected in respect of that particular breach<sup>11</sup>.

The charterer's conduct may show that he has waived his right to rely on a cesser clause<sup>12</sup>.

1 The effect of the clause is to exempt the charterer from liability, whether he is an agent only or a principal: *Francesco v Massey* (1873) LR 8 Exch 101, following *Bannister v Breslauer* (1867) LR 2 CP 497. The last-named decision has, however, been doubted: see per Brett J in *Gray v Carr* (1871) LR 6 QB 522 at 537, 1 Asp MLC 115 at 120, Ex Ch, and in *French v Gerber* (1876) 1 CPD 737 at 743 (affd (1877) 3 Asp MLC 403, CA) and *Clink v Radford & Co* [1891] 1 QB 625 at 629, 7 Asp MLC 10 at 12, CA. See also *Clink v Radford & Co* at 631 and at 13 per Bowen LJ. The fact that he is the consignee of the cargo makes no difference (*Sanguinetti v Pacific Steam Navigation Co* (1876) 2 QBD 238, 3 Asp MLC 300, CA), unless he is otherwise liable under the bill of lading (*Gullischen v Stewart Bros* (1884) 13 QBD 317, 5 Asp MLC 200, CA; *Bryden v Niebuhr* (1884) Cab & El 241; cf *Barwick v Burnyeat, Brown & Co* (1877) 3 Asp MLC 376).

- 2 *Oglesby v Yglesias* (1858) EB & E 930.
- 3 *Gray v Carr* (1871) LR 6 QB 522 at 549, 1 Asp MLC 115 at 124, 125, Ex Ch, per Bramwell B.
- 4 *Oglesby v Yglesias* (1858) EB & E 930. 'The words of the clause must necessarily absolve from all future liability or mean nothing': *French v Gerber* (1876) 1 CPD 737 at 744 per Brett LJ; affd (1877) 3 Asp MLC 403, CA.
- 5 *Lister v Van Haansbergen* (1876) 1 QBD 269, 3 Asp MLC 145 (where the words 'loading excepted' in the cesser clause were held to extend to delay in loading, so that the charterer remained liable notwithstanding the shipment of a full and complete cargo).
- 6 *Oglesby v Yglesias* (1858) EB & E 930.
- 7 *Clink v Radford & Co* [1891] 1 QB 625, 7 Asp MLC 10, CA; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1963] 2 Lloyd's Rep 113, CA (where it was held that by reason of the cesser clause the charterers were not liable for demurrage at the port of loading).
- 8 *Milvain v Perez* (1861) 3 E & E 495; *French v Gerber* (1876) 1 CPD 737 (affd (1877) 2 CPD 247, 3 Asp MLC 403, CA); *Restitution Steamship Co v Sir John Pirie & Co* (1889) 7 Asp MLC 11n, CA; *Salvesen & Co v Guy & Co* (1885) 13 R 85.
- 9 *Lockhart v Falk* (1875) LR 10 Exch 132, 3 Asp MLC 8. See also *Christoffersen v Hansen* (1872) LR 7 QB 509, 1 Asp MLC 305; *Clink v Radford & Co* [1891] 1 QB 625, 7 Asp MLC 10, CA, doubting *Bannister v Breslauer* (1867) LR 2 CP 497; and note 1.
- 10 This remedy takes the form of a lien over the cargo: see PARA 306.
- 11 *Clink v Radford & Co* [1891] 1 QB 625 at 627, 7 Asp MLC 10 at 12, CA, per Lord Esher MR; *Dunlop & Sons v Balfour, Williamson & Co* [1892] 1 QB 507, 7 Asp MLC 181, CA.
- 12 See eg *Marvigora Compania Naviera SA v Romanoexport State Co for Foreign Trade, The Corinthian Glory* [1977] 2 Lloyd's Rep 280.

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### 305. Construction of cesser clause.

To ascertain the extent of the protection conferred by a cesser clause, the lien clause which may follow it<sup>1</sup> embodying the remedy given to the shipowner as the corollary of the charterer's release must be read with it, and the two clauses must, if possible, be taken as co-extensive<sup>2</sup>. In the absence of words clearly showing such an intention no liability is removed by the cesser clause, unless it is re-created in someone else by the lien clause<sup>3</sup>. The construction of the cesser clause is, therefore, governed by the construction of the lien clause; and, if that clause confers no lien on the shipowner in respect of the claim in question, the charterer's liability is not taken away by the cesser clause<sup>4</sup>. Accordingly, the cesser clause usually provides that it is not to take effect unless the cargo shipped is sufficient to satisfy the various liens which the shipowner may possess over the cargo<sup>5</sup>.

1 See PARA 306.

2 *Clink v Radford & Co* [1891] 1 QB 625 at 632, 7 Asp MLC 10 at 13, CA, per Fry LJ; *Dunlop & Sons v Balfour, Williamson & Co* [1892] 1 QB 507, 7 Asp MLC 181, CA; *Hansen v Harrold Bros* [1894] 1 QB 612, 7 Asp MLC 464, CA, applied in *Jenneson, Taylor & Co v Secretary of State for India in Council* [1916] 2 KB 702, 14 Asp MLC 41 (where the cesser clause was held not to relieve the charterer as the form of bill of lading prescribed by the charterparty did not provide for discharge at the rate specified in the charterparty and gave no lien for demurrage and other claims). See also *Williams & Co v Canton Insurance Office Ltd* [1901] AC 462, 9 Asp MLC 247, HL; *Overseas Transportation Co v Mineralimportexport, The Sinoe* [1972] 1 Lloyd's Rep 201, CA; *The*

*Cunard Carrier, Eleranta and Martha* [1977] 2 Lloyd's Rep 261; *Granvias Oceanicas Armadora SA v Jibsen Trading Co, The Kavo Peiratis* [1977] 2 Lloyd's Rep 344; *Bravo Maritime (Chartering) Est v Alsayed Abdullah Mohamed Baroom, The Athinoula* [1980] 2 Lloyd's Rep 481; *Gerani Compania Naviera SA v Toepfer, The Demosthenes V (No 2)* [1982] 1 Lloyd's Rep 282; *Action SA v Britannic Shipping Corp Ltd, The Aegis Britannic* [1987] 1 Lloyd's Rep 119, CA (cesser clause did not relieve charterers of liability where no alternative remedy was in practice available to the shipowners).

3 *Clink v Radford & Co* [1891] 1 QB 625 at 632, 7 Asp MLC 10 at 13, CA, per Fry LJ. See also *Francesco v Massey* (1873) LR 8 Exch 101; *Kish v Cory* (1875) LR 10 QB 553, 2 Asp MLC 593, Ex Ch; *Sanguinetti v Pacific Steam Navigation Co* (1876) 2 QBD 238, 3 Asp MLC 300, CA; *Action SA v Britannic Shipping Corp Ltd, The Aegis Britannic* [1987] 1 Lloyd's Rep 119, CA.

4 *Christoffersen v Hansen* (1872) LR 7 QB 509, 1 Asp MLC 305. See also *Pedersen v Lotinga* (1857) 5 WR 290; *Lockhart v Falk* (1875) LR 10 Exch 132, 3 Asp MLC 8, followed in *Dunlop & Sons v Balfour, Williamson & Co* [1892] 1 QB 507, 7 Asp MLC 181, CA, and in *Gardiner v Macfarlane, M'Crindell & Co* (1889) 16 R 658. It is otherwise as regards future liabilities: *French v Gerber* (1876) 1 CPD 737; affd (1877) 3 Asp MLC 403, CA.

5 A clause in this form has been held to apply to liabilities arising at the port of loading (*Bannister v Breslau* (1867) LR 2 CP 497), but the correctness of the decision was doubted in *Clink v Radford & Co* [1891] 1 QB 625, 7 Asp MLC 10, CA (where, however, the clause was differently worded: see PARA 304 note 1). In *Gardiner v Macfarlane, M'Crindell & Co* (1889) 16 R 658, a clause in this form was held not to apply to detention at the port of loading.

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### *(m) Lien Clauses*

#### **306. Liens usually conferred.**

The cesser clause may be followed by a lien clause, which expresses the consideration received by the shipowner in exchange for his release of the charterer<sup>1</sup>. The liens usually conferred by the clause are for freight, advance freight, dead freight, demurrage and general average<sup>2</sup>, but other liens are sometimes included<sup>3</sup>. Of these liens the lien for freight, strictly so called<sup>4</sup>, and for general average<sup>5</sup> exist at common law, and are specified in the clause merely to prevent any inference being drawn from their omission<sup>6</sup>.

There is, however, no lien at common law for advance freight<sup>7</sup>, dead freight<sup>8</sup> or demurrage<sup>9</sup>; any such lien must be created by special contract<sup>10</sup>. The lien given for dead freight includes unliquidated damages for failing to supply a full cargo<sup>11</sup> and the lien for demurrage applies not only to demurrage in the technical sense of the word<sup>12</sup>, but also to a claim for damages for detention<sup>13</sup>, unless it is clear from the context that the word was intended to bear its technical meaning only<sup>14</sup>. It is immaterial whether the claim for demurrage or damages, as the case may be, arises in connection with the loading<sup>15</sup> or the discharge, unless the cesser clause plainly excludes antecedent liabilities from its operation<sup>16</sup>.

Where there is a chain of charterparties and each charterparty expressly confers a lien on any sub-freight, the shipowner can assert a lien on the ultimate sub-freight<sup>17</sup>.

Where a shipowner asserting a lien competes for payment of freight with an assignee of freight, the issue is one of priority between equitable assignments<sup>18</sup>.

1 See PARA 304.

2 As to such liens see PARA 551 et seq.

3 See PARAS 553-555. As to clauses in time charterparties giving the shipowner a lien upon all cargoes and all sub-freights for any amounts due under the charterparty see *Steelwood Carriers Inc of Monrovia, Liberia v Evimeria Compania Naviera SA of Panama, The Agios Giorgis* [1976] 2 Lloyd's Rep 192; *Aegnoussiotis Shipping Corp of Monrovia v Kristian Jebsens Rederi of Bergen A/S, The Aegnoussiotis* [1977] 1 Lloyd's Rep 268; *International Bulk Carriers (Beirut) SARL v Evlogia Shipping Co SA and Marathon Shipping Co Ltd, The Mihalios Xilas* [1978] 2 Lloyd's Rep 186. A shipowner's lien on sub-freights is registrable under the companies legislation: *Re Welsh Irish Ferries Ltd* [1986] Ch 471, [1985] 3 WLR 610, [1985] 2 Lloyd's Rep 372 (contractual lien on sub-freights held to constitute a charge on book debts and hence registrable); *Annangel Glory Compania Naviera SA v M Golodetz Ltd, The Annangel Glory* [1988] 1 Lloyd's Rep 45 (contractual lien on sub-freights held to constitute a floating charge and hence registrable).

4 As to the meaning of 'freight' see PARAS 255, 460, 567 et seq.

5 *Marvigor Compania Naviera SA v Romanoexport State Co for Foreign Trade, The Corinthian Glory* [1977] 2 Lloyd's Rep 280.

6 As to this principle of construction see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 182.

7 *Kirchner v Venus* (1859) 12 Moo PCC 361, disapproving *Gilkison v Middleton* (1857) 2 CBNS 134, and *Neish v Graham* (1857) 8 E & B 505. See also *How v Kirchner* (1857) 11 Moo PCC 21; *Tamvaco v Simpson* (1866) LR 1 CP 363, Ex Ch.

8 *Phillips v Rodie* (1812) 15 East 547; *Birley v Gladstone* (1814) 3 M & S 205; *Rederiactieselskabet Superior v Dewar and Webb* [1909] 1 KB 948, 11 Asp MLC 232 (varied on appeal [1909] 2 KB 998, 11 Asp MLC 295, CA).

9 *Birley v Gladstone* (1814) 3 M & S 205.

10 *Re Child, ex p Nyholm* (1873) 2 Asp MLC 165. See also *McLean and Hope v Fleming* (1871) LR 2 Sc & Div 128, 1 Asp MLC 160, HL; *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92.

11 *McLean and Hope v Fleming* (1871) LR 2 Sc & Div 128, 1 Asp MLC 160, HL, followed in *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL. The contrary view, taken in *Pearson v Göschén* (1864) 17 CBNS 352, followed in *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch, that 'dead freight' in the lien clause did not cover a claim for unliquidated damages, is no longer law.

12 As to demurrage see PARAS 287, 289 et seq.

13 *Bannister v Breslau* (1867) LR 2 CP 497 (doubted in *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch, but approved in *Kish v Cory* (1875) LR 10 QB 553, 2 Asp MLC 593, Ex Ch); *Harris v Jacobs* (1885) 15 QBD 247, 5 Asp MLC 531, CA; *Restitution Steamship Co v Sir John Pirie & Co* (1889) 6 Asp MLC 428 (affd 7 Asp MLC 11n, CA); *Rederiactieselskabet Superior v Dewar and Webb* [1909] 2 KB 998, 11 Asp MLC 295, CA. See also *Sanguinetti v Pacific Steam Navigation Co* (1876) 2 QBD 238, 3 Asp MLC 300, CA.

14 This inference may be drawn where the charterparty used the word 'demurrage' in its technical sense in other terms: *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch; *Francesco v Massey* (1873) LR 8 Exch 101; *Lockhart v Falk* (1875) LR 10 Exch 132, 3 Asp MLC 8; *Clink v Radford & Co* [1891] 1 QB 625, 7 Asp MLC 10, CA; *Dunlop & Sons v Balfour, Williamson & Co* [1892] 1 QB 507, 7 Asp MLC 181, CA.

15 *Sanguinetti v Pacific Steam Navigation Co* (1876) 2 QBD 238, 3 Asp MLC 300, CA. See also *Francesco v Massey* (1873) LR 8 Exch 101; *Kish v Cory* (1875) LR 10 QB 553, 2 Asp MLC 593, Ex Ch.

16 *Pederson v Lotinga* (1857) 28 LTOS 267n; *Lockhart v Folk* (1875) LR 10 Exch 132, 3 Asp MLC 8; *Lister v Van Haansbergen* (1876) 1 QBD 269, 3 Asp MLC 145.

17 *Care Shipping Corp v Latin American Shipping Corp, The Cebu* [1983] QB 1005, [1983] 1 All ER 1121, [1983] 1 Lloyd's Rep 302, not followed in *Care Shipping Corp v Itex Itagrani Export SA, The Cebu (No 2)* [1993] QB 1, [1992] 1 All ER 91.

18 *G & N Angelakis Shipping Co SA v Compagnie National Algerienne de Navigation, The Attika Hope* [1988] 1 Lloyd's Rep 439.

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## *(n) Penalty Clauses*

### **307. Damages.**

The charterparty usually contains a penalty clause, which is to come into operation in the event of either party failing to perform the contract. One common form of the clause is 'Penalty for non-performance of this agreement estimated amount of freight'. Sometimes the clause runs 'Penalty for non-performance of this agreement proved damages not exceeding estimated amount of freight'<sup>1</sup>. In either form the clause is unenforceable, and the injured party can recover the amount of the damages he has actually suffered and no more<sup>2</sup>.

1 As to the construction of penalty clauses see **DAMAGES** vol 12(1) (Reissue) PARA 1065 et seq; and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 126-128; **EQUITY** vol 16(2) (Reissue) PARAS 801-803.

2 *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, 13 Asp MLC 580, HL, approving the judgment of Bailhache J in *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66, 13 Asp MLC 271 (where the authorities are reviewed). For special forms of penalty clauses which were held enforceable see *Sparrow v Paris* (1862) 7 H & N 594. See also *Heugh v Escombe* (1861) 4 LT 517. In *Leeds Shipping Co Ltd v Société Française Bunge* [1958] 2 Lloyd's Rep 127 at 144, CA, it was said that such a clause might be unexceptionable if restricted to entire non-performance, but that 'non-performance' could not be construed as equivalent to 'breach'. As to the measure of damages see PARAS 458 et seq, 560 et seq.

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## *(o) Employment and Indemnity Clauses*

### **308. Employment and indemnity clauses.**

Time charterparties often contain an 'employment and indemnity clause', the precise wording of such a clause varying in detail. Such a clause may provide, for example, that the master is to be under the orders of the charterer as regards employment, agency and other arrangements and that the charterer is to indemnify the owner against consequences or liabilities arising from the master, officers or agents signing bills of lading or other documents or otherwise complying with such orders<sup>1</sup>.

Where the orders of the charterer are carried out, or bills of lading are signed<sup>2</sup>, and loss or damage is sustained as a result of compliance with the orders, the charterer must indemnify the shipowner. The 'orders' must come within the scope of the words 'employment, agency and other arrangements'. For these purposes, 'employment' means employment of the ship to carry out the purposes for which the charterer wishes to use her, as distinct from employment of persons<sup>3</sup>, and does not extend to navigation of the ship or incidents of navigation<sup>4</sup>.

For the indemnity to operate, there must be a causal connection between the charterer's order and the loss and damage sustained by the shipowner<sup>5</sup>.

Where the charterparty does not contain an express indemnity, an undertaking by the charterers to indemnify the owners against the consequences of complying with their orders<sup>6</sup> will nevertheless normally be implied, it being the case that, if the charterers require to have a vessel at their disposal and to be free to choose voyages and cargoes and bills of lading terms, the owner must be expected to grant such freedom only if he is entitled to an indemnity against loss and liability arising from it<sup>7</sup>. Such an implication is not, however, automatic and

depends on the facts of each case and on the terms of the underlying contractual relationship<sup>8</sup>. Thus, where the master acts wrongfully in complying with the charterers' orders, no liability to indemnify arises<sup>9</sup>.

1 See eg the Baltime charterparty cl 9. As to standard forms of charterparty see PARA 222.

2 The scope of the clause is not limited to the consequences of signing bills of lading but extends to the consequences of other 'orders' of the charterers: *Portsmouth Steamship Co Ltd v Liverpool and Glasgow Salvage Association* (1929) 34 Ll L Rep 459 (order to load particular cargo); *Royal Greek Government v Minister of Transport* (1950) 83 Ll L Rep 228 at 233 per Devlin J. See also *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd* (1935) 52 Ll L Rep 141 at 148, CA, obiter per Greer LJ (where he stated that, as the master had obeyed the orders of the charterers in loading at an unsafe berth, the charterers were bound by the charterparty to indemnify the owners against the consequences thereof); *The Athanasia Comninos and The Georges Chr Lemos* (1979) [1990] 1 Lloyd's Rep 277.

3 *Larrinaga Steamship Co Ltd v R* [1945] AC 246, [1945] 1 All ER 329, 78 Ll L Rep 167, HL; *Helsingfors Steamship Co A/B v Rederiaktiebolaget Rex, The White Rose* [1969] 3 All ER 374, [1969] 1 WLR 198, [1969] 2 Lloyd's Rep 52. Thus, an order to sail from A to B is an order as regards employment, but an order to sail at a particular time is an order as to how to act in the course of that employment: *Larrinaga Steamship Co Ltd v R* at 261-263, 335-337 and at 175-177, HL, per Lord Porter.

4 *Weir v Union Steamship Co Ltd* [1900] AC 525 at 533, 9 Asp MLC 111 at 113, HL, per Lord Davey; *Larrinaga Steamship Co Ltd v R* [1945] AC 246, [1945] 1 All ER 329, 78 Ll L Rep 167, HL (where the general scheme of the charterparty was to place the risks of perils of the sea on the shipowner); *Triad Shipping Co v Stellar Chartering & Brokerage Inc, The Island Archon* [1994] 2 Lloyd's Rep 227, CA; *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2001] 1 AC 638, [2001] 1 All ER 403, [2001] 1 Lloyd's Rep 147, HL (the word 'employment' in a time charter pertains to the economic aspects of operation of the vessel, while the word 'navigation' referred to matters of seamanship: thus the choice of ocean route is, in the absence of some overriding factor, a matter of the employment of the vessel).

5 *Portsmouth Steamship Co Ltd v Liverpool and Glasgow Salvage Association* (1929) 34 Ll L Rep 459; *Larrinaga Steamship Co Ltd v R* [1945] AC 246 at 256, [1945] 1 All ER 329 at 333, 78 Ll L Rep 167 at 173, HL, per Lord Wright; *Helsingfors Steamship Co A/B v Rederiaktiebolaget Rex, The White Rose* [1969] 3 All ER 374, [1969] 1 WLR 198, [1969] 2 Lloyd's Rep 52, explained in *Vardinoyannis v Egyptian General Petroleum Corpn, The Evaggelos TH* [1971] 2 Lloyd's Rep 200 (where it was held that the owner could recover under the employment and indemnity clause if he could prove that the proximate cause of the loss of the vessel was his, or his master's, compliance with the charterer's orders as to the employment of the vessel); *Actis Co Ltd v Sanko Steamship Co Ltd, The Aquacharm* [1982] 1 All ER 390, [1982] 1 WLR 119, [1982] 1 Lloyd's Rep 7, CA. Thus, damage arising from an order to proceed to a port would not be recoverable in terms of the indemnity if the immediate cause were negligence or a peril of the sea. No right to an indemnity arises where the shipowner is aware of the illegality of the order: see *Hansen-Tangens Rederi III A/S v Total Transport Corpn, The Sagona* [1984] 1 Lloyd's Rep 194 at 205, 206 (where it was held that the owner was in fact entitled to his indemnity but that he would not have been had the master severed the link of causation).

6 See *Newa Line v Erechthion Shipping Co SA, The Erechthion* [1987] 2 Lloyd's Rep 180 at 185 (the charterer is bound to indemnify the shipowner against the consequences of the employment of the vessel only and not against the consequences of navigation, which remains the responsibility of the shipowner); *Triad Shipping Co v Stellar Chartering & Brokerage Inc, The Island Archon* [1994] 2 Lloyd's Rep 227, CA.

7 *Strathlorne Steamship Co Ltd v Andrew Weir & Co* (1934) 50 Ll L Rep 185, CA; *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553, [1984] 2 Lloyd's Rep 466; *Sig Bergesen DY & Co v Mobil Shipping and Transportation Co, The Berge Sund* [1993] 2 Lloyd's Rep 453; *Triad Shipping Co v Stellar Chartering & Brokerage Inc, The Island Archon* [1994] 2 Lloyd's Rep 227, CA. Where the charterer has no choice as to the use of the vessel, there is no room for an implied indemnity: see *The George C Lemos* [1991] 2 Lloyd's Rep 107n. See also *Deutsche Ost-Afrika-Linie GmbH v Legent Maritime Co Ltd* [1998] 2 Lloyd's Rep 71 (dangerous cargo).

8 *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA; *Sig Bergesen DY & Co v Mobil Shipping and Transportation Co, The Berge Sund* [1993] 2 Lloyd's Rep 453.

9 *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, CA, per Mustill LJ (for a claim to indemnity to fail, the act must be one which 'involves an element of turpitude and does not extend to the case where the actor has carelessly failed to make inquiries which would have revealed the true nature of the act, or where he has culpably but not recklessly drawn the wrong inference from such inquiries as he has made').

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*(p) Other Clauses*

**309. Arbitration and other clauses.**

Any other lawful terms may be inserted in the charterparty which the parties think it convenient to insert. Thus, there may be terms relating to arbitration<sup>1</sup>, general average<sup>2</sup>, insurance<sup>3</sup>, brokerage and other commissions<sup>4</sup>, payment of dock dues<sup>5</sup>, provisions and payment for fuel<sup>6</sup>, redelivery of the vessel<sup>7</sup> and trading limits<sup>8</sup>. Of these the terms relating to brokerage and other commissions are discussed subsequently<sup>9</sup>.

1 *The Dawlish* [1910] P 339, 11 Asp MLC 496. See also *The Swindon* (1902) 18 TLR 681, CA; *The Cap Blanco* [1913] P 130, 12 Asp MLC 399, CA; *Det Dansk-Franske Dampskibsselskab A/S v Compagnie Financière d'Investissements Transatlantiques SA (Compafina)*, *The Himmerland* [1965] 2 Lloyd's Rep 353; *Liberian Shipping Corp v A King & Sons Ltd* [1967] 2 QB 86, [1967] 1 All ER 934, [1967] 1 Lloyd's Rep 302, CA; *Tradax Export SA v Volkswagenwerk AG* [1970] 1 QB 537, [1970] 1 All ER 420, [1970] 1 Lloyd's Rep 62, CA; *Astro Vencedor Compania Naviera SA of Panama v Mabanaft GmbH, The Damianos* [1971] 2 QB 588, [1971] 2 All ER 1301, [1971] 1 Lloyd's Rep 502; *Intermare Transport GmbH v Naves Transoceanicas Armadora SA, The Aristokratis* [1976] 1 Lloyd's Rep 552; *Transamerican Ocean Contractors Inc v Transchemical Rotterdam BV, The Ioanna* [1978] 1 Lloyd's Rep 238, CA. As to the scope of such a clause see *Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1, 12 Asp MLC 23, HL; *Den of Airlie Steamship Co Ltd v Mitsui & Co Ltd and British Oil and Cake Mills Ltd* (1912) 12 Asp MLC 169, CA; *Federal Bulk Carriers Inc v C Itoh & Co Ltd, The Federal Bulker* [1989] 1 Lloyd's Rep 103, CA. An arbitration clause providing that any differences between the parties as to 'the meaning and intention of the charter' should be referred to arbitration gives the arbitrators jurisdiction to determine not merely the construction of the charter but also the question of fact whether a breach of contract has been committed: *Richards v John Payne & Co* (1916) 13 Asp MLC 446. See *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254 (an arbitration clause in a charterparty ought to be given a wide rather than a narrow interpretation so as to include within the arbitrator's jurisdiction allegations of bribery and fraud in the drawing up of the charterparty); and see also *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm), [2005] 1 Lloyd's Rep 509 (arbitration clause granting one of the parties to a charterparty the option of going to arbitration; stay granted against proceedings legitimately started by the other party).

A clause by which the claim is absolutely barred if not made within a certain time is prima facie valid and enforceable, but a shipowner whose ship is, or is alleged to be, unseaworthy may not be entitled to rely on it: *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 AC 250, 15 Asp MLC 566, HL, distinguished in *H Ford & Co Ltd v Compagnie Furness (France)* [1922] 2 KB 797, 16 Asp MLC 102, DC. A mere reservation of the right to make a claim may constitute a notice of claim within the clause providing for a time limit for claims: *Rendal A/S v Arcos Ltd* [1937] 3 All ER 577, HL.

A statement by the shipowner that he has tried without success to find the missing goods is not a waiver of notice of claim: *Andrew Mantoura & Sons v David* (1926) 32 Com Cas 1, PC. Where the charterer admitted that part of the sum claimed for freight was due, but disputed the balance, and the shipowner failed to appoint his arbitrator in the time specified in the arbitration clause in the charterparty, the shipowner was allowed to sue for the amount of freight admitted to be due, since as to this amount there was no dispute within the meaning of the arbitration clause: *Bede Steam Shipping Co Ltd v Bunge y Born Lda SA* (1927) 43 TLR 374, 27 Ll L Rep 410.

2 As to general average see PARA 605 et seq.

3 *Aira Force Steamship Co Ltd v Christie & Co* (1892) 8 TLR 104, CA (where a term in a time charter that the shipowner was to pay for insurance was held not to relieve the charterer from liability for the negligence of his employees). The charterer is sometimes given a right to breach the trading limits specified in the charterparty by paying an extra insurance premium: see *Tropwood AG v Jade Enterprises Ltd, The Tropwind* [1977] 1 Lloyd's Rep 397; *St Vincent Shipping Co Ltd v Bock, Godeffroy & Co, The Helen Miller* [1980] 2 Lloyd's Rep 95. As to the payment of an extra war risk insurance premium see *Telfair Shipping Corp v Athos Shipping Co SA, The Athos* [1981] 2 Lloyd's Rep 74; *Maritime Transport Overseas GmbH v Unitramp, The Antaios* [1981] 2 Lloyd's Rep 284; *Schiffahrtsgesellschaft Hamburg Middle East Line GmbH v Virtue Shipping Corp, The Oinoussian Virtue (No 2)* [1981]

2 Lloyd's Rep 300; *Ocean Star Tankers SA v Total Transport Corp'n, The Taygetos* [1982] 2 Lloyd's Rep 272; *Phoenix Shipping Corp'n v Apex Shipping Corp'n, The Apex* [1982] 1 Lloyd's Rep 476; *Empresa Cubana de Fletes v Kissavos Shipping Co SA, The Agathon (No 2)* [1984] 1 Lloyd's Rep 183; *Ocean Star Tankers SA v Total Transport Corp'n of Liberia Ltd, The Taygetos (No 2)* [1988] 2 Lloyd's Rep 474.

4 See PARA 310.

5 Cf *Cobridge Steamship Co Ltd v Bucknall Steamship Lines Ltd* (1909) 14 Com Cas 141 and *SA Ungherese di Armamenti Marittimo v Hamburg South American Steamship Co* (1912) 12 Asp MLC 228; and see *The Hamlet* [1924] P 224, 16 Asp MLC 404, CA; *Evera SA Commercial v Bank Line Ltd, The Glenbank* [1961] 1 Lloyd's Rep 231, HL (liability for maritime pensions tax). In wartime special terms against voyages which would expose the ship to war risks were sometimes inserted in charterparties: see eg *Meyer v RF Sanderson & Co* (1916) 32 TLR 428 and *Re Tonnevold and Finn Friis* [1916] 2 KB 551, 13 Asp MLC 439 (where the clause prohibited voyages 'which would involve risk of seizure, capture ... by rulers or governments', and a voyage which exposed the ship to the risk of being attacked by German submarines was within the prohibition). As to the construction of a clause 'War risks, if any required, for charterer's account. It is understood and agreed that value for war risk at all times to be based on value stated in annual policy' see *Holland Gulf Stoomvaart Maatschappij v Watson, Munro & Co* (1915) 13 Asp MLC 279, CA. As to the meaning of 'war region' in a clause providing that, if the vessel was ordered by the charterers to trade in a war region, war risk premiums paid by the owners should be refunded to them by the charterers see *Dominion Coal Co Ltd v Maskinonge Steamship Co Ltd* (1918) 14 Asp MLC 237, HL.

6 *Telfair Shipping Corp'n v Athos Shipping Co SA, The Athos* [1983] 1 Lloyd's Rep 127, CA.

7 Where a charterparty states that the shipowner must take over and pay for all fuel remaining on board at the port of redelivery, the charterer is not entitled to take on board fuel which is in no way required for the charterparty purposes: *Mammoth Bulk Carriers Ltd v Holland Bulk Transport BV, The Captain Diamantis* [1978] 1 Lloyd's Rep 346. The shipowner is entitled to damages if the vessel is redelivered at the wrong port: *Malaysian International Shipping Corp'n v Empresa Cubana de Fletes, The Bunga Kenanga* [1981] 1 Lloyd's Rep 518; *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S, The Rijn* [1981] 2 Lloyd's Rep 267. Where a charterer has failed to redeliver the vessel in the same good order as when delivered (fair wear and tear excepted) as provided for by the charterparty, the shipowner is entitled to claim damages only and cannot insist on the charterer effecting the repairs before redelivery: *Attica Sea Carriers Corp'n v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, CA. As to the right to claim the cost of the repairs and not the hire whilst she is being repaired see PARA 256 note 16.

8 See eg *Segovia Compagnia Naviera SA v R Pagnan and Fratelli, The Aragon* [1977] 1 Lloyd's Rep 343, CA (where a clause in the charterparty stated 'vessel to perform one time charter trip via safe port(s) East Coast Canada within trading limits', and the trading limits were defined as 'always within the Institute Warranty Limits East Coast Canada, USA, East of Panama Canal, UK Continent Gibraltar-Hamburg Range, Mediterranean ...', and it was held that the expression 'USA East of Panama Canal' meant that part of the United States of America which could be reached from Europe westbound without passing through the Panama Canal).

9 See PARAS 310-312.

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### 310. Brokerage clause.

Where a charterparty is negotiated through a broker<sup>1</sup>, a term is usually inserted providing for the payment to him of a commission<sup>2</sup>. The rate of commission varies within wide limits; it may be expressly made payable on the gross amount of freight and demurrage receivable under the charterparty<sup>3</sup>. The term may provide when the commission is to become due, as, for example, on the signing of the charterparty, or the loading of the cargo<sup>4</sup>, or the earning of the freight<sup>5</sup>.

In the absence of any such term, the broker's right to receive his commission depends on the ordinary principles of agency<sup>6</sup>. Thus, the loss of the ship or cargo, or the charterer's failure to supply a full cargo, whereby little or no freight is payable, does not affect the broker's right to have his commission calculated upon the full amount which might have become payable under the charterparty, as he has already earned his commission by procuring the charterparty<sup>7</sup>.

Similarly, he is entitled to commission if, although he does not himself actually complete the negotiations, the signing of the charterparty is directly<sup>8</sup> attributable to his intervention<sup>9</sup>. If, however, the event on which his commission was to become payable never takes place, then, in the absence of any default on the part of his principal<sup>10</sup>, he may not claim any commission<sup>11</sup>.

The term may also provide that the ship is to be reported by the broker at the custom house on her return. In this case the broker is not entitled to any remuneration unless she in fact returns<sup>12</sup>.

1 Where there is a managing owner (see PARA 215), it is his duty to procure employment for the ship, and he is not entitled, in the absence of a special contract, to retain commissions on the charterparties or freights procured by him or by brokers employed by him: *Williamson v Hine* [1891] 1 Ch 390, 6 Asp MLC 559. See also *Manners v Raeburn and Verel* (1884) 11 R 899; cf *Benson v Heathorn* (1842) 1 Y & C Ch Cas 326; *Miller v Mackay (No 2)* (1865) 34 Beav 295. As to contracts to pay commission see *Smith v Lay* (1856) 3 K & J 105. See also *Salter v Adey* (1855) 1 Jur NS 930; *The Meredith* (1885) 10 PD 69, sub nom *White v Ditchfield, The Meredith* 5 Asp MLC 400. As to secret commissions see *Brenan v Preston* (1853) 2 WR 138; and as to agents generally see **AGENCY** vol 1 (2008) PARA 1 et seq.

2 See eg *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, 14 Asp MLC 451, HL; *Christie and Vesey Ltd v Maatschappij Tot Exploitatie van Schepen en Andere Zaken, Helvetia NV* [1960] 1 Lloyd's Rep 540. The term appearing in the charterparty may be disregarded if inapplicable to the actual contract: *Holl v Pinsent* (1821) 6 Moore CP 228.

3 Where the charterparty simply provides for commission at so much per cent, the commission will be payable only on the freight and not on demurrage, in the absence of proof of custom to pay commission also on demurrage: *Moor Line Ltd v Louis Dreyfus & Co* [1918] 1 KB 89, 14 Asp MLC 185, CA.

4 *Ward & Co Ltd v Weir & Co* (1899) 4 Com Cas 216 (where the commission was made payable on completion of loading or if the ship was lost, and it was held (distinguishing *Sibson and Kerr v Ship Barcraig Co* (1896) 24 R 91) that the commission was payable even though the ship was lost on an intermediate voyage).

5 See *White v Turnbull, Martin & Co* (1898) 8 Asp MLC 406, CA; *Moor Line Ltd v Louis Dreyfus & Co* [1918] 1 KB 89, 14 Asp MLC 185, CA (cited in note 3).

6 See **AGENCY** vol 1 (2008) PARAS 101, 102. Specific performance of a contract to employ a particular person as broker will not be granted: *Brett v East India and London Shipping Co Ltd* (1864) 2 Hem & M 404; and see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARAS 807, 812.

7 *Hill v Kitching* (1846) 3 CB 299; *Harley & Co v Nagata* (1917) 23 Com Cas 121 (custom of trade that broker's commission only payable in respect of hire actually earned) was in effect overruled in *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, 14 Asp MLC 451, HL (where it was held that such a custom contradicted a clause in the charterparty providing that commission was due to the brokers 'on the estimated gross amount of hire on signing this charter (ship lost or not lost)' and that, therefore, under a charterparty containing such a clause the charterer, as trustee for the broker, could recover commission from the shipowner, although no hire was payable owing to the requisition of the ship before she came on hire). Lord Birkenhead LC reserved the question whether evidence of an independent oral contract between the broker and the shipowner, by which the shipowner was not to be liable for commission if no hire was payable, would have been admissible. Lord Atkinson appears to have thought that it would not. As to this question see *Wake v Harrop* (1861) 30 LJ Ex 273.

8 *Gibson v Crick* (1862) 1 H & C 142.

9 *Burnett v Bouch* (1840) 9 C & P 620; *Kynaston v Nicholson* (1863) 1 Mar LC 350. As to a claim by a broker for commissions on future charterparties see *Allan v Sundius* (1862) 1 H & C 123 (where evidence of a custom to pay such commissions was held admissible, but it was intimated that the custom, if proved, would be strictly construed).

10 It has even been held that, when the principal himself broke off negotiations, there was no custom entitling the broker to charge for his trouble in procuring a charterparty: see *Broad v Thomas* (1830) 7 Bing 99; *Read v Rann* (1830) 10 B & C 438.

11 *White v Turnbull, Martin & Co* (1898) 8 Asp MLC 406, CA, applied in *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451, 15 Asp MLC 544, HL (charterparty provided for commission on hire paid and earned under the charterparty and on any continuation; ship sold during the currency of the charterparty; broker not entitled to commission on the hire which would have been earned during the rest of the charterparty; no implied term of the contract that the owners would not sell the ship and thus prevent the broker earning his

commission). See also *Howard Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110, 16 Asp MLC 95 (where the charterparty gave the charterers an option to buy the ship for £125,000 and the shipowners agreed to pay the brokers commission at 3½% should the option be exercised; the ship was sold to the charterers for £65,000, and it was held that the brokers could recover neither commission nor a quantum meruit for their services even assuming these services had been the efficient cause of the sale).

12 *Cross v Pagliano* (1870) LR 6 Exch 9.

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### 311. Services to ship.

Other terms may confer on specified persons the right of performing services to the ship in return for a commission. Where the services include the procuring of a homeward cargo at the port of discharge<sup>1</sup>, commission is payable, even if the homeward cargo is procured through other persons<sup>2</sup>. The shipowner is not, however, bound under such a term to take on board a homeward cargo at the port of discharge under the charterparty; and, if he proceeds elsewhere and loads there, no commission is payable<sup>3</sup>.

1 The term must clearly include this: *Phillipps v Briard* (1856) 1 H & N 21.

2 *Robertson v Wait* (1853) 8 Exch 299.

3 *Cross v Pagliano* (1870) LR 6 Exch 9.

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### 312. By whom commission is payable.

By the terms of the charterparty the liability to pay commission is usually imposed on the shipowner, even if the broker is in fact employed by the charterer. Except where the person to whom the commission is payable is himself a party to the contract, or where he has actually rendered services to the shipowner, he cannot sue the shipowner, but only his own principal, the charterer<sup>1</sup>; but the charterer may sue for commission as trustee for the broker<sup>2</sup>. The same principle applies where the charterer is not himself liable to pay commission, as, for example, where the shipowner fails to employ the charterer's agent to procure a homeward cargo; the charterer may sue the shipowner for the full amount of the commission due, and will hold it, when received, as trustee for his agent<sup>3</sup>.

1 *Barnetson v Petersen Bros* (1902) 5 F 86; cf *The Nuova Raffaelina* (1871) LR 3 A & E 483, 1 Asp MLC 16.

2 *Robertson v Wait* (1853) 8 Exch 299, approved in *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, 14 Asp MLC 451, HL (cited in PARA 310 note 7); *Christie and Vesey Ltd v Maatschappij Tot Exploitatie Van Schepen en Andere Zaken, Helvetia NV* [1960] 1 Lloyd's Rep 540. The broker may sue the shipowner if he was employed by the shipowner: *White v Turnbull, Martin & Co* (1898) 8 Asp MLC 406, CA. When the ship is consigned to the charterer's agents free of commissions, any commission which the shipowner is compelled to pay to such agents is recoverable from the charterer: *Russell v Griffith* (1860) 2 F & F 118.

3 *Robertson v Wait* (1853) 8 Exch 299.

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## **C. BILLS OF LADING**

### **(A) NATURE AND FUNCTIONS OF BILLS OF LADING**

#### **313. Description of bill of lading.**

A bill of lading<sup>1</sup> is a document signed by the shipowner, or by the master or other agent of the shipowner<sup>2</sup>, which states that certain specified goods have been shipped in a particular ship, and which purports to set out the terms on which the goods have been delivered to and received by the ship<sup>3</sup>. After signature, it is handed to the shipper, who may either retain it or transfer it to a third person. This person may be named in the bill of lading as the person to whom delivery of the goods is to be made on arrival at their destination, in which case he is known as the consignee<sup>4</sup>; if he is not named in the bill of lading, he is usually known as the holder or indorsee of the bill of lading<sup>5</sup>. A bill of lading issued by the shipowner's agent in the absence of any contract of carriage is a nullity<sup>6</sup>.

1 As to bills of lading generally see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 366 et seq; and as to negotiability see PARA 314. Except where otherwise stated, the observations which follow in this paragraph and in PARA 314 et seq apply to bills of lading which are, as well as those which are not, subject to the Carriage of Goods by Sea Act 1971, which in general applies to all bills of lading for outward shipments from British ports (see PARA 367 et seq).

2 As to the signature of bills of lading see PARA 328 et seq.

3 *Sewell v Burdick* (1884) 10 App Cas 74 at 105, 5 Asp MLC 376 at 386, HL, per Lord Bramwell. A document which recites that the goods have been 'received for shipment' on board a named ship or some other ship owned by a named owner is a bill of lading so as to confer jurisdiction on the Admiralty Court (*The Marlborough Hill v Alex Cowan & Sons Ltd* [1921] 1 AC 444, 15 Asp MLC 163, PC), but is not a bill of lading for the purpose of a cif contract unless the contract expressly provides for a bill of lading in that form (see *Diamond Alkali Export Corp v FI Bourgeois* [1921] 3 KB 443, 15 Asp MLC 455), or unless there is a custom in the particular trade that a bill of lading in that form is acceptable (*Weis & Co v Produce Brokers' Co* (1921) 7 Ll L Rep 211, CA; cf *United Baltic Corp v Burgett and Newsam* (1921) 8 Ll L Rep 190, CA, and *Suzuki & Co v Burgett and Newsam* (1922) 10 Ll L Rep 223, CA). Nor is a 'received for shipment' bill of lading a good tender under a fob contract: *Yelo v SM Machado & Co Ltd* [1952] 1 Lloyd's Rep 183. References in the Carriage of Goods by Sea Act 1924 to a bill of lading expressly include references to a 'received for shipment' bill of lading: see s 1(2)(b); and PARA 338.

It is an implied condition of a cif contract that the date of shipment should not be misstated in the bill of lading so as to represent that the goods have been shipped in time, contrary to the fact (*James Finlay & Co Ltd v Kwick Hoo Tong Handel Maatschappij NV* [1929] 1 KB 400, 17 Asp MLC 566, CA), but the insertion of a false date, even by a deliberate forgery, will not make the bill of lading a nullity (*Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779, [1954] 1 Lloyd's Rep 16; cf **CONTRACT** vol 9(1) (Reissue) PARA 1055 et seq).

As to bills of lading under cif (cost, insurance, freight) contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 324 et seq; and as to bills of lading under fob (free on board) contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 351 et seq.

4 The insertion of a name in the bill of lading does not bind the shipper, so that he may revoke the consignment to the named consignee at any time until that consignee has received the bill of lading or the goods: *Mitchel v Ede* (1840) 11 Ad & El 888. The shipper must, however, recall the bill of lading already issued, or indemnify the master against any liability under it: *Davidson v Gwynne* (1810) 12 East 381; *Tindall v Taylor* (1854) 4 E & B 219.

5 See PARA 335.

6 *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 83 Ll L Rep 438. In such a case no action will lie against the broker for breach of warranty even if the goods were never shipped; there is no general duty of care to the public in the issue of a bill of lading: *Heskell v Continental Express Ltd*.

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### 314. How far bills of lading are negotiable instruments.

Although a bill of lading has often been described as a negotiable instrument<sup>1</sup>, it is not in the strict sense of the words<sup>2</sup>. The principal points of resemblance of a bill of lading to a negotiable instrument are that:

- 35 (1) the right to demand delivery of the goods from the carrier is transferred by the delivery to the lawful holder of the bill of lading<sup>3</sup>, no distinct contract of assignment and no notice to the carrier being necessary for the transfer to take effect<sup>4</sup>;
- 36 (2) in some cases the transferee may acquire, by virtue of the transfer, rights over the goods which are greater than those of the transferor<sup>5</sup>;
- 37 (3) the transferee of the bill may in certain circumstances sue and be sued on the contract contained in the bill of lading<sup>6</sup>;
- 38 (4) the transferee, even if his title is defective, may give a good discharge to the carrier who delivers the goods to him<sup>7</sup>; and
- 39 (5) the consideration provided by the transferee may be a past consideration<sup>8</sup>.

1 *Barber v Meyerstein* (1870) LR 4 HL 317 at 337 per Lord Westbury. See also *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219 at 228.

2 *Gurney v Behrend* (1854) 3 E & B 622. It may be noted that the special verdict in *Lickbarrow v Mason* (1794) 5 Term Rep 683, 1 Smith LC (13th Edn) 703, describes bills of lading 'to order or assigns' as negotiable and transferable by indorsement and delivery, but does not call them negotiable instruments. Moreover, in discussing the transfer of bills of lading (see Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 843), Lord Tenterden uses the words 'assignment' and 'assignable'. In *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 at 446, PC, Lord Devlin said that, when 'negotiable' was used in relation to a bill of lading, it merely meant 'transferable'.

3 As defined in the Carriage of Goods by Sea Act 1924 s 5(2): see PARA 338.

4 *Barber v Meyerstein* (1870) LR 4 HL 317.

5 See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158, 253.

6 See the Carriage of Goods by Sea Act 1924 ss 2(1)(a), 3(1); and PARAS 338, 342; and as to implied contracts of carriage see PARA 348.

7 *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591, 4 Asp MLC 580, HL; cf **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1488.

8 See PARA 352; cf **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1478-1482, 1486-1487.

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### 315. Document of title.

The bill of lading is a symbol of the goods specified in it<sup>1</sup>. Its possession is equivalent to the possession of the goods themselves<sup>2</sup>, and its transfer, being a symbolical delivery of the goods<sup>3</sup>, has by commercial usage<sup>4</sup> the same effect as an actual delivery in the same circumstances<sup>5</sup>.

On a transfer, therefore, of a bill of lading by way of sale<sup>6</sup>, mortgage or pledge<sup>7</sup>, the property in the goods passes either absolutely or otherwise, according to the intention of the parties, to the transferee, provided that the transferor was able to dispose of them<sup>8</sup>; and the right of the original owner of the goods to stop them in transit is either wholly defeated, where there is an absolute transfer by way of sale, or becomes subject to the mortgage or pledge<sup>9</sup>. As a bill of lading is not in the full sense of the word<sup>10</sup> a negotiable instrument, the title of the transferor to the bill of lading and his ability to dispose of the goods specified in it are, however, important elements to be taken into consideration.

As regards the shipowner, the bill of lading is a document of title, entitling its holder on production to delivery of the goods<sup>11</sup>. Accordingly, a delivery to the holder of the bill of lading, even where he is not entitled to the goods, discharges the shipowner, provided that it is made in good faith without notice of any defect in the holder's title<sup>12</sup>. The shipowner is not, however, discharged, however bona fide his act may be, by delivery to the wrong person without the production of the bill of lading<sup>13</sup>.

A bill of lading is also a document of title for the purposes of the Sale of Goods Act 1979; and consequently the holder of a bill of lading may in certain circumstances have a better title to the goods than that of the true owner<sup>14</sup>.

1 *Barber v Meyerstein* (1870) LR 4 HL 317; *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 341, 5 Asp MLC 160 at 164, CA, per Bowen LJ.

2 *Cole v North Western Bank* (1875) LR 10 CP 354 at 362, Ex Ch, per Blackburn J; cf *Wright v London Dock Co* (1859) 5 Jur NS 1411, CA. See also *Trucks and Spares Ltd v Maritime Agencies (Southampton) Ltd* [1951] 2 All ER 982, [1951] 2 Lloyd's Rep 345, CA (where a mandatory injunction ordering shipowners to deliver goods to the consignees who were not in possession of the relevant bills of lading was refused).

3 *Burdick v Sewell* (1883) 10 QBD 363, 5 Asp MLC 79 (affd (1884) 10 App Cas 74, 5 Asp MLC 376, HL); *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 341, 5 Asp MLC 160 at 164, CA, per Bowen LJ; and see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 366. After the transfer of one bill of lading belonging to a set, the transfer of a second bill of lading belonging to the same set is inoperative: *Barber v Meyerstein* (1870) LR 4 HL 317. As to the transfer of bills in a set see further PARA 334.

4 *Lickbarrow v Mason* (1794) 5 Term Rep 683; 1 Smith LC (13th Edn) 703.

5 *Cole v North Western Bank* (1875) LR 10 CP 354, Ex Ch. See also *Gurney v Behrend* (1854) 3 E & B 622 at 636 per Lord Campbell CJ; *Pease v Gloaher, The Marie Joseph* (1866) LR 1 PC 219 at 228; *Barber v Meyerstein* (1870) LR 4 HL 317; *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL. Hence the indorsement of the bill of lading is prima facie evidence that the property in the specified goods has passed to the indorsee: *Dracachi v Anglo-Egyptian Navigation Co* (1868) LR 3 CP 190.

6 *Wright v Campbell* (1767) 4 Burr 2046.

7 *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL. A deposit of bills of lading to secure an advance is a pledge: *Sewell v Burdick*; and see PARA 351.

8 See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 368; cf *The Argentina* (1867) LR 1 A & E 370.

9 *Lickbarrow v Mason* (1794) 5 Term Rep 683; *Leask v Scott Bros* (1877) 2 QBD 376, 3 Asp MLC 469, CA; *Kemp v Falk* (1882) 7 App Cas 573, 5 Asp MLC 1, HL, following *Re Westzinthus* (1833) 5 B & Ad 817 and *Spalding v Ruding* (1843) 6 Beav 376.

10 See PARAS 314, 349.

11 *Barber v Meyerstein* (1870) LR 4 HL 317; cf *Trucks and Spares Ltd v Maritime Agencies (Southampton) Ltd* [1951] 2 All ER 982, [1951] 2 Lloyd's Rep 345, CA.

12 *Schuster v McKellar* (1857) 7 E & B 704; *The Tigress* (1863) Brown & Lush 38; *Barber v Meyerstein* (1870) LR 4 HL 317; *Gabarron v Kreeft*, *Kreeft v Thompson* (1875) LR 10 Exch 274, 3 Asp MLC 36; *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 610, 4 Asp MLC 580 at 585, HL, per Lord Blackburn, commenting on *Fearon v Bowers* (1753) 1 Hy Bl 364n. The shipowner may interplead if he has notice of conflicting claims: *Lowe v Richardson* (1818) 3 Madd 277.

13 *Short v Simpson* (1866) LR 1 CP 248; *The Stettin* (1889) 14 PD 142, 6 Asp MLC 395; cf *Erichsen v Barkworth* (1858) 3 H & N 601, 894, Ex Ch. It is immaterial that the true owner did not become holder of the bill of lading until after the wrongful delivery: *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653, 7 Asp MLC 69, CA; and see *Pirie & Sons v Warden* (1871) 9 M 523.

14 See by virtue of the Factors Act 1889 s 9; the Sale of Goods Act 1979 ss 24, 25: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158.

## UPDATE

### 315 Document of title

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 316. Bill of lading as a receipt; statements about the goods.

A bill of lading is an acknowledgment of the receipt of the goods specified in it<sup>1</sup>. It usually contains various representations as to the quantity and condition of the goods and other matters relating to the shipment. If fraudulently or negligently made, such representations may form the basis of a claim in tort against the carrier by third parties who suffer loss in reliance on them, in particular consignees who take up and pay for the shipping documents when, if the true facts had been stated, they would have been entitled to reject them<sup>2</sup>.

A bill of lading is prima facie evidence or, in certain cases conclusive evidence<sup>3</sup>, of facts contained in it, for example, as to the condition of the goods<sup>4</sup>, quantity<sup>5</sup>, marks<sup>6</sup>, quality<sup>7</sup>, and date of loading<sup>8</sup>. The bill of lading may contain a 'conclusive evidence clause'<sup>9</sup>.

Where the bill of lading is prima facie evidence only, the burden of proving that it is incorrect is on the shipowner<sup>10</sup>.

Where the Hague-Visby Rules apply to a bill of lading, the carrier or the master or agent of the carrier must, after receiving the goods into his charge, issue to the shipper on demand by him a bill of lading showing, among other things, the leading marks necessary for the identification of the goods as furnished in writing by the shipper before the loading of such goods starts, either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper and the apparent order and condition of the goods, save where the carrier, master or agent has reasonable ground for suspecting that the marks, number, quantity or weight do not accurately represent the goods actually received or which he has had no reasonable means of checking<sup>11</sup>.

1 *Bates v Todd* (1831) 1 Mood & R 106; *Berkley v Watling, Nave and Crisp* (1837) 7 Ad & El 29; *Leduc & Co v Ward* (1888) 20 QBD 475 at 479, 6 Asp MLC 290 at 291, CA, per Lord Esher MR. See also *Yelo v SM Machado & Co Ltd* [1952] 1 Lloyd's Rep 183.

2 See eg *The Saudi Crown* [1986] 1 Lloyd's Rep 261 (where a fraudulent misrepresentation was made as to the date on which the goods were shipped); *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2002] UKHL 43, [2003] 1 AC 959, [2002] 1 All ER 173 (fraudulent misrepresentation made by director).

3 See PARA 317.

4 See PARA 318.

5 See PARA 317.

6 See *Parsons v New Zealand Shipping Co* [1901] 1 KB 548, CA.

7 See *Cox, Patterson & Co v Bruce & Co* (1886) 18 QBD 147 at 152 per Lord Esher MR (master has no apparent authority to represent the quality of goods in a bill of lading).

8 See *The Saudi Crown* [1986] 1 Lloyd's Rep 261 (the date which a bill of lading bears is prima facie the last day on which the goods were loaded and not the date the bill of lading is signed).

9 See PARA 317.

10 *Henry Smith & Co v Bedouin Steam Navigation Co Ltd* [1896] AC 70, HL. The shipowner may discharge this burden by showing that a mistake has been made in the bill of lading: see *Sanday v Strath Steamship Co* (1921) 7 Ll L Rep 107, CA; *North Shipping Co Ltd v Joseph Rank Ltd* (1926) 26 Ll L Rep 123.

11 See the Hague-Visby Rules art III r 3; and PARA 379. As to the effect of such a bill of lading see PARAS 317, 380.

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### 317. Bill of lading as conclusive evidence.

At common law, where a person has made to another a clear and unequivocal representation of fact, with knowledge of its falsehood or with the intention that it should be acted on, and the other person has acted on such representation and thereby altered his position to his prejudice<sup>1</sup>, an estoppel arises against the party who made the representation, and he is not allowed to argue that the fact is otherwise than he represented it to be<sup>2</sup>. Thus, a shipowner is estopped as against the assignee of a bill of lading by an erroneous statement in it that freight has been paid in advance<sup>3</sup> or that goods have been shipped in apparent good order and condition<sup>4</sup>. In an action for lump sum freight against an indorsee, the master is not, however, estopped by the statement of weight in the bill, at least where it is merely a matter of measurement, which may vary after the goods are shipped<sup>5</sup>, although it may be otherwise in a claim for short delivery<sup>6</sup>. Nor in a claim for non-delivery is the person signing the bill of lading estopped from showing that mere identification marks are incorrectly stated; but, if the identity of his goods can be established by other means, such marks become material<sup>7</sup>.

A bill of lading<sup>8</sup> which:

40 (1) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel<sup>9</sup>; and

41 (2) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading<sup>10</sup>,

is conclusive evidence, in favour of a person who has become the lawful holder<sup>11</sup> of the bill, against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment<sup>12</sup>. Such a bill of lading is not, however, conclusive evidence of statements as to the order and condition of the goods or any other such matters<sup>13</sup>.

By an express term, the bill of lading may be made conclusive evidence of the quantity shipped<sup>14</sup>. In this case, in the absence of fraud, the shipowner is bound by the statement in the bill of lading, and cannot escape liability by showing that the goods specified in it, or some portion of them, had not been shipped<sup>15</sup>, or even that they had been lost before shipment by an excepted peril<sup>16</sup>, or that more goods had been shipped than stated for the purposes of calculating freight<sup>17</sup>. The cause of the misstatement is immaterial; it may be a pure miscalculation<sup>18</sup>, or it may be a mistaken belief that in the circumstances the goods had to be signed for, although not put on board<sup>19</sup>. If there is a miscalculation, the shipowner cannot, where there are two or more classes of goods concerned, escape liability for delivering less than the specified quantity of one class of goods by showing that he has delivered more than the specified quantity of another class, since as against him both quantities are conclusive<sup>20</sup>. Where, however, words are inserted qualifying the statement as to quantity<sup>21</sup>, the bill of lading is no longer to be regarded as conclusive evidence of the quantity shipped, and the shipowner, in spite of the term, is not precluded from showing that the whole or part of the goods specified was not shipped.

Where the Hague-Visby Rules apply, a bill of lading issued by the carrier or the master or agent of the carrier to the shipper and showing, among other things, the leading marks necessary for the identification of the goods, the number of packages or pieces, or the quantity or weight, as the case may be, and the apparent order and condition of the goods<sup>22</sup>, is prima facie evidence of the receipt by the carrier of such goods; and, where the bill of lading has been transferred to a third party acting in good faith, it is conclusive evidence<sup>23</sup>.

1 See eg *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416 at 428, sub nom *Silver and Layton v Ocean Steamship Co* 35 Ll L Rep 49 at 53, CA, per Scrutton LJ. The holder of a bill of lading may not take advantage of an estoppel if he knew that the statement was untrue: *Evans v James Webster & Bros Ltd* (1928) 32 Ll L Rep 218.

2 *The Skarp* [1935] P 134, 18 Asp MLC 576; *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341, [1973] 2 Lloyd's Rep 366. As to estoppel generally see **ESTOPPEL** vol 16(2) (Reissue) PARA 951 et seq; and as to estoppel in pais see **ESTOPPEL** vol 16(2) (Reissue) PARA 1043 et seq.

3 See *Howard v Tucker* (1831) 1 B & Ad 712.

4 See PARA 318.

5 See *Blanchet v Powell's Llantivit Collieries Co Ltd* (1874) LR 9 Exch 74.

6 See *Blanchet v Powell's Llantivit Collieries Co Ltd* (1874) LR 9 Exch 74 at 77.

7 See *Parsons v New Zealand Shipping Co* [1901] 1 KB 548, CA.

8 As to the meaning of references to a bill of lading see PARA 338.

9 Carriage of Goods by Sea Act 1992 s 4(a).

10 Carriage of Goods by Sea Act 1992 s 4(b).

11 As to the meaning of references to the 'holder' of a bill of lading, and as to the meaning of 'lawful holder of a bill of lading', see PARA 338.

12 Carriage of Goods by Sea Act 1992 s 4. This provision creates an estoppel only; it does not confer a claim.

Without prejudice to s 2(2) (see PARA 339) and s 4, nothing in the Carriage of Goods by Sea Act 1992 precludes its operation in relation to a case where the goods to which a document relates cease to exist after the issue of the document or cannot be identified, whether because they are mixed with other goods or for any other reason; and references to the goods to which a document relates are to be construed accordingly: s 5(4). The

Act has effect without prejudice to the application, in relation to any case, of the Hague-Visby Rules which for the time being have the force of law by virtue of the Carriage of Goods by Sea Act 1971 s 1 (see PARA 367): Carriage of Goods by Sea Act 1992 s 5(5). Thus s 4 will be of limited application only where the Hague-Visby Rules apply because in such a case art III r 4 (see below) will govern the bill of lading.

13 As to statements that goods have been shipped in good order and condition see PARA 318; and as to qualification of statements as to goods see PARA 319.

14 Such a term is usual in bills of lading relating to timber, being introduced to avoid questions arising as to whether a loss took place before or after shipment: *Fisher, Renwick & Co v Calder & Co* (1896) 1 Com Cas 456 at 458 per Mathew J. Sometimes the bill of lading is made conclusive of the quantity shipped 'unless error or fraud can be proved'. For this purpose, 'error' means a definite mistake, eg in copying or adding, and the exception will not avail the shipowner if he can only produce evidence which would justify the inference that the bill of lading is not correct: *Sugar Supply Commission v Hartlepool's Seaton Steamship Co Ltd* [1927] 2 KB 419, 17 Asp MLC 307.

A 'conclusive evidence clause' may be used in a bill of lading to which the Hague-Visby Rules apply since it extends, rather than diminishes, the carrier's liabilities thereunder.

15 *Lishman v Christie* (1887) 19 QBD 333, 6 Asp MLC 186, CA; applied in *Crossfield & Co v Kyle Shipping Co Ltd* [1916] 2 KB 885, 13 Asp MLC 410, CA. Where the shipowner unsuccessfully contended that, as the clause provided that the bills of lading should be 'conclusive evidence as establishing the quantity delivered to the ship as stated therein', he was not estopped from showing that the quantity of timber stated in the bill of lading had not been shipped on board the steamer, some of the timber having been lost in lighters on its way to the steamer: *Oostzee Stoomvaart Maats v Bell and Harrison* (1906) 11 Com Cas 214. The shipowner is not, however, bound by the bill of lading if the master signs it expressly as agent for the charterer: *Harrison v Huddersfield Steamship Co Ltd* (1903) 19 TLR 386.

16 *Fisher, Renwick & Co v Calder & Co* (1896) 1 Com Cas 456.

17 *Oostzee Stoomvaart Maats v Bell and Harrison* (1906) 11 Com Cas 214 (where the incorporated charterparty provided both that freight was to be payable on the intake quantity of cargo and that the bill of lading was to be conclusive evidence as to quantity, and it was held that freight was only payable on the actual intake quantity).

18 *Mediterranean and New York Steamship Co v Mackay* [1903] 1 KB 297, CA.

19 *Lishman v Christie* (1887) 19 QBD 333, 6 Asp MLC 186, CA.

20 *Mediterranean and New York Steamship Co v Mackay* [1903] 1 KB 297, CA. Acceptance by the consignees of the excess does not of itself do more than give the shipowners a right to the payment of additional freight, and even that right depends on the inference to be drawn from the particular facts: *The Nordborg* [1939] P 121, [1939] 1 All ER 70, 62 Ll L Rep 213, CA, disapproving a dictum of Romer LJ in *Mediterranean and New York Steamship Co v Mackay*.

21 Eg 'quantity unknown' or 'so many pieces lost': see *J Lohden & Co v Charles Calder & Co* (1898) 14 TLR 311; *Crossfield & Co v Kyle Shipping Co Ltd* [1916] 2 KB 885, 13 Asp MLC 410, CA. As to qualification of statements as to goods see further PARA 319.

22 Is a bill of lading issued under the Hague-Visby Rules art III r 3: see PARA 379.

23 See the Hague-Visby Rules art III r 4; and PARA 380.

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### **318. Statement that goods 'shipped in good order and condition'.**

In a bill of lading the words 'shipped in good order and condition' do not import a warranty, but they do amount to a representation of fact that the goods were shipped in apparent good order and condition<sup>1</sup>; and, if an indorsee changes his position on the faith of this representation<sup>2</sup> and

afterwards sues the shipowner for delivering the goods in bad condition, the shipowner (at any rate where he was not induced to make the statement by fraud) will be estopped<sup>3</sup> from denying that the goods were shipped in apparent good order and condition<sup>4</sup>. The shipowner will not, however, be estopped from proving that the internal condition of the goods was bad<sup>5</sup>.

In any contract for the carriage of goods by sea to which the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from insufficiency of packing<sup>6</sup>.

1 *Compania Naviera Vasconzada v Churchill and Sim* [1906] 1 KB 237, 10 Asp MLC 177; *Martineaus Ltd v Royal Mail Steam Packet Co Ltd* (1912) 12 Asp MLC 190. A bill of lading containing such a statement is known as a 'clean bill of lading'; but see PARA 262 note 4. The importance of a clean bill of lading is that, as such, it will be acceptable for presentation to banks under a letter of credit: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 953.

2 Where, however, the Hague-Visby Rules apply and the receiver is taking advantage of the estoppel in the Hague-Visby Rules art III r 4, there is no need for him to prove that he relied on the statement: see PARAS 317, 380.

3 The estoppel will be available to the indorsee or holder only if he has changed his position on the faith of the representation: *The Skarp* [1935] P 134, 18 Asp MLC 576; *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341, [1973] 2 Lloyd's Rep 366 (where it was shown that the bills of lading would have been rejected by the buyers of tapioca stated to be 'shipped in good order and condition', if the bills of lading had been claused). The fact that the indorsee has taken up and pays for the bill of lading and other shipping documents under a cif contract is prima facie evidence that he has changed his position on the faith of the representation in the bill of lading: *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, sub nom *Silver and Layton v Ocean Steamship Co* 35 Ll L Rep 49, CA. If, however, his contract of sale precludes the indorsee from rejecting the shipment although giving him a right to claim damages for the defects in the goods, he will not have changed his position by taking up the documents: *The Skarp*; cf *Amis, Swain & Co v Nippon Yusen Kabushiki Kaisha* (1919) 1 Ll L Rep 51. The addition of 'apparent' to 'good' in the phrase 'shipped in good order and condition' is immaterial; with or without this addition the phrase only means that the external condition of the shipment is good, so far as would appear from such examination as the shipowner's employees could reasonably make (*The Peter der Grosse* (1875) 1 PD 414; affd (1876) 3 Asp MLC 195, CA), and, therefore, the person relying on the estoppel must satisfy the court that the defect in question was one which would have been apparent to the shipowner on reasonable examination (*National Petroleum Co v Athelviscount (Owners)* (1934) 48 Ll L Rep 164). The statement on which the alleged estoppel is founded must be clear and unqualified, otherwise the whole case of estoppel fails: *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, PC (where the bills of lading were claused 'in apparent good order and condition' with a stamped indorsement 'signed under guarantee to produce ship's clean receipt'); *Tokio Marine and Fire Insurance Co Ltd v Retla Steamship Co* [1970] 2 Lloyd's Rep 91 (US 9th Cir) (where it was held that no estoppel arose in the case of a bill of lading for steel pipes damaged by rust before shipment, because the bill of lading, although stating that the goods were 'shipped in apparent good order and condition', stated 'The term 'apparent good order and condition', when used in this bill of lading with reference to iron, steel or metal products, does not mean that the goods, when received, were free of visible rust or moisture').

4 *Compania Naviera Vasconzada v Churchill and Sim* [1906] 1 KB 237, 10 Asp MLC 177; *Cummins Sales and Service Inc v Institute of London Underwriters and Deutsche Dampfschiffahrt Gesellschaft Hansa, The Goldenfels* [1974] 1 Lloyd's Rep 292 (US 5th Cir) (where the shipowners were estopped from showing pre-shipment damage to some component parts of a prefabricated metal building). It is only as against an indorsee, or a holder of the bill of lading who takes delivery under it (*Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, 16 Asp MLC 262, CA), that this estoppel arises; as against the shipper it seems the representation is a mere admission which the shipowner is entitled to disprove. As to the position when the shipowner knowingly signs an inaccurate bill of lading in exchange for an indemnity from the shipper see *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, [1957] 2 All ER 844, [1957] 2 Lloyd's Rep 1, CA; *Hellenic Lines Ltd v Chemoleum Corp* [1972] 1 Lloyd's Rep 350 (NY App Div) (where it was held that a letter of guarantee against a clean bill of lading in respect of bagged fertiliser in a leaky condition contravened public policy as expressed by United States statute and could not be enforced).

5 *Compania Naviera Vasconzada v Churchill and Sim* [1906] 1 KB 237, 10 Asp MLC 177; and see *The Tromp* [1921] P 337, 15 Asp MLC 338 and *National Petroleum Co v Athelviscount (Owners)* (1934) 48 Ll L Rep 164. It seems that the representation has no relation to original defects of quality or type: *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416 at 433, sub nom *Silver and Layton v Ocean Steamship Co* 35 Ll L Rep 49 at 55, CA, per Greer LJ.

6 See the Hague-Visby Rules art IV r 2(n); and PARA 389.

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### 319. Qualification of statements as to goods.

In view of the principle that the words 'shipped in good order and condition' do not import a warranty<sup>1</sup>, it is the practice of the master or person signing the bill of lading to qualify the statements as to the goods inserted in the bill of lading by adding some such phrase as 'weight, quality, quantity and contents unknown'<sup>2</sup>. Although, by signing the bill of lading, he admits that certain goods have been received by the ship, the effect of the qualification is that he declines to accept the particulars furnished to him by the shipper as correct<sup>3</sup>.

He is not, therefore, bound by any statement in the bill of lading with reference to matters specifically excluded by the qualification<sup>4</sup>. At the same time, he must deliver the goods which he has actually received, whatever they may be<sup>5</sup>. However, unless the qualification expressly refers to the condition of the goods, the statement that the goods have been shipped in good order and condition constitutes, as against both the master and the shipowner<sup>6</sup>, an admission that the goods were externally to all appearances in good order and condition at the time of shipment<sup>7</sup>. If, therefore, the goods on delivery appear to be damaged externally, *prima facie* the shipowner is liable on the admission<sup>8</sup>, but, if the claim is made by a person who has not changed his position on the faith of the admission, the shipowner can displace this *prima facie* case and escape liability if he can prove either that the admission was in fact incorrect because the damage occurred before he received the goods or that the goods were damaged by a cause for which he is not responsible<sup>9</sup>.

If, however, the damage is internal, the shipper must prove that the goods were in good order and condition internally when shipped<sup>10</sup>, or that the damage is attributable, not to an inherent defect in the goods themselves<sup>11</sup>, but to some external cause<sup>12</sup>; otherwise the shipowner is not responsible.

1 See PARA 318.

2 Bills of lading typically contain many variants of such phrase, such as 'said to be/weight/contain', 'shipper's load and tally, given for information only', 'shipper's figures, without carrier's responsibility' etc.

3 *Lebeau v General Steam Navigation Co* (1872) LR 8 CP 88 at 96, 1 Asp MLC 435 at 437 per Brett J, referring to *Jessel v Bath* (1867) LR 2 Exch 267. The master is not, however, precluded from claiming freight on the quantities expressed in the bill of lading: *Tully v Terry* (1873) LR 8 CP 679, 2 Asp MLC 61. As to measurement of the cargo see *Jos Merryweather & Co Ltd v Wm Pearson & Co* [1914] 3 KB 587, 12 Asp MLC 540. In *Hogarth Shipping Co Ltd v Blyth, Greene, Jourdain & Co Ltd* [1917] 2 KB 534, 14 Asp MLC 124, CA, the bills of lading contained the clause 'freight and all other conditions and exceptions as per charterparty' and the charterparty provided that the captain should 'sign Eastern Trade bills of lading which are to be deemed conclusive proof of cargo shipped, and their conditions to form part of this charterparty'. It was held that the conclusive proof clause in the charterparty was not incorporated in the bill of lading. Where the master signed bills of lading for a cargo of potatoes in bags in which they were described as shipped in good order and condition, 'weight, quality, condition and measure unknown', it was held that the qualification 'condition unknown' only applied to the internal condition of the cargo and that the shipowner was estopped from denying that the bags were dry when shipped: *The Tromp* [1921] P 337, 15 Asp MLC 338. Whether 'condition' refers to the internal or to the external state of the goods is in every case a question of construction of the particular words used. See also *The Skarp* [1935] P 134, 18 Asp MLC 576 (where a similar qualification was held not sufficient to entitle the shipowner to prove that a cargo of timber was shipped in a wet and musty condition). The words 'shipped in good order and condition and to be delivered in like good order and condition' do not import a contract to deliver in good order and condition: *The Skarp*, applying *Compania Naviera Vasconzada v Churchill and Sim*, *Compania Naviera Vasconzada v Burton & Co* [1906] 1 KB 237, 10 Asp MLC 177. See also *Canada and Dominion Sugar Co v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, PC (cited in PARA 318 note 3).

4 *Jessel v Bath* (1867) LR 2 Exch 267; cf *Haddow v Parry* (1810) 3 Taunt 303; *New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd* [1917] 2 KB 664, 14 Asp MLC 131, CA ('a quantity said to be 937 tons', 'weight, measurement, contents, and value (except for the purposes of estimating freight) unknown'; bill of lading held not to be even prima facie evidence of number of tons shipped) (applied in *Craig Line Steamship Co v North British Storage and Transit Co*, 55 *Craigforth* 1921 SC 114); *North Shipping Co Ltd v Joseph Rank Ltd* (1926) 26 Ll L Rep 123; *Noble Resources Ltd v Cavalier Shipping Corp*, *The Atlas* [1996] 1 Lloyd's Rep 642 (where Longmore J said at 646 that 'if the bills provide 'weight . . . number . . . quantity unknown' . . . they 'show' nothing at all because the shipowner is not prepared to say what the number or weight is. He can, of course, be required to show it under the Hague-Visby Rules art III r 3 (see PARA 379) but, unless and until he does so, the provisions of art III r 4 (see PARAS 317, 380) as to prima facie evidence cannot come into effect'. See however *Conoco (UK) Ltd v Limni Maritime Co Ltd*, *The Sirina* [1988] 2 Lloyd's Rep 613, where Phillips J at 615 said that 'where the discrepancy between cargo actually loaded and cargo alleged to have been loaded is so great that it . . . give[s] rise to the implication that the quantity loaded was not wildly at odds with the bill of lading quantity'. See also *Rederiaktiebolaget Gustav Erikson v Ismail, The Herroe and The Askoe* [1986] 2 Lloyd's Rep 281, where Hobhouse J held, at 283, that an additional signature and stamp placed by the master against the figures in the description box superseded the 'weight and quantity' clause.

5 *Lebeau v General Steam Navigation Co* (1872) LR 8 CP 88, 1 Asp MLC 435; *The Emilien Marie* (1875) 2 Asp MLC 514. The liability of the person signing is not affected by a misdescription of the goods, unless fraudulent: *Lebeau v General Steam Navigation Co*.

6 *Compania Naviera Vasconzada v Churchill and Sim*, *Compania Naviera Vasconzada v Burton & Co* [1906] 1 KB 237, 10 Asp MLC 177 (where the bill of lading stated 'quality unknown', and it was held that this did not qualify the admission that the goods were shipped in good condition), followed in *Martineaus Ltd v Royal Mail Steam Packet Co Ltd* (1912) 12 Asp MLC 190; cf *Crawford and Law v Allan Line Steamship Co Ltd* [1912] AC 130, 12 Asp MLC 100, HL. Even the words 'condition unknown' may not be enough to entitle the shipowner to prove that the goods were shipped in bad apparent condition: see *The Tromp* [1921] P 337, 15 Asp MLC 338; *The Skarp* [1935] P 134, 18 Asp MLC 576. A master's protest alleging that some of the cargo was damaged on shipment will not preclude the indorsee from relying on a clean bill of lading, since the protest does not necessarily refer to the goods covered by the bill of lading and the indorsee is entitled to rely on the latter document unless he has a contradictory statement before him which is at least as clear as the representation in the bill of lading: *Evans v James Webster & Bros Ltd* (1928) 32 Ll L Rep 218.

7 *The Peter der Grosse* (1875) 1 PD 414 (affd (1876) 3 Asp MLC 195, CA); *Compania Naviera Vasconzada v Churchill and Sim*, *Compania Naviera Vasconzada v Burton & Co* [1906] 1 KB 237, 10 Asp MLC 177; *Martineaus Ltd v Royal Mail Steam Packet Co Ltd* (1912) 12 Asp MLC 190.

8 See note 7.

9 *The Peter der Grosse* (1875) 1 PD 414 (affd (1876) 3 Asp MLC 195, CA); *Crawford and Law v Allan Line Steamship Co Ltd* [1912] AC 130, 12 Asp MLC 100, HL. As to the position where the claim is made by an indorsee as holder of the bill of lading see PARA 332.

10 Where the damage may arise either from the bad condition of the goods when shipped, or from some cause existing in the ship, it may be essential to prove the state of the goods before shipment, as where a cargo of grain is found to be heated; but, where noxious substances calculated to produce the peculiar damage actually present are found in close proximity to the goods, cause and effect are so closely brought together that a conclusion can be reached without proof of their condition at the time of shipment: *Moore v Harris* (1876) 1 App Cas 318 at 326, 3 Asp MLC 173, PC (where tea in packages was tainted by a disinfectant, and such disinfectant had been used on board). Similarly, the arrival of the ship without the goods is prima facie evidence against the shipowner (*Wilson Sons & Co v Xantho (Cargo Owners)*, *The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL), although there is no evidence to show how the goods were lost (*Baxter's Leather Co v Royal Mail Steam Packet Co* [1908] 2 KB 626, 11 Asp MLC 98, CA), but it is otherwise if the ship herself fails to arrive (*Boyson v Wilson* (1816) 1 Stark 236).

11 *The Barcore* [1896] P 294, 8 Asp MLC 189; *Greenshields, Cowie & Co v Stephens & Sons Ltd* [1908] AC 431 at 436, 11 Asp MLC 167 at 168, HL, per Lord Halsbury, approving *Johnson v Chapman* (1865) 19 CBNS 563 at 581 per Willes J. As to inherent defect or vice see PARA 273.

12 *The Ida* (1875) 2 Asp MLC 551, PC (disapproving *The Prosperino Palasso* (1873) 2 Asp MLC 158); *J Kaufman Ltd v Cunard Steamship Co Ltd* [1965] 2 Lloyd's Rep 564, Ex Ct, Que Adm Dist.

and Functions of Bills of Lading/320. The bill of lading and the terms of the contract of carriage.

### **320. The bill of lading and the terms of the contract of carriage.**

The contract of affreightment need not necessarily be expressed in writing<sup>1</sup>. In the absence of a charterparty<sup>2</sup> or bill of lading, the terms on which the parties have agreed may be ascertained by reference not only to documents of a more or less informal character, such as advice notes<sup>3</sup>, freight notes<sup>4</sup>, mate's receipts<sup>5</sup>, handbills<sup>6</sup>, sea waybills<sup>7</sup>, delivery orders<sup>8</sup> or booking notes<sup>9</sup>, but also to advertisements<sup>10</sup>, and even to conversations<sup>11</sup> or oral promises<sup>12</sup>, and the general course of business followed on previous occasions by the parties<sup>13</sup>.

Where, as is usually the case, there is a bill of lading relating to the goods, the terms of the contract on which the goods are carried are prima facie to be ascertained from the bill of lading<sup>14</sup>. As between the shipper and the carrier, the bill of lading is not, however, conclusive evidence of those terms<sup>15</sup>, and the person accepting it is not necessarily bound by all its terms<sup>16</sup> but may be entitled to repudiate them on the ground that, as he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection<sup>17</sup>. However, although the contract of carriage will generally be made before the goods are sent to the ship, the contract may afterwards be reduced into writing and expressed in the bill of lading<sup>18</sup>, which then constitutes 'excellent evidence' of the terms of the contract of carriage<sup>19</sup>.

As between the shipowner and an indorsee, the bill of lading constitutes the contract<sup>20</sup>, and it may also constitute the contract as between the shipowner and the shipper<sup>21</sup>.

1 See PARA 219.

2 As to charterparties see PARA 205 et seq.

3 *Armstrong v Allan Bros & Co* (1892) 7 Asp MLC 277.

4 *Lipton v Jescott Steamers* (1895) 1 Com Cas 32, CA (where references to a particular form of bill of lading had been stamped on advice notes and freight notes). If, however, the note is simply a quotation of freight, there is no contract: see *Scancarriers A/S v Aotearoa International Ltd, The Barranduna and The Tarago* [1985] 2 Lloyd's Rep 419, PC.

5 As to mate's receipts see PARA 324.

6 *Phillips v Edwards* (1858) 3 H & N 813.

7 As to sea waybills see PARA 364.

8 As to delivery orders see PARA 365.

9 See eg *Ngo Chew Hong Edible Oil Pte Ltd v Scindia Steam Navigation Co Ltd, The Jalamohan* [1988] 1 Lloyd's Rep 443; *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd, The Pembroke* [1995] 2 Lloyd's Rep 290, NZ HC. If, however, the booking note is expressed to be 'subject to details/logical amendments', there is no contract until agreement is reached on the detailed provisions of the form: *CPC Consolidated Pool Carriers GmbH v CTM Cia Transmediterranea SA, The CPC Gallia* [1994] 1 Lloyd's Rep 68.

10 *Phillips v Edwards* (1858) 3 H & N 813.

11 *Runquist v Ditchell* (1799) 3 Esp 64.

12 *Ardennes (Cargo Owners) v Ardennes (Owners)* [1951] 1 KB 55, [1950] 2 All ER 517, 84 Ll L Rep 340.

13 *Lipton v Jescott Steamers* (1895) 1 Com Cas 32, CA.

14 *Leduc & Co v Ward* (1888) 20 QBD 475 at 479, 6 Asp MLC 290 at 291, CA, per Lord Esher MR. See also *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 596, 4 Asp MLC 580 at 581, HL, per

Lord Selborne LC; cf *Chappel v Comfort* (1861) 10 CBNS 802 at 810 per Willes J. As to the position where there is a charterparty as well as a bill of lading see PARA 321.

15 *Sewell v Burdick* (1884) 10 App Cas 74 at 105, 5 Asp MLC 376 at 386, HL, per Lord Bramwell. See also *Wagstaff v Anderson* (1880) 5 CPD 171, as reported in 4 Asp MLC 290 at 291 per Bramwell LJ; *Ardennes (Cargo Owners) v Ardennes (Owners)* [1951] 1 KB 55, [1950] 2 All ER 517, 84 Ll L Rep 340 (where there was a collateral oral warranty), distinguishing *Leduc & Co v Ward* (1888) 20 QBD 475, CA.

16 *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216 (where an unusual clause was printed in the middle of about 30 lines of small type without any marks to draw attention to it); cf *Lewis v M'Kee* (1868) LR 4 Exch 58, Ex Ch; *Dennis & Sons Ltd v Cork Steamship Co Ltd* [1913] 2 KB 393, 12 Asp MLC 337.

17 *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216. In *Armour & Co Ltd v Leopold Walford (London) Ltd* [1921] 3 KB 473 at 476, 15 Asp MLC 415 at 416, McCardie J was of the opinion that, whatever the prior express bargain had been, if a shipper chose to receive a bill of lading in a certain form without protest, he should ordinarily be bound by it. However, in that case, he held that the bill of lading was in accordance with the prior bargain.

18 *Leduc & Co v Ward* (1888) 20 QBD 475 at 479, 6 Asp MLC 290 at 291, CA, per Lord Esher MR; and see, in the context of carriage by rail *London and North Western Ry Co v Richard Hudson & Sons Ltd* [1920] AC 324, HL.

19 *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL.

20 *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 596, 4 Asp MLC 580 at 581, HL, per Lord Selborne LC; *Bank of Australasia v Clan Line Steamers Ltd* [1916] 1 KB 39, 13 Asp MLC 99, CA. The only exception is where the indorsee is agent only of the charterer: *Gledstanes v Allen* (1852) 12 CB 202; *Kern v Deslandes* (1861) 10 CBNS 205, as explained in *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689.

21 *Van Casteel v Booker* (1848) 2 Exch 691 at 708 per Parke B; *Fraser v Telegraph Construction and Maintenance Co* (1872) LR 7 QB 566 at 571, 1 Asp MLC 421 at 422 per Blackburn J; *Hayn v Culliford* (1879) 4 CPD 182 at 185, 4 Asp MLC 128 at 129, CA, per Bramwell LJ; *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 596, 4 Asp MLC 580 at 581, HL, per Lord Selborne LC; *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521 at 530, 5 Asp MLC 65 at 68, CA, per Brett LJ.

## UPDATE

### 320 The bill of lading and the terms of the contract of carriage

NOTE 19--See *Geofizika DD v MMB International Ltd (Greenshields Cowie & Co Ltd, Part 20 defendant)* [2009] EWHC 1675 (Comm), [2009] 2 All ER (Comm) 1034.

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### 321. Effect of bill of lading where there is a charterparty.

Even where there is a charterparty, the bill of lading is prima facie, as between the shipowner and an indorsee, the contract on which the goods are carried<sup>1</sup>. This is certainly so when the indorsee is ignorant of the terms of the charterparty, and may be so even if he knows of them<sup>2</sup>. As between the shipowner and the charterer, the bill of lading may in some cases have the effect of modifying the contract as contained in the charterparty<sup>3</sup>, although, in general, the charterparty will prevail, and the bill of lading will operate solely as an acknowledgment of receipt<sup>4</sup>.

1 *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689; *Leduc & Co v Ward* (1888) 20 QBD 475, 6 Asp MLC 290, CA. As to the incorporation of the charterparty in the bill of lading see PARA 360 et seq.

2 Cf PARA 360.

3 *Gullischen v Stewart Bros* (1884) 13 QBD 317, 5 Asp MLC 200, CA (cesser clause); *Bryden v Niebuhr* (1884) Cab & El 241; *Davidson v Bisset & Son* (1878) 5 R 706 (where it was suggested that the bill of lading might only vary the charterparty in matters of detail). Cf *Barwick v Burnyeat, Brown & Co* (1877) 3 Asp MLC 376. See also PARA 354.

4 *Rodocanachi v Milburn* (1886) 18 QBD 67, 6 Asp MLC 100, CA; *President of India v Metcalfe Shipping Co Ltd* [1970] 1 QB 289, [1969] 3 All ER 1549, [1969] 2 Lloyd's Rep 476, CA. A charterer who is not the shipper, and to whom the bill of lading is indorsed, is, as regards the goods specified in the bill of lading, in the position of an indorsee, and cannot rely on any other contract than that contained in the bill of lading: *SS Calcutta Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395. See also PARA 348.

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### 322. Through and combined transport bills of lading.

A document containing or evidencing a contract for the carriage of goods under which the goods are to be carried in separate stages by more than one vessel, or partly by sea and partly by some other means of transport, for example, by road<sup>1</sup>, rail<sup>2</sup> or air<sup>3</sup>, is usually referred to as a 'through bill of lading' or, as the case may be, as a 'combined transport bill of lading'.

Under a through bill of lading the carrier who issues the bill may be responsible for the whole carriage, in which case the carriers performing the other stages of the carriage are merely sub-contractors of the issuing carrier<sup>4</sup>, or he may be contractually responsible as a principal only when he has control of the goods, usually the sea transit, and as an agent at all other times, during which the shipper will be subject to the terms and conditions of the road, rail or air carrier<sup>5</sup>.

The terms and conditions of through bills of lading differ widely and it may often be difficult to discover whether terms were intended to apply to the entirety of the transit or to one stage only. However, unless the through bill of lading states the contrary<sup>6</sup>, the contract is to be regarded as made solely with the shipowner or other person who issues it<sup>7</sup>, and he alone exercises the rights and incurs the liabilities arising out of the various stages of the transit<sup>8</sup>. If the contract of the shipowner provides that his liability as such is to cease at a particular place, it is, nevertheless, his duty to contract on behalf of the shipper for the forwarding of the goods to their destination<sup>9</sup>.

A through bill of lading often incorporates by reference the regular form of bill of lading used by the shipowner<sup>10</sup>, which thus becomes a part of the contract<sup>11</sup>, except in so far as its terms are inconsistent with the express terms of the through bill of lading<sup>12</sup>.

As a general rule the whole of the inclusive freight is payable to the shipowner issuing the through bill of lading<sup>13</sup>. If it is payable in advance, he may retain the whole, notwithstanding that a part of it can never be earned by reason of the loss of the goods before some of the stages of the journey have begun<sup>14</sup>.

Similarly, where the land or air transit precedes the sea voyage and the bill of lading gives the shipowner a lien for his charges of the land transit<sup>15</sup>, the shipowner may, on part of the goods being lost during the voyage, exercise the lien for the full amount of such charges over the remainder of the goods, although he would not be entitled to do so in respect of the full amount of his own freight in the strict sense of the word<sup>16</sup>. If an overcharge has been made in

respect of the land transit, the shipowner is responsible for its repayment, and may not require the shipper to recover it from the land carrier<sup>17</sup>.

Under a combined transport bill of lading the combined transport operator who issues the document will normally act as principal throughout all stages of the transit<sup>18</sup>. With the expansion in the use of containers and pallets, combined transport has become increasingly common. Difficult problems may, however, arise when different parts of the carriage are subject to the compulsory provisions of international Conventions relating to carriage by sea<sup>19</sup>, road<sup>20</sup>, rail<sup>21</sup> or air<sup>22</sup>.

Through and combined transport bills of lading may in theory be subject to various legal defects. For example, it may sometimes be doubtful whether such a document is a bill of lading for the purposes of the Carriage of Goods by Sea Act 1992<sup>23</sup>, or even whether it is a document of title, or whether, in the absence of a trade usage or express agreement, such a bill of lading is a valid tender under a cif contract<sup>24</sup>. In practice, these considerations are unlikely to cause difficulty. These types of document are now so widely used that the courts should have little difficulty in holding that they are bills of lading within the 1992 Act, and that their use in international contracts of sale is generally justified by trade usage.

The use of containers raises a number of matters which do not arise in the case of older and more conventional forms of transport. The rights of the parties need to be specified in the event of the time of loss or damage to the contents being undiscoverable. If the container is packed by the shipper, it is advisable for the bill of lading to acknowledge the receipt of a container 'said to contain' the goods described in order to prevent the bill from being treated as evidence of the contents of the container or creating an estoppel binding on the carrier in that respect. In such cases the carrier usually excludes his liability and takes an indemnity from the shipper in respect of stowage within the container. By contract, where containers are supplied by the shipowner, his responsibility is probably that of a bailor of goods<sup>25</sup>, to supply a container reasonably fit for its purpose<sup>26</sup>, although there may be occasions when the container is rather to be treated as a part of the ship and subject to the same rules as to seaworthiness<sup>27</sup>. It is common to provide for demurrage on containers supplied by the carrier to be paid in the event of delay. Where the Hague-Visby Rules apply, then for the purpose of calculating the limit of a carrier's liability, the number of units or packages enumerated in the bill of lading as packed in the container is deemed to be the actual number of packages or units<sup>28</sup>. In practice, containers are often carried on deck, and the bill of lading should, therefore, permit goods stowed in containers to be carried on deck<sup>29</sup> and provide that they will be treated as subject to the Hague-Visby Rules and as included in general average<sup>30</sup>.

1 As to carriage by road see PARA 650 et seq.

2 As to carriage by rail see PARA 683 et seq.

3 As to carriage by air see PARA 121 et seq.

4 *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 428, [1954] 2 All ER 158 at 169, [1954] 1 Lloyd's Rep 321 at 334 per Devlin J. In such circumstances the sub-contractors may, however, still find that they owe a duty of care to the owner of the goods and may have a liability in tort for loss or damage: *The Termagant* (1914) 30 TLR 377. In certain circumstances the sub-contracted carrier may also find that he is liable to the cargo owner as a sub-bailee on the terms of the sub-contract between him and the main carrier: *The Pioneer Container* [1994] 2 AC 324, sub nom *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC.

The same principles apply where goods have to be transhipped and carried to their destination in a ship belonging to a different shipowner: cf *Greeves v West India and Pacific Steamship Co* (1870) 22 LT 615, Ex Ch (where the goods had to be carried by sea to Colon, taken across the Isthmus of Panama by rail, and thence by sea to San Francisco); *Wiener & Co v Wilsons and Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413, CA (where the contract covered the conveyance by lighter from the wharf to the steamer). For a usage requiring a seller to produce a through bill of lading see *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94, 12 Asp MLC 182.

- 5 *Crawford and Law v Allan Line Steamship Co Ltd* [1912] AC 130, 12 Asp MLC 100, HL.
- 6 *Allan Bros & Co v James Bros & Co* (1897) 3 Com Cas 10; *Crawford and Law v Allan Line Steamship Co Ltd* [1912] AC 130, 12 Asp MLC 100, HL.
- 7 *Greeves v West India and Pacific Steamship Co* (1870) 22 LT 615, Ex Ch; cf *Leech v Glynn & Son* (1890) 6 TLR 306, DC.
- 8 Cf PARAS 12-14, 36. Prima facie a master who signs a so-called 'through bill of lading' at an intermediate port has no authority to bind his owners as to the carriage of the goods during the period before they came into the master's possession: *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 45, 15 Asp MLC 546 at 550, HL, per Lord Sumner.
- 9 *Moore v Harris* (1876) 1 App Cas 318 at 327, 3 Asp MLC 173 at 176, PC.
- 10 *E Clemens Horst Co v Norfolk and North American Steam Shipping Co* (1906) 11 Com Cas 141; *The Hibernian* [1907] P 277, 10 Asp MLC 501, CA. It may also incorporate the conditions of the contract between the shipowner and the lighterman or other carrier who brings the goods to the vessel or carries them after the sea voyage: see *Aberdeen Grit Co Ltd v Ellerman's Wilson Line Ltd* 1933 SC 9.
- 11 *E Clemens Horst Co v Norfolk and North American Steam Shipping Co* (1906) 11 Com Cas 141.
- 12 *Moore v Harris* (1876) 1 App Cas 318 at 327, 3 Asp MLC 173 at 176, PC.
- 13 *The Hibernian* [1907] P 277, 10 Asp MLC 501, CA. See also *Kitts v Atlantic Transport Co* (1902) 7 Com Cas 227.
- 14 *Greeves v West India and Pacific Steamship Co* (1870) 22 LT 615, Ex Ch.
- 15 As to the construction of a provision giving a general lien for any money due from the owner of the goods see *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL (where it was held that the general lien was available only against the consignee and the goods must be redelivered to the consignor who had stopped them in transit). See also PARA 770.
- 16 *The Hibernian* [1907] P 277, 10 Asp MLC 501, CA.
- 17 *Kitts v Atlantic Transport Co Ltd* (1902) 7 Com Cas 227.
- 18 See *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) para 2.47.
- 19 See eg the Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 13 December 1974; TS 40 (1987); Cm 202); and PARA 634 et seq.
- 20 See eg the Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956; Cmnd 2260); and PARA 650 et seq.
- 21 See eg the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41) (COTIF); and PARA 683 et seq.
- 22 See the Warsaw and Montreal Conventions (ie the Convention for the Unification of Certain Rules for International Carriage by Air (Warsaw, 12 October 1929; TS 11 (1933); Cmnd 4284) and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999; TS 44 (2004); Cm 6369); and PARA 121 et seq.
- 23 See PARA 338 et seq.
- 24 See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 332.
- 25 The implied condition as to fitness applies only where, under a contract for the hire of goods, the bailor bails goods in the course of a business and the bailee, expressly or by implication, makes known to the bailor in the course of negotiations conducted by him in relation to the making of the contract any particular purpose for which the goods are being bailed: see the Supply of Goods and Services Act 1982 s 9(4)(a), (5); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 89. The implied intention does not apply where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor: see s 9(6); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 89.
- 26 See the Supply of Goods and Services Act 1982 s 9(5); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 89.

27 As to seaworthiness see PARAS 418-422, 464 et seq.

28 See *Owners of cargo lately on board the River Gurara v Nigerian National Shipping Line Ltd, The River Gurara* [1998] QB 610, [1997] 4 All ER 498, [1997] 1 Lloyd's Rep 225, CA; the Hague-Visby Rules art IV r 5(c); and PARA 394.

29 A term in a bill of lading that a ship has liberty to carry goods on deck does not amount to a statement that the goods are so carried and, therefore, does not exclude the application of the Hague-Visby Rules: *Svenska Traktor Akt v Maritime Agencies (Southampton) Ltd* [1953] 2 QB 295, [1953] 2 All ER 570, [1953] 2 Lloyd's Rep 124.

30 To give rise to a general average contribution the cargo jettisoned must have been stowed in a proper place. In general it is not proper to stow cargo on deck (see PARA 455); and, in the absence of a special custom or the consent of the other interests in the adventure, the owner of deck cargo has no claim for a general average contribution, if it is jettisoned: *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, PC.

## UPDATE

### 322 Through and combined transport bills of lading

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## (B) FORM OF BILLS OF LADING

### 323. Usual contents.

A bill of lading<sup>1</sup> is usually expressed in a printed document, containing blank spaces for the insertion of the necessary details<sup>2</sup>. It states that the goods specified in it<sup>3</sup> have been shipped in good order and condition<sup>4</sup> by the shipper in and on a certain ship then lying in the port of loading and bound for a particular port, and are to be delivered in like good order and condition<sup>5</sup> at their destination to, or to the order of, a specified person or his assigns, or to bearer<sup>6</sup>, on payment of the freight<sup>7</sup>. Under the usual form<sup>8</sup> the ship is given liberty to deviate<sup>9</sup>, certain perils are excepted<sup>10</sup>, and there is a negligence clause<sup>11</sup>. The charterparty, if any, is usually incorporated to a greater or less extent<sup>12</sup>, and provision is made for the payment of general average<sup>13</sup>. In some cases the bill of lading contains a large number of terms which deal fully with the respective rights and duties of the parties.

1 See PARA 313 note 1.

2 There are innumerable forms of bills of lading in use. Some are designed especially for use with charterparties, eg BIMCO's CONGENBILL 2007, whereas others are designed by individual carriers for their own use. One type of bill of lading, known as a liner bill of lading, is used where a shipping company offers a regular service and the goods are merely booked on the first available space, forming part of a general cargo. In some cases a bill of lading will contain a small number of terms and conditions and is known as a 'short form' bill of lading. It will, however, expressly incorporate the rather more extensive terms and conditions of another bill of lading, usually referred to as the 'long form'. The rules governing the construction of bills of lading are the same as those applicable to charterparties: see PARAS 227-229.

3 The particulars will be contained in boxes carried on the front of the bill of lading. The bill of lading is not invalidated as a negotiable instrument by the details as to the goods being filled in by the shipper after the

master has signed: *Cowdenbeath Coal Co Ltd v Clydesdale Bank* (1895) 22 R 682. As to the extent to which a bill of lading is negotiable see PARAS 314, 349. Any loss occasioned by a misdescription falls on the consignee: *Shirwell v Shaplock* (1815) 2 Chit 397.

4 As to the effect of the words 'shipped in good order and condition' see PARA 318; and as to the carrier's, or the master or agent of the carrier's, duty in any contract for the carriage of goods by sea to which the Hague-Visby Rules apply to issue to the shipper a bill of lading see the Hague-Visby Rules art III r 3; and PARAS 325, 379.

5 See PARA 319.

6 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 843. As to the transfer of a bill of lading see PARA 333 et seq.

7 As to the payment of freight see PARA 567 et seq. The particular form of words used in the bill of lading is immaterial: *Weguelin v Cellier* (1873) LR 6 HL 286. The master may deliver to the consignee without requiring payment of the freight, in which case the shipper has no claim on this ground against the shipowner: *Shepard v De Bernales* (1811) 13 East 565.

8 In any contract for the carriage of goods by sea to which the Hague-Visby Rules apply the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods is, however, subject to the responsibilities and liabilities, and entitled to the rights and immunities, in the Hague-Visby Rules, subject to the provisions of art VI (see PARA 397): see art II; and PARA 372.

9 As to deviation see PARA 248 et seq.

10 For the usual exceptions see PARA 265 et seq.

11 As to negligence clauses see PARA 280; and as to the position where the charterparty contains a negligence clause, and the charterer presents bills of lading which do not contain such a clause, see PARA 262 note 10.

12 See PARA 360.

13 It is usually provided that the adjustment is to be made according to the York-Antwerp Rules, with or without modifications: see PARA 608. As to adjustment generally see PARA 620.

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## (C) ISSUE OF BILLS OF LADING ON SHIPMENT OF THE GOODS; MATE'S RECEIPTS

### 324. Mate's receipt.

When the goods are delivered to the ship, the shipper is usually handed a written acknowledgment of their receipt on behalf of the ship<sup>1</sup>. This acknowledgment is called the 'mate's receipt'<sup>2</sup>, and it is prima facie evidence that the goods specified in it have been delivered to and received by the ship<sup>3</sup>. It is not, however, conclusive evidence, although the burden of proving that it is incorrect lies on the shipowner<sup>4</sup>. Qualifying words may be inserted describing the condition of the goods at the time of shipment; in the absence of any qualification the receipt is known as a 'clean receipt'<sup>5</sup>.

1 See PARA 313. As to what is meant by 'delivering to the ship' see PARA 440.

2 A mate's receipt is merely an acknowledgment that the ship has taken delivery of the cargo; it is a simple receipt, not a negotiable instrument and, if the master or mate signs it without qualification, it is prima facie

evidence of receipt in good order and condition: *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA.

3 *Cobban v Downe* (1803) 5 Esp 41; *Biddulph v Bingham* (1874) 2 Asp MLC 225; cf *British Columbia Saw-Mill Co v Nettleship* (1868) LR 3 CP 499; *De Clermont and Donner v General Steam Navigation Co* (1891) 7 TLR 187. If, therefore, the goods are lost after the mate's receipt has been given, the owner of the goods may sue the shipowner, even though no bill of lading is ever signed: *Fragano v Long* (1825) 4 B & C 219 (where the principal was held entitled to sue although the goods were shipped by an agent).

4 *Biddulph v Bingham* (1874) 2 Asp MLC 225.

5 See *Armstrong v Allan Bros & Co* (1892) 7 Asp MLC 277; revsd on appeal 7 Asp MLC 293, CA.

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### 325. Right to receive bill of lading.

In any contract for the carriage of goods by sea to which the Hague-Visby Rules apply<sup>1</sup>, after receiving the goods into his charge, the carrier, or the master or agent of the carrier, must, on demand of the shipper<sup>2</sup>, issue to the shipper a bill of lading showing (among other things) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper, and the apparent order and condition of the goods<sup>3</sup>.

If the shipper is refused a bill of lading, or if the terms of the bill of lading offered differ from those which he is entitled to require<sup>4</sup>, or if his instructions are not complied with<sup>5</sup>, he may demand the redelivery of his goods<sup>6</sup>, and a refusal to redeliver them, when so demanded<sup>7</sup>, amounts to a conversion of them by the shipowner<sup>8</sup>. The shipowner is not discharged from his responsibility to the owner of the goods merely on the ground that a bill of lading has already been signed and handed over to a third person who was believed in good faith to be the owner<sup>9</sup>.

Where the bill of lading is issued in a set<sup>10</sup>, it is the practice for the master to retain one part for his own use and to deliver the remaining parts to the shipper.

A bill of lading must not be dated earlier than the date by which all the cargo referred to in the bill of lading has been loaded<sup>11</sup>.

1 Where the Hague-Visby Rules do not apply, it would appear that a shipper has a right to demand a bill of lading from the carrier at any rate where he has in his possession a mate's receipt from the carrier for goods shipped and where the demand is for a bill of lading made out to the shipper's order, signifying that property has yet to pass to the buyer: see *Falk v Fletcher* (1865) 18 CBNS 403.

2 In practice, a carrier will give the shipper a bill of lading without waiting for a demand; equally, in practice, a shipper will not demand a bill of lading giving particular details because the shipper needs the bill of lading promptly to obtain payment under its sale contract or letter of credit.

3 See the Hague-Visby Rules art III r 3; and PARA 379. No carrier, master or agent of the carrier is bound, however, to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking: see art III r 3 proviso; and PARA 379.

4 See PARAS 320, 353.

5 *Armstrong v Allan Bros & Co* (1892) 7 Asp MLC 277; revsd on appeal 7 Asp MLC 293, CA, on the ground that on the facts of the case there was a waiver of compliance with the instructions by the conduct of the owner of the goods.

6 See PARA 355.

7 There is no conversion where there is only a refusal to sign the bill of lading owing to a dispute as to the terms of the contract, and the owner of the goods does not object to the ship sailing with them, the shipowner intending to deliver them to the proper consignee (*Jones v Hough* (1879) 5 Ex D 115, 4 Asp MLC 248, CA), although it might have been otherwise if the owner had demanded the redelivery of his goods (*Jones v Hough* at 120 and at 249 per Cockburn CJ; cf *Ralli Bros v Paddington Steamship Co Ltd (Mackintosh & Co, Third Parties)* (1900) 5 Com Cas 124).

8 *Falk v Fletcher* (1865) 18 CBNS 403.

9 *Craven v Ryder* (1816) 6 Taunt 433; *Thompson v Trail* (1826) 6 B & C 36.

10 See PARA 334.

11 *Mendala III Transport v Total Transport Corp'n, The Wilomi Tanana* [1993] 2 Lloyd's Rep 41.

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### 326. Effect of mate's receipt.

Possession of the mate's receipt prima facie entitles the holder to receive a bill of lading<sup>1</sup>. Therefore, on its production, in the absence of notice that the holder is not the owner, the master or other agent of the shipowner is justified in signing a bill of lading and delivering it to the holder in exchange for the mate's receipt<sup>2</sup>. He is not, however, bound to insist on its production<sup>3</sup>, and may sign the bill of lading without requiring the mate's receipt to be returned or accounted for<sup>4</sup>. It is then his duty to satisfy himself that the goods for which he signs are actually on board the ship, and that the person to whom he delivers the bill of lading was at the time of shipment entitled to the bill of lading as owner of the goods or otherwise<sup>5</sup>. Accordingly, if the bill of lading is delivered to the wrong person, and no mate's receipt is asked for, the shipowner remains responsible to the owner<sup>6</sup>.

1 *Schuster v McKellar* (1857) 7 E & B 704; *Falk v Fletcher* (1865) 18 CBNS 403. See also *Craven v Ryder* (1816) 6 Taunt 433; *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, [1938] 2 All ER 285, 60 Ll L Rep 181, PC.

2 *Craven v Ryder* (1816) 6 Taunt 433. As to the shipper's duty towards his own principal to exchange the mate's receipt for a bill of lading see *Stearine Kaarsen Fabrick Gonda Co v Heintzmann* (1864) 17 CBNS 56.

3 *Hathesing v Laing, Laing v Zeden* (1873) LR 17 Eq 92 at 104, 2 Asp MLC 170 at 173 per Bacon V-C.

4 *Craven v Ryder* (1816) 6 Taunt 433; *Hathesing v Laing, Laing v Zeden* (1873) LR 17 Eq 92, 2 Asp MLC 170; *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, [1938] 2 All ER 285, 60 Ll L Rep 181, PC.

5 *Schuster v McKellar* (1857) 7 E & B 704. See also *Thompson v Trail* (1826) 6 B & C 36; *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, [1938] 2 All ER 285, 60 Ll L Rep 181, PC. Presumably, if the shipowner receives notice that since shipment the right to receive the bill of lading has passed to some third person, he must deliver the bill of lading to the third person or, if not satisfied as to the third person's title, interplead.

6 *Schuster v McKellar* (1857) 7 E & B 704. See also *Thompson v Trail* (1826) 6 B & C 36.

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### **327. Transfer of mate's receipt.**

A transfer of the mate's receipt does not, of itself, pass the property in the goods specified in it<sup>1</sup>, and, therefore, as against the true owner, the holder cannot claim the bill of lading or the goods themselves<sup>2</sup>. However, a transfer of the goods with the intention of passing the property in them to the transferee entitles the transferee, as against the transferor, to receive the bill of lading, notwithstanding that the mate's receipt is not transferred but is retained by the original owner<sup>3</sup>.

1 *Hathesing v Laing, Laing v Zeden* (1873) LR 17 Eq 92, 2 Asp MLC 170 (where a custom to treat the transfer of the mate's receipt as passing the property in the goods was held bad). See also *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, [1938] 2 All ER 285, 60 Ll L Rep 181, PC; *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC (where a trade custom to the effect that in trade between Sarawak and Singapore mate's receipts were universally adopted as documents of title in the same way as bills of lading was proved, but the custom was held to be inconsistent with the words 'not negotiable' in the mate's receipt concerned).

2 *Hathesing v Laing, Laing v Zeden* (1873) LR 17 Eq 92, 2 Asp MLC 170.

3 *Cowas-Jee v Thompson* (1845) 5 Moo PCC 165; cf *Craven v Ryder* (1816) 6 Taunt 433 (where the unpaid seller had not intended to part with his lien).

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## **(D) SIGNING OF BILLS OF LADING**

### **328. Persons who may sign.**

A bill of lading<sup>1</sup> is usually signed, not by the shipowner personally, but by the master or other agent acting on the shipowner's behalf<sup>2</sup>. If the shipowner signs it himself<sup>3</sup>, no difficulty arises<sup>4</sup>. Where, however, the signature is that of an agent, the shipowner's liability depends on the extent of the agent's authority, and the general principles of agency apply<sup>5</sup>.

1 As to the form of a bill of lading see PARA 323.

2 Bills of lading have for some time been usually signed by brokers: cf *Hayn v Culliford* (1878) 4 Asp MLC 48 at 50 per Denman J; affd without reference to this point (1879) 4 Asp MLC 128, CA.

3 The shipowner may sign by a clerk or employee: *Thorman v Burt, Boulton & Co* (1886) 5 Asp MLC 563, CA.

4 As to the liability of persons signing the bill of lading for representations contained in it see PARA 332.

5 See eg *The Saudi Crown* [1986] 1 Lloyd's Rep 261 (where the bill of lading was wrongly dated by the shipowner's agent and the consignee of the cargo suffered loss accordingly); **AGENCY** vol 1 (2008) PARA 29 et seq. As to the question whether the master is agent for the shipowner or for the charterer see PARA 357. See also, for the requirements as to signature in the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600), PARA 366.

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### **329. Effect of master's signature.**

The shipowner is bound by the master's signature to a bill of lading<sup>1</sup>, provided that the master, in signing the bill of lading, did not exceed the authority which the shipper knew or ought to have known that the master possessed<sup>2</sup>. Where the bill of lading in question is one which the master was expressly authorised to sign, the shipowner's liability is clear<sup>3</sup>. His liability does not, however, depend on the existence of an express authority; he is equally liable where the master is acting within the scope of his usual authority<sup>4</sup> as such<sup>5</sup>.

1 As to the effect of the master's signature when the vessel on which the goods are carried is chartered see PARA 358.

2 *Leduc & Co v Ward* (1888) 20 QBD 475 at 479, 6 Asp MLC 290 at 291, CA, per Lord Esher MR. The shipowner is not liable where the master expressly signs as agent for the charterers: *Harrison v Huddersfield Steamship Co Ltd* (1903) 19 TLR 386 (where the word 'master' was struck out); cf *Thorman v Burt, Boulton & Co* (1886) 5 Asp MLC 563, CA (where the bill of lading was signed by an agent on behalf of the master).

3 *Lishman v Christie* (1887) 19 QBD 333, 6 Asp MLC 186, CA, applied in *Crossfield & Co v Kyle Shipping Co Ltd* [1916] 2 KB 885, 13 Asp MLC 410, CA.

4 See PARA 330.

5 *The St Cloud* (1863) 8 LT 54; *Sandeman v Scurr* (1866) LR 2 QB 86; *The Emilien Marie* (1875) 2 Asp MLC 514.

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### **330. Usual authority of master.**

All persons taking a bill of lading are entitled to presume that the master who signed it possessed the authority usual in the line of business in which he was employed<sup>1</sup>. Where, therefore, the bill of lading as signed falls within the usual authority of a master, the shipowner cannot repudiate liability merely on the ground that he had limited the authority of the particular master and that the bill of lading in consequence did not fall within the master's express authority<sup>2</sup>. No limitation in derogation of the usual authority is binding except as against persons who are or ought to have been aware of it<sup>3</sup>. To exempt the shipowner from liability he must show that the limitation of authority has been brought to the knowledge, or was within the means of knowledge, of the person claiming under the bill of lading<sup>4</sup>. The nature and limitation of a master's authority are, however, deemed to be well known among persons engaged in commerce<sup>5</sup>. Where, therefore, the bill of lading falls outside the usual authority of a master, in signing it the master exceeds his authority, and his signature imposes no liability on the shipowner<sup>6</sup> unless, in the particular circumstances, his express authority extends thus far<sup>7</sup>.

Under his usual authority the master may bind the shipowner by statements in the bill of lading relating to the amount of freight to be paid by the consignee<sup>8</sup>, or to the shipment or receipt of the goods<sup>9</sup>, or to the condition of the goods<sup>10</sup>, or to the time allowed for discharging the cargo<sup>11</sup>.

1 *Mitchell v Scaife* (1815) 4 Camp 298; *Cox v Bruce* (1886) 18 QBD 147 at 151, 6 Asp MLC 152 at 155, CA, per Lord Esher MR.

2 *The Patria* (1871) LR 3 A & E 436, 1 Asp MLC 71; *Serraino & Sons v Campbell* [1891] 1 QB 283, 7 Asp MLC 48, CA; cf *Runquist v Ditchell* (1799) 3 Esp 64. The form of the bill of lading may, however, put the holder on inquiry: *Small v Moates* (1833) 9 Bing 574; but see *Foster v Colby* (1858) 3 H & N 705; *Chappel v Comfort* (1861) 10 CBNS 802 at 810 per Willes J.

3 *Manchester Trust v Furness* [1895] 2 QB 539, sub nom *Manchester Trust Ltd v Furness, Withy and Co* 8 Asp MLC 57, CA; *Turner v Haji Goolam Mahomed Azam* [1904] AC 826, 9 Asp MLC 588, PC. As to the effect of a difference between the charterparty and the bill of lading see PARA 353 et seq.

4 *The St Cloud* (1863) 8 LT 54; *Pearson v Göschen* (1864) 17 CBNS 352; *Turner v Haji Mahomed Azam* [1904] AC 826, 9 Asp MLC 588, PC; *Draupner (Owners) v Draupner (Cargo Owners)* [1910] AC 450, 11 Asp MLC 436. HL. As to when the holder of a bill of lading is bound by the limitations of the charterparty see PARA 353 et seq.

5 *Cox v Bruce* (1886) 18 QBD 147 at 152, 6 Asp MLC 152 at 155, CA.

6 *Cox v Bruce* (1886) 18 QBD 147, 6 Asp MLC 152, CA. A bill of lading which is in excess of the agent's usual authority and has not been authorised by the shipowner does not bind the shipowner even in the hands of a bona fide holder for value: *Reynolds v Jex* (1865) 7 B & S 86.

7 *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233; *Lishman v Christie* (1887) 19 QBD 333, 6 Asp MLC 186, CA; *Fisher, Renwick & Co v Calder & Co* (1896) 1 Com Cas 456; *Mediterranean and New York Steamship Co v Mackay* [1903] 1 KB 297, CA.

8 *Mitchell v Scaife* (1815) 4 Camp 298; *Gilkison v Middleton* (1857) 2 CBNS 134; *Chappel v Comfort* (1861) 10 CBNS 802; *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689; *Dillon and Aldgate Steamship Co Ltd v Livingston, Briggs & Co and Peninsular and Oriental Steam Navigation Co* (1895) 11 TLR 312; cf *Pearson v Göschen* (1864) 17 CBNS 352. As to where the bill of lading freight differs from the chartered freight see PARA 355.

9 A bill of lading representing goods to have been shipped or received for shipment, signed by the master or by a person having the express, implied or apparent authority of the carrier and in the hands of the lawful holder acting in good faith is conclusive evidence of such shipment or receipt as against the carrier: see the Carriage of Goods by Sea Act 1992 s 4; and PARA 317. Where, however, the Hague-Visby Rules apply and the receiver is taking advantage of the estoppel in art III r 4, there is no need for him to prove that he relied on the statement: see PARAS 317, 380.

10 *Compania Naviera Vasconzada v Churchill and Sim, Compania Naviera Vasconzada v Burton & Co* [1906] 1 KB 237, 10 Asp MLC 177 (distinguishing *Cox v Bruce* (1886) 18 QBD 147, 6 Asp MLC 152, CA); *Martineaus Ltd v Royal Mail Steam Packet Co Ltd* (1912) 12 Asp MLC 190.

11 *Allan v Johnstone, The Archdruid* (1892) 19 R 364.

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### 331. Limits on master's usual authority.

The master has no usual authority to bind the shipowner by signing a bill of lading for goods for which he has already given a different bill of lading<sup>1</sup>; nor does he bind the shipowner by statements in the bill of lading that no freight is to be payable<sup>2</sup>, or that the freight is to be paid to a third person<sup>3</sup>, or by statements relating to the quality<sup>4</sup> of the goods actually received.

A bill of lading representing goods to have been shipped or received for shipment, signed by the master and in the hands of the lawful holder acting in good faith, is conclusive evidence of such shipment or receipt as against the carrier<sup>5</sup>.

1 *Hubbersty v Ward* (1853) 8 Exch 330.

2 *Grant v Norway* (1851) 10 CB 665. The master has no authority to waive a claim for demurrage: *Portofino Tank Steamer (Owners) v Berlin Derunaphtha* (1934) 49 Ll L Rep 62, CA.

3 *Reynolds v Jex* (1865) 7 B & S 86; *The Canada* (1897) 13 TLR 238; cf *The Sir Henry Webb* (1849) 13 Jur 639 (where it was held that the master had no authority to assign the freight to secure advances).

4 *Cox v Bruce* (1886) 18 QBD 147, 6 Asp MLC 152, CA, applied in *National Petroleum Co v Athelviscount (Owners)* (1934) 48 Ll L Rep 164.

5 See the Carriage of Goods by Sea Act 1924 s 4; and PARA 317. Where, however, the Hague-Visby Rules apply and the receiver is taking advantage of the estoppel in art III r 4, there is no need for him to prove that he relied on the statement: see PARAS 317, 380. Where the Hague-Visby Rules do not apply and the master wishes to take advantage of the common law estoppel against the carrier (see PARA 317), he does need to prove that he relied on the statements on the bill in those regards.

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### **332. Exceeding of master's authority.**

Where the master has exceeded his authority in signing the bill of lading, and the shipowner in consequence successfully repudiates liability, the master, if he signed the bill of lading as agent only<sup>1</sup>, will be liable for breach of warranty of authority<sup>2</sup>; but, if he made himself a party to the contract, he will be liable on the bill of lading<sup>3</sup>.

1 *Repetto v Millar's Karri and Jarrah Forests Ltd* [1901] 2 KB 306, 9 Asp MLC 215.

2 See **AGENCY** vol 1 (2008) PARAS 160, 161.

3 *Smith, Edwards & Co v Tregarthen* (1887) 6 Asp MLC 137, DC.

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## **(E) TRANSFER OF BILLS OF LADING**

### **(a) Method of Transfer**

### **333. Restrictions on transfer.**

A bill of lading<sup>1</sup>, being a document of title<sup>2</sup>, has always been regarded by commercial custom<sup>3</sup> as transferable<sup>4</sup>, unless transfer is precluded by the form in which it is drawn<sup>5</sup>.

A bill of lading does not appear to be transferable where it requires the goods specified in it to be delivered to a named person, omitting any<sup>6</sup> reference to his order or assigns<sup>7</sup>. The further transfer of a bill of lading transferable in origin may be restricted<sup>8</sup> or prohibited by the form in which it is indorsed<sup>9</sup>.

1 As to bills of lading see PARA 313 et seq.

2 See PARA 315; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 940.

3 *Lickbarrow v Mason* (1794) 5 Term Rep 683; 1 Smith LC (13th Edn) 703; *Haille v Smith* (1796) 1 Bos & P 563, Ex Ch.

4 *Evans v Marlett* (1697) 1 Ld Raym 271; *Appleby v Pollock* (1748) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 844; *Wright v Campbell* (1767) 4 Burr 2046; *Caldwell v Ball* (1786) 1 Term Rep 205; *Hibbert v Carter* (1787) 1 Term Rep 745; *Salomons v Nissen* (1788) 2 Term Rep 674; *Lickbarrow v Mason* (1794) 5 Term Rep 683; *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL.

5 *Henderson & Co v Comptoir d'Escompte de Paris* (1873) LR 5 PC 253, 2 Asp MLC 98.

6 If the consignee box does not contain the word 'order' but the bill contains elsewhere, at any rate on its front page, an undertaking that the carrier will deliver the goods to the consignee 'or to his or their assigns' the bill is nonetheless transferable: see *Parsons Corp v CV Scheepvaartonderneming Happy Ranger, The Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357 at 363 per Tuckley J. Cf, where such a bill also contains, in the consignee box, the words 'if order state notify party', *The Chitral* [2000] 1 Lloyd's Rep 529 at 532-533, per David Steel J.

7 *Henderson & Co v Comptoir d'Escompte de Paris* (1873) LR 5 PC 253, 2 Asp MLC 98. See also *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 at 446, PC (where Lord Devlin stated that it had never been settled whether delivery of a bill of lading which was marked 'non-negotiable' transferred title at all, and that this was not surprising for, when the consignor and the consignee were the seller and the buyer, as they most often were, the shipment ordinarily served as delivery and also as an unconditional appropriation of the goods which passed the property; as between the seller and the buyer, therefore, it did not usually matter whether the bill of lading was a document of title or not). However, despite the fact that such a bill of lading is not transferable at common law, it is probable that the named consignee would have a contractual claim to the goods as against the carrier, such a bill being capable of being considered as a sea waybill within the meaning of the Carriage of Goods by Sea Act 1992 s 1(3) (see PARA 364); and see ss 2(1)(b), 5(3); and PARA 364.

8 *Lewis v M'Kee* (1868) LR 4 Exch 58, Ex Ch (where the indorsement was 'without recourse'); cf *Barrow v Coles* (1811) 3 Camp 92. As to stoppage in transit generally see PARA 495; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq.

9 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 843.

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### 334. Transfer of bills in a set.

A bill of lading is usually drawn in a set of three, numbered consecutively<sup>1</sup>, and it is provided that, any one of the set being accomplished, the others are to be void<sup>2</sup>.

Where a bill of lading is issued in a set, and the shipper is in possession of more than one part, the different parts cannot be transferred to different persons so as to give each of them an indefeasible right to claim the goods from the carrier<sup>3</sup>. There is only one bill of lading, although represented by different parts; a transfer of any one part, if intended to operate as such<sup>4</sup>, is a transfer of the bill of lading<sup>5</sup>, and the subsequent transfer of any other part is inoperative<sup>6</sup>, thus protecting the carrier from the risk of successive actions by holders of different parts.

1 *Barber v Meyerstein* (1870) LR 4 HL 317. For a criticism of the practice see *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 605, 4 Asp MLC 580 at 583, HL, per Lord Blackburn.

2 See further PARA 325.

3 *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591, 4 Asp MLC 580, HL; and see *Gilbert v Guignon* (1872) 8 Ch App 16, 1 Asp MLC 498.

4 *Moakes v Nicolson* (1865) 19 CBNS 290. See also *The Tigress* (1863) Brown & Lush 38; *Barber v Meyerstein* (1870) LR 4 HL 317.

5 *Sanders Bros v Maclean & Co* (1883) 11 QBD 327, 5 Asp MLC 160, CA (where it was held that a tender of two out of three parts to a buyer of the goods was effectual, and the buyer was not entitled to refuse it on the ground that the third part was not forthcoming).

6 *Caldwell v Ball* (1786) 1 Term Rep 205; *Barber v Meyerstein* (1870) LR 4 HL 317. See also PARA 352.

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### 335. Mode of transfer.

A bill of lading which contains the name of the consignee, and further provides for delivery to his order or to his assigns, is transferred by indorsement and delivery<sup>1</sup>. The indorsement may name the transferee to whom delivery is to be made, in which case it is called a 'special indorsement'<sup>2</sup> or an indorsement 'in full'. If no transferee is named, the indorsement is called an 'indorsement in blank'<sup>3</sup>, and the goods specified in the bill of lading are deliverable to bearer<sup>4</sup>.

If the bill of lading does not name the consignee but makes the goods deliverable to bearer or to order or assigns, the space for the name of the consignee being left blank, it may be transferred by delivery without indorsement<sup>5</sup>.

Under a special indorsement, if the form of the indorsement so permits, the indorsee may transfer the bill of lading by indorsement and delivery to a subsequent indorsee<sup>6</sup>. If the bill of lading is indorsed in blank, it is transferable by mere delivery<sup>7</sup>. However, the holder may, at any time, convert the indorsement in blank into a special indorsement by inserting in it the name of the person to whom delivery is to be made; and he may also specially indorse a bill of lading to bearer<sup>8</sup>, or insert the name of a consignee in the space on the face of the bill of lading, if left blank. In these cases the bill of lading ceases to be transferable by mere delivery, and requires indorsement by the consignee whose name is inserted or by the indorsee named in the special indorsement, as the case may be, before it is capable of being further transferred<sup>9</sup>.

1 *Lickbarrow v Mason* (1794) 5 Term Rep 683; 1 Smith LC (13th Edn) 703. Until delivery either of the bill of lading or of the goods to the indorsee the indorsement may be revoked: *Mitchel v Ede* (1840) 11 Ad & El 888.

2 As to the difference between a special indorsement and an indorsement in blank as regards the title passed to the transferee see *Sewell v Burdick* (1884) 10 App Cas 74 at 83, 5 Asp MLC 376 at 378-379, HL, per Lord Selborne LC.

3 *Gurney v Behrend* (1854) 3 E & B 622.

4 *Sewell v Burdick* (1884) 10 App Cas 74 at 83, 5 Asp MLC 376 at 378-379, HL, per Lord Selborne LC.

5 *Sewell v Burdick* (1884) 10 App Cas 74 at 83, 5 Asp MLC 376 at 379, HL, per Lord Selborne LC.

6 *Sewell v Burdick* (1884) 10 App Cas 74 at 83, 5 Asp MLC 376 at 379, HL, per Lord Selborne LC. As to the effect of reindorsement to the shipper see *Short v Simpson* (1866) LR 1 CP 248.

7 *Sewell v Burdick* (1884) 10 App Cas 74 at 83, 5 Asp MLC 376 at 378, 379, HL.

8 *Lickbarrow v Mason* (1794) 5 Term Rep 683.

9 *Sewell v Burdick* (1884) 10 App Cas 74 at 83, 5 Asp MLC 376 at 379, HL, per Lord Selborne LC. See also *Pease v Gloahed, The Marie Joseph* (1866) 3 Moo PCCNS 556.

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### 336. Transfer to agent.

A bill of lading may be transferred to an agent merely for purposes of convenience, to enable him to deal with the goods specified in it on behalf of the owner, as, for example, where he is authorised to take delivery of them<sup>1</sup>, or to stop them in transit<sup>2</sup>. In this case no property in the goods passes to the agent as holder of the bill of lading by reason of the transfer of the bill of lading, as the transfer is not intended to have that effect<sup>3</sup>. Therefore, as a general rule, the agent cannot by a further transfer of the bill of lading divest his principal of his property in the goods<sup>4</sup>. Where, however, the agent has authority, express<sup>5</sup> or implied<sup>6</sup>, to deal with the bill of lading so as to pass the property in the goods, a transfer of the bill of lading by him in accordance with his authority will be equivalent to a transfer by the principal himself, and will pass the property to the transferee<sup>7</sup>.

1 *Patten v Thompson* (1816) 5 M & S 350; *Burgos v Nascimento, McKeand Claimant* (1908) 11 Asp MLC 181.

2 *Morison v Gray* (1824) 2 Bing 260. A holder of a bill of lading who is merely an agent of the shipper is in the position of the shipper: *Gledstanes v Allen* (1852) 12 CB 202; *Kern v Deslandes* (1861) 10 CBNS 205 (followed in *West Hartlepool Steam Navigation Co Ltd v Tagart, Beaton & Co* (1903) 19 TLR 251, CA); cf *Small v Moates* (1833) 9 Bing 574; *Pearson v Göschen* (1864) 17 CBNS 352.

3 *Waring v Cox* (1808) 1 Camp 369; cf *Lauritzen v Carr* (1894) 72 LT 56; *Burgos v Nascimento, McKeand Claimant* (1908) 11 Asp MLC 181; and see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 241, 368.

4 Cf *Blake v Belfast Discount Co* (1880) 5 LR Ir 410 (Ir CA); *Newsom v Thornton* (1805) 6 East 17.

5 *The Argentina* (1867) LR 1 A & E 370.

6 See the Factors Act 1889 s 1(1); the Sale of Goods Act 1979 s 25; **AGENCY** vol 1 (2008) PARA 148; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158.

7 *The Argentina* (1867) LR 1 A & E 370; and see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 152.

## UPDATE

### 336 Transfer to agent

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 337. Electronic transfer.

The Secretary of State<sup>1</sup> may by regulations make provision for the application of the Carriage of Goods by Sea Act 1992 to cases where an electronic communications network<sup>2</sup> or any other information technology<sup>3</sup> is used for effecting transactions corresponding to:

- 42 (1) the issue of a document to which the Act applies<sup>4</sup>;
- 43 (2) the indorsement, delivery or other transfer of such a document<sup>5</sup>; or
- 44 (3) the doing of anything else in relation to such a document<sup>6</sup>.

Such regulations may:

- 45 (a) make such modifications of the Act as the Secretary of State considers appropriate in connection with the application of the Act to any case mentioned above<sup>7</sup>; and
- 46 (b) contain supplemental, incidental, consequential and transitional provision<sup>8</sup>.

At the date at which this volume states the law no such regulations had been made.

1 As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 355.

2 As to the meaning of this term for the purposes of the legislation governing electronic communications see the Communications Act 2003 s 32(1); and **TELECOMMUNICATIONS** vol 97 (2010) PARA 60.

3 For these purposes 'information technology' includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form: Carriage of Goods by Sea Act 1992 s 5(1).

4 Carriage of Goods by Sea Act 1992 s 1(4)(a) (s 1(4) amended by the Communications Act 2003 Sch 17 para 119). As to the documents to which the Act applies see s 1(1); and PARA 338.

5 Carriage of Goods by Sea Act 1992 s 1(4)(b) (as amended: see note 4).

6 Carriage of Goods by Sea Act 1992 s 1(4)(c) (as amended: see note 4).

7 Carriage of Goods by Sea Act 1992 s 1(5)(a).

8 Carriage of Goods by Sea Act 1992 s 1(5)(b).

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### *(b) Effects of Transfer*

#### **338. Rights of lawful holder of transferable bill of lading.**

A person who becomes the lawful holder of a bill of lading has, by virtue of becoming the holder of the bill, transferred to and vested in him all rights of suit under the contract of carriage<sup>1</sup> as if he had been a party to that contract<sup>2</sup>. For these purposes, references to a 'bill of lading' do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement but, subject to that, do include references to a received for shipment bill of lading<sup>3</sup>; and references to the holder of a bill of lading are references to any of the following persons, that is to say:

- 47 (1) a person with possession<sup>4</sup> of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates<sup>5</sup>;
- 48 (2) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill<sup>6</sup>; and
- 49 (3) a person with possession of the bill as a result of any transaction<sup>7</sup> by virtue of which he would have become a holder falling within head (1) or (2) above had not the transaction been effected at a time when possession of the bill no longer gave a right, as against the carrier, to possession of the goods to which the bill relates<sup>8</sup>,

and a person is regarded as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith<sup>9</sup>.

1 For these purposes, 'contract of carriage', in relation to a bill of lading, means the contract contained in or evidenced by that bill: Carriage of Goods by Sea Act 1992 s 5(1)(a).

2 Carriage of Goods by Sea Act 1992 s 2(1)(a).

3 Carriage of Goods by Sea Act 1992 ss 1(2), 5(1). The Act does not contain a statutory definition of 'bill of lading', a bill of lading usually being identified by reference to its three main functions, ie that it is a receipt for the goods, that it usually evidences the contract of carriage and that it may be a document of title. Under s 1(2) the bill of lading must, however, be transferable; a straight bill of lading, eg one made out 'to X' without any such words as 'to order', does not satisfy the requirements of s 1(2). Thus a straight bill of lading will not fall within the ambit of s 2(1)(a) or s 4 (representations in bills of lading: see PARA 317) but it may nevertheless be a sea waybill (see PARA 364). 'Bill of lading' includes a 'received for shipment' bill of lading, thereby resolving any doubts as to whether such a bill of lading is a transferable document of title: see *The Marlborough Hill v Alex Cowan & Sons Ltd* [1921] 1 AC 444, 15 Asp MLC 163, PC; *Ishag v Allied Bank International* [1981] 1 Lloyd's Rep 92; *Elder Dempster Lines v Ishag, The Lycaon* [1983] 2 Lloyd's Rep 548; cf *Diamond Alkali Export Corp v Fl Bourgeois* [1921] 3 KB 443 at 452, 15 Asp MLC 455 at 459 per McCardie J.

The Carriage of Goods by Sea Act 1992 applies to bills of lading, sea waybills and ship's delivery orders (s 1(1)) and has effect without prejudice to the application, in relation to any case, of the Hague-Visby Rules which for the time being have the force of law (see PARA 367) by virtue of the Carriage of Goods by Sea Act 1971: Carriage of Goods by Sea Act 1992 s 5(5). As to sea waybills and ship's delivery orders see PARAS 364, 365.

4 It was suggested, but explicitly not decided, by Rix J in *Gulf Interstate Oil Corp v ANT Trade & Transport Ltd of Malta, The Giovanna* [1999] 1 Lloyd's Rep 867 at 874, that for a cargo-interest to be a 'holder' 'with possession of the bill', the cargo-interest did not actually have to have the bill in *his* possession: it was enough if the bill of lading had been indorsed and transmitted to the 'holder' by courier. On the other hand, it was held by Thomas J in *Aegean Sea Traders Corp v Repsol Petroleo SA, The Aegean Sea* [1998] 2 Lloyd's Rep 39 at 59-60 that the simple endorsement and transmission of a bill of lading to a person for whom it was not intended and who, rather than accepting the bill, sent it back to the endorsee for re-endorsement and re-transmission to the intended endorsee, did not make the unintended transferee a 'holder' of the bill of lading for the purposes of the Carriage of Goods by Sea Act 1992.

5 Carriage of Goods by Sea Act 1992 s 5(1), (2)(a).

6 Carriage of Goods by Sea Act 1992 s 5(2)(b).

7 'Transaction' was interpreted in *Primetrade AG v Ythan Ltd, The Ythan* [2005] EWHC 2399, [2006] 1 Lloyd's Rep 457, to mean the physical process by which the bill was transferred from one person to another.

8 Carriage of Goods by Sea Act 1992 s 5(2)(c). The words 'at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates' were taken to apply to a situation where the goods had been lost forever: see *Primetrade AG v Ythan Ltd, The Ythan* [2005] EWHC 2399, [2006] 1 Lloyd's Rep 457.

9 Carriage of Goods by Sea Act 1992 s 5(2). See *Aegean Sea Traders Corp v Repsol Petroleo SA, The Aegean Sea* [1998] 2 Lloyd's Rep 39 at 60 per Thomas J: 'Although it could be argued that in view of lack of definition in [the Carriage of Goods by Sea Act 1992] a broad meaning should be attributed to "in good faith", I do not consider that would be the correct interpretation. In the commercial context of bills of lading, the meaning of the term "good faith" should be clear, capable of unambiguous application and be consistent with the usage in other contexts and countries. In my view, it therefore connotes honest conduct and not a broader

concept of good faith such as "the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned".<sup>1</sup> For the same reason, it is unlikely that the word 'lawful' would be interpreted to mean that the carrier must enquire about ownership: see *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) para 2.22. See, in this regard, Thomas J in *The Aegean Sea* at 60: 'The provisions of [the Carriage of Goods by Sea Act 1992] do not depend on the passing of property; it would be impermissible, in my view, to re-introduce the link between the passing of property and rights under the bill of lading under the Bills of Lading Act 1855 by interpreting the word "endorsement" in such a way as to link it with the passing of property'. Cf the use of the expression 'in good faith' in the Hague-Visby Rules: see art III r 4; and PARA 380.

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### **339. Transfer of rights to holder after delivery of goods.**

Where, when a person becomes the lawful holder of a bill of lading<sup>1</sup>, possession of the bill no longer gives a right, as against the carrier, to possession of the goods to which the bill relates<sup>2</sup>, that person does not have any rights of suit transferred to him<sup>3</sup> unless he becomes the holder of the bill:

- 50 (1) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill<sup>4</sup>; or
- 51 (2) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements<sup>5</sup>.

Without prejudice to these provisions<sup>6</sup>, nothing in the Carriage of Goods by Sea Act 1992 precludes its operation in relation to a case where the goods to which a document relates cease to exist after the issue of the document or cannot be identified, whether because they are mixed with other goods or for any other reason<sup>7</sup>.

1 As to the meanings of 'lawful holder of a bill of lading', 'holder of a bill of lading' and 'bill of lading' see PARA 338.

3 As to references to goods to which a document relates see PARA 317 note 12.

3 Ie by virtue of the Carriage of Goods by Sea Act 1992 s 2(1): see PARA 338.

4 Carriage of Goods by Sea Act 1992 s 2(2)(a). Thus, if goods which are to be delivered in June are sold by A to B in March, by B to C in April and by C to D in May, then, upon delivery of the goods to the person entitled to them, the bill of lading ceases to be a transferable document of title; it can no longer perform its function of granting constructive possession of the goods to which the bill relates. If the bill of lading is ultimately indorsed to D in September, then, although the bill of lading has by that time ceased to be a transferable document of title, D has rights of suit against the carrier because he became the lawful holder of the bill of lading in pursuance of arrangements, ie the contract of sale concluded in May, made before the bill of lading ceased to be a transferable document of title, ie in June. As to the Carriage of Goods by Sea Act 1992 generally see PARA 338.

5 Carriage of Goods by Sea Act 1992 s 2(2)(b). Thus, if S and B conclude a contract of sale in March, the goods to be delivered in June, the bill ceases to be a transferable document of title after delivery of the goods. If the goods are rejected on arrival and the documents rejected on tender, then, although by the time the documents reach S, the bill has stopped being a transferable document of title, S may sue the carrier because he became the holder of the bill as a result of the rejection of goods delivered under an arrangement, ie the sale concluded in March, made before the bill of lading ceased to be a transferable document of title.

6 le without prejudice to the Carriage of Goods by Sea Act 1992 s 2(2) (see the text and notes 1-5) and s 4 (see PARA 317).

7 Carriage of Goods by Sea Act 1992 s 5(4).

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### **340. Persons suffering loss or damage but not having right of suit.**

Where a person with any interest or right in or in relation to goods to which a bill of lading relates<sup>1</sup> sustains loss or damage in consequence of a breach of the contract of carriage<sup>2</sup> but rights of suit in respect of that breach are vested<sup>3</sup> in another person, the other person is entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised<sup>4</sup>.

1 As to references to goods to which a document relates see PARA 317 note 12; and as to the meaning of 'bill of lading' see PARA 338.

2 As to the meaning of 'contract of carriage' see PARA 338 note 1.

3 le by virtue of the operation of the Carriage of Goods by Sea Act 1992 s 2(1): see PARA 338.

4 Carriage of Goods by Sea Act 1992 s 2(4). If s 2(4) had not been enacted, the general rule that a plaintiff who has suffered no financial loss may not recover substantial damages would have prevailed: see eg *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, [1976] 2 Lloyd's Rep 467, HL (where the plaintiffs were held not to be entitled to recover damages, because, although there had been a breach of the charterparty, they had suffered no loss, property and risk having passed to the indorsee before the loss was sustained), explaining *Dunlop v Lambert* (1839) 6 Cl & Fin 600, HL.

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### **341. Loss of rights of suit.**

Where rights of suit are transferred<sup>1</sup> to a person who becomes the lawful holder of a bill of lading<sup>2</sup>, that transfer extinguishes any entitlement to those rights which derives from a person's having been an original party to the contract of carriage<sup>3</sup> or an intermediate lawful holder<sup>4</sup> of a bill of lading<sup>5</sup>. Where, however, the original party to the contract of carriage was a charterer, or where he had taken a sea waybill<sup>6</sup> or a delivery order<sup>7</sup>, the transfer of the bill of lading, sea waybill or delivery order, as the case may be, will not extinguish the contractual rights against the carrier of the original party to the contract of carriage<sup>8</sup>.

1 le by virtue of the operation of the Carriage of Goods by Sea Act 1992 s 2(1): see PARA 338.

2 As to the meanings of 'lawful holder of a bill of lading', 'holder of a bill of lading' and 'bill of lading' see PARA 338.

3 Carriage of Goods by Sea Act 1992 s 2(5)(a). The transfer of contractual rights of suit does not appear to extinguish the shipper's residual rights in bailment or rights analogous to bailment: see *East West Corpn v DKBS 1912 A/S* [2003] EWCA Civ 83, [2003] 2 All ER 700, [2003] 1 Lloyd's Rep 239 (rights of suit not extinguished pursuant to these provisions where person in possession of several original bills of lading was not the lawful holder of all such bills). As to the meaning of 'contract of carriage' see PARA 338 note 1.

4 le by virtue of the previous operation of the Carriage of Goods by Sea Act 1992 s 2(1) in relation to the bill of lading.

5 Carriage of Goods by Sea Act 1992 s 2(5)(b).

6 See the Carriage of Goods by Sea Act 1992 s 1(3); and PARA 364.

7 See the Carriage of Goods by Sea Act 1992 s 1(4); and PARA 365.

8 Carriage of Goods by Sea Act 1992 s 2(5).

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### **342. Liabilities of person who becomes lawful holder of transferable bill of lading.**

Where a person becomes the lawful holder of a bill of lading<sup>1</sup> and has transferred to and vested in him<sup>2</sup> all rights of suit under the contract of carriage<sup>3</sup> as if he had been a party to the contract and that person:

- 52 (1) takes or demands delivery<sup>4</sup> from the carrier of any of the goods to which the bill of lading relates<sup>5</sup>;
- 53 (2) makes a claim<sup>6</sup> under the contract of carriage against the carrier in respect of any of those goods<sup>7</sup>; or
- 54 (3) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods<sup>8</sup>,

that person, by virtue of taking or demanding delivery or making the claim or, in a case falling within head (3) above, of having the rights vested in him, becomes subject to the same liabilities under that contract as if he had been a party to that contract<sup>9</sup>, but without prejudice, so far as the above provisions impose liabilities under any contract on any person, to the liabilities under the contract of any person as an original party to the contract<sup>10</sup>.

1 As to the meanings of 'lawful holder of a bill of lading', 'holder of a bill of lading' and 'bill of lading' see PARA 338.

2 le by virtue of the operation of the Carriage of Goods by Sea Act 1992 s 2(1): see PARA 338.

3 As to the meaning of 'contract of carriage' see PARA 338 note 1.

4 See *Borealis AB (formerly Borealis Petrokemi AB) v Stargas Ltd (Bergesen DY A/S, third party), The Berge Sisar* [2001] UKHL 17, [2002] 2 AC 205, [2001] 2 All ER 193 ('taking delivery' means the voluntary transfer of possession from one person to another, which is more than simply co-operating with the discharge of the cargo).

5 Carriage of Goods by Sea Act 1992 s 3(1)(a). As to references to goods to which a document relates see PARA 317 note 12.

6 As to the meaning of 'makes a claim' see *Primetrade AG v Ythan Ltd, The Ythan* [2005] EWHC 2399, [2006] 1 Lloyd's Rep 457 at 481 per Aikens J (requesting a letter of understanding not 'making a claim').

7 Carriage of Goods by Sea Act 1992 s 3(1)(b).

8 Carriage of Goods by Sea Act 1992 s 3(1)(c).

9 Carriage of Goods by Sea Act 1992 s 3(1). It appears that the shipper's indemnity towards the carrier under the Hague-Visby Rules art III r 5 (see PARA 381) does not transfer to the lawful holder of the bill of lading: see *Aegean Sea Traders Corp v Repsol Petroleo SA, The Aegean Sea* [1998] 2 Lloyd's Rep 39 at 69-70 per Thomas J. See also PARA 381 note 1.

10 Carriage of Goods by Sea Act 1992 s 3(3).

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### 343. Representations in bills of lading.

A bill of lading representing goods to have been shipped or received for shipment, signed by the master or by a person having the express, implied or apparent authority of the carrier and in the hands of the lawful holder acting in good faith, is conclusive evidence of such shipment or receipt as against the carrier<sup>1</sup>.

1 See the Carriage of Goods by Sea Act 1992 s 4 (revsg *Grant v Norway* (1851) 10 CB 665: see *Oceanfocus Shipping Ltd v Hyundai Merchant Marine Co Ltd, The Hawk* [1999] 1 Lloyd's Rep 176 at 185); and PARA 317. See also *Agrosin Pte Ltd v Highway Shipping Co Ltd, The Mata K* [1998] 2 Lloyd's Rep 614 at 619, per Clarke J ('s 4 of the Carriage of Goods by Sea Act 1992 was intended to lead to the same result as [the Hague-Visby Rules art III r 4]). As to the Hague-Visby Rules art III r 4 see PARA 380.

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### 344. Liability for damage to goods.

If the goods are delivered in a damaged condition, the shipowner is liable to the consignee or indorsee for all damage sustained by the goods while in his custody<sup>1</sup>, unless the damage is occasioned by some inherent defect in the goods themselves or by some other peril excepted by the bill of lading or at common law or, in the case of contracts for the carriage of goods by sea to which the Hague-Visby Rules apply<sup>2</sup>, by virtue of the Carriage of Goods by Sea Act 1971<sup>3</sup>.

1 *Diederichsen v Farquharson Bros* [1898] 1 QB 150, 8 Asp MLC 333, CA. As to the limitation of shipowners' liability see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042 et seq.

2 See PARA 372 et seq.

3 *Calcutta Steamship Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395.

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### 345. Effect of excess of authority by agent signing bill.

A bill of lading which, as issued, falls outside the authority, express, implied or ostensible, of the agent who signed it cannot in general be enforced against the shipowner by the consignee or indorsee and recourse must be had to the agent<sup>1</sup>. If, however, the bill of lading is covered by the authority which it is usual for such an agent to have, his signature binds his principal, and it is immaterial that he exceeded his actual authority in signing the bill of lading<sup>2</sup>, provided that the consignee or indorsee had no notice that the agent's authority had been limited<sup>3</sup>.

1 See the cases cited in PARA 330 note 1.

2 As to the extent of the master's authority see PARA 329 et seq.

3 See PARA 332. As to the authority of agents generally see **AGENCY** vol 1 (2008) PARA 29 et seq.

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### 346. Pledgees and others holding bill of lading as security.

A pledgee or other person holding a bill of lading as security has contractual rights directly against the carrier:

- 55 (1) where the pledgee or other such person holds an order bill of lading naming him as consignee<sup>1</sup>;
- 56 (2) where he holds a bearer bill of lading<sup>2</sup>; or
- 57 (3) where he holds an order bill of lading indorsed to him, whether in full or in blank<sup>3</sup>.

Where the pledgee falls within one of heads (1) to (3) above but is not the party who has actually sustained the loss ensuing from the carrier's breach of contract, the pledgee may recover from the carrier for the benefit of the party who has sustained such loss<sup>4</sup>. The pledgee is not, however, liable for such matters as freight or demurrage unless he seeks to enforce his security for his own benefit<sup>5</sup>.

Where, however, the pledgee or other such person does not fall within heads (1) to (3) above, he would have contractual rights against the carrier only through a contract implied from the fact of delivery<sup>6</sup>.

1 By virtue of the Carriage of Goods by Sea Act 1924 s 2(1) the lawful holder of a bill of lading may sue the carrier, 'holder of a bill of lading' for these purposes including the consignee of the goods: see ss 2(1)(a), 5(2)(a); and PARA 338.

2 By virtue of the Carriage of Goods by Sea Act 1924 s 2(1) the lawful holder of a bill of lading may sue the carrier, 'holder of a bill of lading' for these purposes including 'a person with possession of the bill as a result of the completion ... in the case of a bearer bill, of any ... transfer of the bill': see ss 2(1)(a), 5(2)(b); and PARA 338.

3 By virtue of the Carriage of Goods by Sea Act 1924 s 2(1) the lawful holder of a bill of lading may sue the carrier, 'holder of a bill of lading' for these purposes including 'a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill ...': see ss 2(1)(a), 5(2)(b); and PARA 338.

4 See the Carriage of Goods by Sea Act 1992 s 2(4); and PARA 340.

5 See the Carriage of Goods by Sea Act 1992 s 3; and PARA 342.

6 As to implied contracts see and PARA 348.

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### **347. Effect of indorsement on liabilities of shipper, carrier and intermediate indorsees.**

The liabilities of a shipper or carrier as an original party to a contract of carriage are not affected by the Carriage of Goods by Sea Act 1992<sup>1</sup>.

Where any person entitled<sup>2</sup> to sue takes or demands delivery or otherwise makes a claim against the carrier, he becomes subject to any<sup>3</sup> contractual liabilities as if he had been a party to the contract of carriage<sup>4</sup>. Likewise, where a person takes or demands delivery before he has any contractual rights, as, for example, where he takes delivery pursuant to a letter of indemnity, he becomes liable when he subsequently has rights of suit conferred on him<sup>5</sup>.

1 See the Carriage of Goods by Sea Act 1992 s 3(3); and PARA 342. Thus, for example, a shipper who ships dangerous goods without informing the carrier remains liable despite the transfer of the bill of lading to a third person: see *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, [1998] 1 All ER 495, HL.

2 As soon as a person ceases to be entitled to sue, through endorsement of the bill of lading, that person ceases to be liable on it: see *Borealis AB (formerly Borealis Petrokemi AB) v Stargas Ltd (Bergesen DY A/S, third party), The Berge Sisar* [2001] UKHL 17, [2002] 2 AC 205, [2001] 2 All ER 193 (liability of intermediate indorsee ceased when bill transferred to new third party purchaser).

3 It remains a moot point whether a transferee assumes liability for matters arising at the port of shipment over which he has no control, eg the shipment of dangerous goods without informing the carrier. This point was not in terms decided in *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, [1998] 1 All ER 495, HL; but see *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) paras 3.20-3.22.

4 See the Carriage of Goods by Sea Act 1992 s 3(1); and PARA 342.

5 See note 2.

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### **348. Implied contracts.**

Where a bill of lading is presented in order to obtain delivery of the goods, and the goods are delivered in whole or in part to the person presenting the bill of lading, a contract may be implied between the holder of the bill of lading and the carrier on the terms of the bill of lading<sup>1</sup>.

If a holder of the bill of lading who is not a consignee or indorsee presents the bill of lading to the shipowner and requests and obtains delivery of the goods, he impliedly agrees with the shipowner that each is to have the right to enforce the contract contained in the bill of lading against the other<sup>2</sup>. The holder who thus obtains delivery is bound only by the terms expressly mentioned or referred to in the bill of lading unless he agrees, expressly or by necessary implication, to be bound by further terms. Such agreement cannot be inferred merely from the fact that he presents the bill of lading and obtains delivery<sup>3</sup>. It is doubtful, however, whether such a contract will be implied where none of the goods subject to the security is delivered<sup>4</sup>.

1 See eg *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341, sub nom *The Dona Mari* [1973] 2 Lloyd's Rep 366 (contract implied where the buyer presented a ship's delivery order in which the terms of the bill of lading were incorporated by reference). Recourse to an implied contract is not necessary, however, where the parties have rights of suit under the Carriage of Goods by Sea Act 1924: see PARA 338 et seq.

2 *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, 16 Asp MLC 262, CA; and see *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 (where a *Brandt v Liverpool* contract was implied, in order to give business reality to the transaction between the shipowner and the person taking delivery, even though the latter neither paid, nor undertook to pay, the freight nor presented, nor undertook to present, a bill of lading); *Mitsui & Co Ltd v Novorossiysk Shipping Co, The Gudermes* [1993] 1 Lloyd's Rep 311, CA (no implied contract). The rule in *Brandt v Liverpool* is far more often pleaded than established by judicial decision: see *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1983] 1 Lloyd's Rep 203 at 207 per Staughton J.

3 *The St Joseph* [1933] P 119, 18 Asp MLC 375.

4 See *The Aramis* [1989] 1 Lloyd's Rep 213 at 230, CA, per Stuart-Smith LJ ('... where there was no delivery, there is no basis, in my judgment, for implying a contract').

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### **349. Limit to operation of transfer.**

A bill of lading is not, in the full sense of the words, a negotiable instrument<sup>1</sup>. Thus, if the bill of lading is stolen from the shipper or transferred without his authority, a subsequent transferee in good faith and for value cannot take title under it against him<sup>2</sup>. However, some cases exist where a transferee may acquire rights over the goods which are greater than those of the transferor<sup>3</sup>.

1 See PARA 314.

2 *Gurney v Behrend* (1854) 3 E & B 622; cf *Gilbert v Guignon* (1872) 8 Ch App 16, 1 Asp MLC 498 (where the subsequent transfer was made by mistake).

3 See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158, 253.

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### **350. Transfer of bill operating as transfer of goods.**

A transfer of a bill of lading may be intended to operate as a transfer of the goods specified in it<sup>1</sup>, in which case the property which passes to the transferee is that which the parties intended to pass<sup>2</sup>. Whether the transfer is intended to pass the whole or only a qualified property is a question of fact depending on the circumstances of each particular case<sup>3</sup>.

The issue or transfer to the buyer of a bill of lading operates prima facie as a delivery to the buyer of the goods shipped<sup>4</sup>, but the whole property in the goods does not pass unless the transfer of the bill of lading was intended to have that effect<sup>5</sup>.

Where the intention to pass the whole property is clear, as, for example, where the goods are sold while at sea, the transfer of the bill of lading to the buyer divests the seller of all property in the goods and constitutes the buyer owner<sup>6</sup>. If, however, the seller is unpaid, he will retain his right to stop the goods in transit<sup>7</sup>, but this right will be defeated by a resale of the goods by the buyer<sup>8</sup>, accompanied by a transfer of the bill of lading to the new buyer<sup>9</sup>, or by the buyer taking delivery of the goods under the bill of lading<sup>10</sup>. For his protection the seller may reserve the right of disposal of the goods by taking a bill of lading under which the goods are deliverable to himself or to his agent, or he may provide for the transfer being conditional on payment of the price of the goods. These courses open to the seller are discussed elsewhere in this work<sup>11</sup>.

1 *Barber v Meyerstein* (1870) LR 4 HL 317; *E Clemens Horst Co v Biddell Bros* [1912] AC 18 at 22, 12 Asp MLC 80 at 82, HL, per Lord Loreburn LC. Cf *The Tigress* (1863) Brown & Lush 38. See further **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1254; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 368.

2 *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL (discussing *Barber v Meyerstein* (1870) LR 4 HL 317); *Newsom v Thornton* (1805) 6 East 17 at 40.

3 *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL.

4 *Groning v Mendham* (1816) 5 M & S 189 (captain's refusal to deliver goods); *Green v Sichel* (1860) 7 CBNS 747 (waiver by buyer of custom to deliver by bill of lading); *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 341, 5 Asp MLC 160 at 164, CA, per Bowen LJ (where he compares a bill of lading to the key of a warehouse); *E Clemens Horst Co v Biddell Bros* [1912] AC 18, 12 Asp MLC 80, HL; *The Parchim* [1918] AC 157, 14 Asp MLC 196, PC; *The Annie Johnson, The Kronprinsessan Margareta* [1918] P 154, 14 Asp MLC 301. A bill of lading truly represents the goods and possession of it carries possession of the goods, and it operates as long as the engagement of the shipowner has not been fulfilled: *Barber v Meyerstein* (1870) LR 4 HL 317. See also **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 366. Generally, where goods are in the possession of a third person, an attornment to the buyer by the bailee is necessary, but this does not affect the transfer of a document of title: see the Sale of Goods Act 1979 s 29(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 170.

5 *Newsom v Thornton* (1805) 6 East 17; *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL. In the absence of evidence to the contrary and apart from rules which arise out of a state of war existing or imminent at the beginning of the transaction, the general law infers that under a cif contract when the bill of lading is delivered to the buyer's agent in exchange for the buyer's acceptance of the seller's draft it is intended that the ownership of the goods is to be transferred to the buyer by such delivery: *The Prinz Adalbert* [1917] AC 586 at 590, 14 Asp MLC 81 at 82, PC, per Lord Sumner. The circumstances may, however, warrant the inference that the property was intended to pass on shipment even where the bill of lading was taken out in the seller's name and was not intended to pass into the buyer's possession until payment of the purchase price: *The Parchim* [1918] AC 157, 14 Asp MLC 196, PC. A so-called 'sale' of a draft on the buyers to a bank accompanied by a delivery to the bank of the bill of lading indorsed in blank and other shipping documents does not indicate an intention to transfer the general property in the goods to the bank: *The Orteric* [1920] AC 724, 15 Asp MLC 10, PC. As to bills of lading under cif (cost, insurance, freight) contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 324 et seq; and as to bills of lading under fob (free on board) contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 351 et seq.

6 *Wright v Campbell* (1767) 4 Burr 2046; *Barber v Meyerstein* (1870) LR 4 HL 317. The property in the goods may, however, pass without any transfer of the bill of lading, if such is the intention of the parties: *Meyer v Sharpe* (1813) 5 Taunt 74; *Nathan v Giles* (1814) 5 Taunt 558; *Joyce v Swann* (1864) 17 CBNS 84; cf *Dick v Lumsden* (1793) Peake 189.

7 *Walley v Montgomery* (1803) 3 East 585; *Tucker v Humphrey* (1828) 4 Bing 516; *Pease v Gloahac, The Marie Joseph* (1866) LR 1 PC 219; *Bethell v Clark* (1888) 20 QBD 615, 6 Asp MLC 346, CA; *Kemp v Ismay, Imrie*

& Co (1909) 14 Com Cas 202; but see *Wilmshurst v Bowker* (1844) 7 Man & G 882, Ex Ch. As to stoppage in transit see PARA 495; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq.

8 *Jenkyns v Usborne* (1844) 7 Man & G 678; *Pease v Gloaher, The Marie Joseph* (1866) LR 1 PC 219. The original buyer in his turn may stop the goods as against the new buyer: *Patten v Thompson* (1816) 5 M & S 350.

9 *The Argentina* (1867) LR 1 A & E 370. See also *Kemp v Canavan* (1864) 15 ICLR 216. If the bill of lading has never been transferred to the original buyer, a resale does not affect the original seller's right: *Kemp v Falk* (1882) 7 App Cas 573, 5 Asp MLC 1, HL.

10 *Coxe v Harden* (1803) 4 East 211. A stoppage in transit after a portion of the goods has been delivered is effectual as regards the balance: *Re McLaren, ex p Cooper* (1879) 11 ChD 68, 4 Asp MLC 63, CA.

11 As to the reservation by the seller of the right of disposal, and as to delivery in exchange for payment, and indorsement to a bank see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 370-371.

## UPDATE

### 350 Transfer of bill operating as transfer of goods

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 351. Transfer by way of mortgage or pledge.

Where the transfer of a bill of lading is intended to pass only a qualified property in the goods specified in the bill, it may operate either by way of mortgage or by way of pledge<sup>1</sup>. The question whether the transaction is to be regarded as a mortgage or as a pledge depends on whether the parties intended to transfer to the transferee the legal interest or only the equitable interest in the goods<sup>2</sup>. Where the bill of lading is indorsed in blank and deposited as security for an advance, the transaction is a pledge<sup>3</sup>. The pledgor is not divested of all his interest in the goods<sup>4</sup>, but the pledgee is entitled to claim delivery of them<sup>5</sup> and, if necessary, to sell them in order to realise his security<sup>6</sup>.

The right of an unpaid seller to stop the goods in transit is not defeated by a transfer of the bill of lading by way of mortgage or pledge, but it can only be exercised subject to the rights of the mortgagee or pledgee<sup>7</sup>.

1 *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL. Where the shipowner is part owner of the goods specified in the bill of lading, a pledge of the bill of lading with his consent operates also as a pledge of the freight due upon the goods unless expressly excluded: *Grote v Milne* (1811) 4 Taunt 133. As to the liability of an indorsee to whom a bill of lading has been indorsed by way of pledge or mortgage see PARA 346; and as to mortgage and pledge generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1620 et seq; **MORTGAGE** vol 77 (2010) PARA 101 et seq; **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 1 et seq.

2 *Sewell v Burdick* (1884) 10 App Cas 74 at 95, 96, 5 Asp MLC 376 at 383, HL, per Lord Blackburn, citing *Howes v Ball* (1827) 7 B & C 481 and *Flory v Denny* (1852) 7 Exch 581.

3 *Sewell v Burdick* (1884) 10 App Cas 74, 5 Asp MLC 376, HL.

4 *The Glamorganshire* (1888) 13 App Cas 454, 6 Asp MLC 344, PC. See also *Re Westzinthus* (1833) 5 B & Ad 817.

5 *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653, 7 Asp MLC 69, CA.

6 Cf *Depperman v Hubbersty* (1852) 17 QB 766; *Edwards v Southgate* (1862) 10 WR 528.

7 *Kemp v Falk* (1882) 7 App Cas 573, 5 Asp MLC 1, applying *Re Westzinthus* (1833) 5 B & Ad 817 and *Spalding v Ruding* (1843) 6 Beav 376.

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### 352. Transfers passing no property.

In the following circumstances, a transfer of a bill of lading, although purporting to pass the property in the goods, in fact passes no property in them to the transferee:

- 58 (1) where the transfer is made without consideration<sup>1</sup>; to be valid, the transfer must be made for valuable consideration<sup>2</sup> but a past consideration is sufficient<sup>3</sup>;
- 59 (2) where the transfer is made to a transferee who is aware of circumstances making the transfer inoperative, such as the insolvency of the buyer through whom he claims<sup>4</sup>, or a breach of faith on the part of the transferor<sup>5</sup>, and, therefore, is not to be regarded as a holder in good faith<sup>6</sup>; it is not sufficient to show that the transferee knows that the goods specified in the bill of lading have not been paid for<sup>7</sup>; moreover, where a person who has obtained the property in the goods and possession of the bill of lading by a voidable (as distinct from a void) title transfers the bill of lading (with intent to pass the property in the goods) to a transferee, who takes it for value and without notice of the defect in the transferor's title, the property in the goods passes to the transferee<sup>8</sup>;
- 60 (3) where the transferor has himself no property in the goods<sup>9</sup>, and has no authority to deal with the property in them<sup>10</sup>; a person who has already sold the goods apart from the bill of lading cannot afterwards, by dealing with the bill of lading, transfer any property in them to the transferee<sup>11</sup>; similarly, where one part of a bill of lading drawn in a set has already been transferred with the intention of passing the property in the goods, the transferor has divested himself of all property in them, and the subsequent transfer of another part to another person does not pass any property to him<sup>12</sup>;
- 61 (4) where it is clear from the circumstances that no property was intended to pass<sup>13</sup>;
- 62 (5) where at the time of the transfer the goods have already been delivered by the shipowner to the person entitled to have them delivered to him<sup>14</sup>.

1 *Sewell v Burdick* (1884) 10 App Cas 74 at 80, 5 Asp MLC 376 at 377, HL, per Lord Selborne LC.

2 *Chartered Bank of India, Australia and China v Henderson* (1874) LR 5 PC 501 (where a forbearance to take proceedings and a release from an existing obligation to deposit shipping documents were held to be sufficient). See also *Cuming v Brown* (1808) 9 East 506; cf *Glegg v Bromley* [1912] 3 KB 474, CA. As to consideration generally see **CONTRACT** vol 9(1) (Reissue) PARAS 727-765.

3 *Leask v Scott Bros* (1877) 2 QBD 376, 3 Asp MLC 469, CA (not following *Rodger v Comptoir d'Escompte de Paris* (1869) LR 2 PC 393 (where a forbearance to insist on an existing right was held insufficient)); and see *The Emilien Marie* (1875) 2 Asp MLC 514; *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219.

4 *Cuming v Brown* (1808) 9 East 506; *Vertue v Jewell* (1814) 4 Camp 31; cf *Salomons v Nissen* (1788) 2 Term Rep 674 (where the transferee by a subsequent agreement became a partner with the transferor in the particular shipment).

- 5 *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219 at 228.
- 6 *Wright v Campbell* (1767) 4 Burr 2046; *Dick v Lumsden* (1793) Peake 189.
- 7 *Cuming v Brown* (1808) 9 East 506. Where, however, the bill of lading bears a special indorsement to the transferor making the goods deliverable to him if he should accept and pay a bill of exchange, and, if he should not do both, to the holder of the bill of exchange, the transferee is put upon inquiry and must ascertain that the condition has been fulfilled: *Barrow v Coles* (1811) 3 Camp 92.
- 8 *The Argentina* (1867) LR 1 A & E 370. See also *Jenkyns v Usborne* (1844) 7 Man & G 678; *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219.
- 9 *Gurney v Behrend* (1854) 3 E & B 622 at 634 per Lord Campbell CJ; *Finlay v Liverpool and Great Western Steamship Co Ltd* (1870) 23 LT 251; cf *Gilbert v Guignon* (1872) 8 Ch App 16, 1 Asp MLC 498.
- 10 *Gurney v Behrend* (1854) 3 E & B 622.
- 11 *London Joint Stock Bank Ltd v British Amsterdam Maritime Agency* (1910) 11 Asp MLC 571; cf *Dick v Lumsden* (1793) Peake 189.
- 12 *Barber v Meyerstein* (1870) LR 4 HL 317. See also PARA 334.
- 13 See PARA 351.
- 14 *The Future Express* [1993] 2 Lloyd's Rep 542, CA.

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## (F) BILLS OF LADING WHERE SHIP IS CHARTERED

### (a) Relationship of Bills of Lading and Charterparty

#### **353. Where a claim is brought against the carrier by a charterer.**

Where the goods are shipped by the charterer himself and the bill of lading is taken by him in his own name, or where a claim is brought against the carrier by a receiver who is a charterer<sup>1</sup>, then, in the absence of anything to show the contrary, the bill of lading is an acknowledgment only of the receipt of the goods<sup>2</sup>, and the contract of carriage is to be found in the charterparty alone<sup>3</sup>. Where a bill of lading is transferred to the receiver-charterer as consignee or indorsee, it does not affect the contractual relationship between them as shipowner and charterer, which continues to be governed by the charterparty unless altered by the parties, expressly or by implication<sup>4</sup>.

A bill of lading which differs in its terms from the charterparty does not, therefore, override the charterparty<sup>5</sup>, whether the difference arises from the addition of fresh terms, such as a negligence clause<sup>6</sup>, or from the omission<sup>7</sup> or alteration<sup>8</sup> of some of the terms of the charterparty. As, however, the parties may vary their contract by agreement, the bill of lading will prevail over the charterparty, even as between the shipowner and the charterer, where they have expressly agreed to vary the contract as contained in the charterparty, and have inserted in the bill of lading a statement to that effect<sup>9</sup>, or where it is otherwise clear from the circumstances that the contract is intended to be varied<sup>10</sup>.

It is immaterial that the charterer was merely an agent acting on behalf of the real owner of the goods; as regards the principal, the charterparty is equally the contract<sup>11</sup>.

- 1 As to where the claim is brought by a non-charterer see PARA 354.
- 2 *Rodocanachi v Milburn* (1886) 18 QBD 67 at 75, 6 Asp MLC 100 at 103, CA, per Lord Esher MR; *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL (where an inaccurate statement as to days used in loading inserted in the bill of lading by agreement between the master and the shipper was held not to affect the charterers, although they took delivery under the bill of lading). As to bills of lading to which the Hague-Visby Rules apply see art V; and PARA 396. There is nothing in the Carriage of Goods by Sea Act 1924 (see PARA 338 et seq) which deprives a charterer who is also the shipper of any of his rights under the charterparty.
- 3 *Sewell v Burdick* (1884) 10 App Cas 74 at 105, 5 Asp MLC 376 at 386, HL, per Lord Bramwell, citing *Gledstanes v Allen* (1852) 12 CB 202. As to when the charterer may sue for short delivery under the charterparty, even though he has indorsed the bill of lading, see *Den of Airlie Steamship Co Ltd v Mitsui & Co Ltd and British Oil and Cake Mills Ltd* (1912) 12 Asp MLC 169, CA.
- 4 *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL; *President of India v Metcalfe Shipping Co Ltd, The Dunelmia* [1970] 1 QB 289, [1969] 3 All ER 1549, [1969] 2 Lloyd's Rep 476, CA (charterparty authorised the master to sign the bill of lading 'without prejudice to' the charterparty), explaining *Calcutta Steamship Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395; *Gardner Smith Pty Ltd v The Ship Tomoe 8, The Tomoe 8* (1990) 19 NSWLR 588, Aust SC. There is no authority for the general proposition which had been expounded in leading commercial textbooks that, where a bill of lading, different in terms from the charterparty, is issued to a shipper who is not the charterer or his agent, and is subsequently indorsed to the charterer, the bill of lading necessarily supersedes the charterparty and governs the relations between charterers and shipowners: *President of India v Metcalfe Shipping Co Ltd, The Dunelmia* at 307-308, 1555 and 483 per Lord Denning MR, at 310, 1557 and 483 per Edmund Davies LJ and at 311, 1557 and 485 per Fenton Atkinson LJ.
- 5 *Houston & Co v Sansinena & Co* (1893) 7 Asp MLC 311, HL; *Temperley Steam Shipping Co v Smyth & Co* [1905] 2 KB 791, 10 Asp MLC 123, CA (overruling *Runciman & Co v Smyth & Co* (1904) 20 TLR 625, DC); *Sugar Supply Commission v Hartlepool Seaton Steamship Co Ltd* [1927] 2 KB 419, 17 Asp MLC 307 (conclusive evidence clause in charterparty not affected by clause in bill of lading).
- 6 *Rodocanachi v Milburn* (1886) 18 QBD 67, 6 Asp MLC 100, CA. As to negligence clauses see PARA 280.
- 7 *The San Roman* (1872) LR 3 A & E 583, 1 Asp MLC 347; affd sub nom *Anderson, Anderson & Co v The San Roman (Owners), The San Roman* (1873) LR 5 PC 301, 1 Asp MLC 603.
- 8 *Pickernell v Jauberry* (1862) 3 F & F 217 (where the rate of freight was varied); *Pearson v Göschen* (1864) 17 CBNS 352; *Caughey v Gordon & Co* (1878) 3 CPD 419.
- 9 *Rodocanachi v Milburn* (1886) 18 QBD 67 at 75, 6 Asp MLC 100 at 103, CA, per Lord Esher MR.
- 10 In *Davidson v Bisset & Son* (1878) 5 R 706, it was held that oral evidence was admissible to prove that it was intended to vary the charterparty by the bill of lading.
- 11 *Delaurier & Co v Wyllie* (1889) 17 R 167.

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### **354. Where a claim is brought against the carrier by a non-charterer.**

Where the goods are shipped on a chartered ship by a person other than the charterer, or where a claim is brought against the carrier by a receiver who is not the charterer<sup>1</sup>, the issue arises as to who is the relevant cargo-interest's contractual carrier in a cargo claim, the shipowner or the charterer.

It is clear that where the ship is under a demise charterparty<sup>2</sup>, the contract under the bill of lading is between the relevant cargo-interest and the demise charterer, and not between that cargo-interest and the shipowner<sup>3</sup>. The shipowner has divested himself of the possession and control of the ship and is, therefore, under no liability to the cargo-interest<sup>4</sup> (other than, of course, to the demise charterer himself), nor has he any rights against the cargo-interest<sup>5</sup>.

Where the charterparty is not a demise charterparty two developments, one judicial, the other in trade practice, have made the task of identifying the carrier considerably easier than it once was<sup>6</sup>.

The identity of the carrier is now<sup>7</sup> a matter of construction and depends on the signature at the bottom of the bill of lading and, where the bill of lading has one, the logo at the top: if that process identifies the carrier, then the person so identified would be the carrier irrespective of any contrary indication, for example in a demise clause<sup>8</sup>, at any rate one contained on the reverse side of the bill of lading<sup>9</sup>.

The second development, trade practice in the field of letters of credit, made it common for bills of lading to contain on their face a clear statement of who the carrier is. The ICC Uniform Customs and Practice for Documentary Credits<sup>10</sup> requires bills of lading to indicate on their face the name of the carrier and to carry a signature either by the carrier or by the master or by an agent for either, in the latter case clearly indicating the name and the capacity of the party on whose behalf the agent was signing<sup>11</sup>.

1 As to where the claim is brought by a charterer, whether shipper or receiver, see PARA 353.

2 As to demise charterparties see PARA 212.

3 *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115. See also *Colvin v Newberry and Benson* (1832) 1 Cl & Fin 283, HL. Cf *Wagstaff v Anderson* (1880) 5 CPD 171, 4 Asp MLC 290; *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281 at 284. This is so whether the shipper had notice of the charterparty or not: *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL.

4 *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL, following *Frazer v Marsh* (1811) 13 East 238.

5 *Marquand v Banner* (1856) 6 E & B 232, as explained in *Gilkison v Middleton* (1857) 2 CBNS 134 and in *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92.

6 The question whether the contract under the bill of lading was between the shipper-receiver and the shipowner or between the shipper/receiver and the charterer depended on the circumstances of the particular case: *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115. The starting point appeared to be that a bill of lading signed by the ship's master pointed towards the shipowner as being the carrier: *Manchester Trust v Furness* [1895] 2 QB 539, 8 Asp MLC 57, CA; see also *The Rewia* [1991] 2 Lloyd's Rep 325, CA; *Sunrise Maritime Inc v Uvisco Ltd, The Hector* [1998] 2 Lloyd's Rep 287. The presumption was, however, a weak one, and it was something of a lottery as to whether the contractual weather-vane would point towards the shipowner (*Fetim BV v Oceanspeed Shipping Ltd, The Flecha* [1999] 1 Lloyd's Rep 612; *The Ines* [1995] 2 Lloyd's Rep 144; *The Nea Tyhi* [1982] 1 Lloyd's Rep 606) or with the charterer (*The Venezuela* [1980] 1 Lloyd's Rep 393; *The Okehampton* [1913] P 173 at 181, 12 Asp MLC 428, CA; and *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115).

7 It is since the decision of the House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2003] 2 All ER 785, [2003] 1 Lloyd's Rep 571.

8 A demise clause is clause contained in a bill of lading indicating to the holder who the carrier is. The clause has been well-received by the courts: see *The Berkshire* [1974] 1 Lloyd's Rep 185; *W & R Fletcher (New Zealand) Ltd v Sigurd Haavik A/S, The Vikfrost* [1980] 1 Lloyd's Rep 560, CA; *Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif* [1982] 1 Lloyd's Rep 456; *Ngo Chew Hong Edible Oil Pte Ltd v Scindia Steam Navigation Co Ltd, The Jalamohan* [1988] 1 Lloyd's Rep 443. See also PARA 213 note 4.

9 *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2003] 2 All ER 785, [2003] 1 Lloyd's Rep 571.

10 ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600) (see PARA 366).

11 The Uniform Customs and Practice for Documentary Credits (2007 Revision) art 20 states: 'A bill of lading, however named, must appear to indicate the name of the carrier and be signed by: the carrier or a named agent for or on behalf of the carrier; or the master or a named agent for or on behalf of the carrier. Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent. Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master'. See also PARAS 366, 499.

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### **355. Rights of shipper or receiver where not the charterer.**

As a general rule, a cargo-interest (whether shipper or receiver) who is not a charterer is entitled to hold his contractual carrier (whether owner or charterer) responsible for his goods, and to claim delivery of them on the terms of the bill of lading<sup>1</sup>. The contractual carrier cannot rely on any terms in the charterparty which are not incorporated in the bill of lading<sup>2</sup>. The cargo-interest cannot, therefore, be required to pay freight at a rate greater than that fixed by the bill of lading, even if such a greater rate is expressly specified in the charterparty<sup>3</sup>. The carrier is entitled to a lien on the cargo for freight due on delivery under the bill of lading<sup>4</sup>, but he cannot claim to exercise any further lien given by the charterparty, whether for the difference between the chartered freight and the bill of lading freight<sup>5</sup>, or for advance freight<sup>6</sup>, dead freight or demurrage at the port of loading<sup>7</sup>.

If the contract evidenced by the bill of lading is made with him<sup>8</sup>, the shipowner is entitled to collect the freight due from the holder of the bill of lading, but must account to the charterer for the amount by which the bill of lading freight exceeds the charterparty freight<sup>9</sup>. If, however, the bill of lading contract is not made with the shipowner, the shipowner may only claim the bill of lading freight from the holder by virtue of some special agreement, for example, the clause usually inserted in charterparties giving the shipowner a lien on such freight<sup>10</sup>. Such a lien gives the shipowner the right to give notice to the bill of lading holder to pay the freight to himself and not to the charterer, but, to be effective, the notice must be given before the holder has paid the freight to the charterer or his agent<sup>11</sup>. He is not, however, excused for a failure to deliver the goods by an exception which appears only in the charterparty<sup>12</sup>, nor may he rely on the fact that the charterparty contained terms limiting the master's authority to sign bills of lading<sup>13</sup>, or providing for the master to sign them as agent of the charterer<sup>14</sup>, unless he can prove that the shipper was not merely aware that there was a charterparty<sup>15</sup>, but actually knew that it contained such terms<sup>16</sup>. If, however, it is to bind the shipowner, the bill of lading signed must be covered by the usual authority of the master or other agent who signed it<sup>17</sup>.

A shipper who has shipped goods in ignorance of the terms of the charterparty may not be called on to accept a bill of lading drawn up in accordance with those terms, if they are unusual or if they impose undue liabilities upon him, as, for example, where the shipowner is given a lien for chartered freight and demurrage<sup>18</sup>. In this case the shipper is entitled to demand the redelivery of his goods free of all charges<sup>19</sup>.

1 *Manchester Trust v Furness* [1895] 2 QB 539, sub nom *Manchester Trust Ltd v Furness, Withy and Co* 8 Asp MLC 57, CA (where the charterparty provided that the master was to sign bills of lading as agent for the charterer). See also *Anthony Hordern & Sons Ltd v Commonwealth and Dominion Line Ltd* [1917] 2 KB 420, 14 Asp MLC 51 (conflict of provisions in bill of lading excepting shipowner from liability but incorporating the Harter Act 1893 (see PARA 280 note 6) under United States law; the shipowner was held liable under the Harter Act for loss of goods); *Australasian United Steam Navigation Co Ltd v Hunt* [1921] 2 AC 351, 15 Asp MLC 221, PC (term

in bill of lading rendered inoperative by the law of Fiji); *Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd* [1938] 1 KB 459, [1937] 4 All ER 304, 59 Ll L Rep 23 (conflict between bill of lading and the Harter Act).

2 See, however, note 16. As to the incorporation of the charterparty in the bill of lading see PARA 360 et seq.

3 *Paul v Birch* (1743) 2 Atk 621; *Faith v East India Co* (1821) 4 B & Ald 630; *Shand v Sanderson* (1859) 4 H & N 381; cf *Ralli Bros v Paddington Steamship Co Ltd (Mackintosh & Co, Third Parties)* (1900) 5 Com Cas 124 (cited in note 19); *Smidt v Tiden* (1874) LR 9 QB 446, 2 Asp MLC 307.

4 *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92.

5 *Turner v Haji Goolam Mahomed Azam* [1904] AC 826, 9 Asp MLC 588, PC; and see *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA.

6 *Tamvaco v Simpson* (1866) LR 1 CP 363, Ex Ch; cf *The Stornoway* (1882) 4 Asp MLC 529.

7 *Birley v Gladstone* (1814) 3 M & S 205; *Gladstone v Birley* (1817) 2 Mer 401.

8 See PARA 354.

9 *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92, as explained in *Molthes Rederi Aktieselskabet v Ellerman's Wilson Line Ltd* [1927] 1 KB 710, 17 Asp MLC 219.

10 See PARA 306.

11 *Tagart, Beaton & Co v James Fisher & Sons* [1903] 1 KB 391, 9 Asp MLC 381, CA, as explained in *Molthes Rederi Aktieselskabet v Ellerman's Wilson Line Ltd* [1927] 1 KB 710, 17 Asp MLC 219.

12 *The Patria* (1871) LR 3 A & E 436, 1 Asp MLC 71; cf *Sandeman v Scurr* (1866) LR 2 QB 86; and *Calcutta Steamship Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395 (where the shipowner was protected by an exception in the bill of lading, which did not appear in the charterparty, as against the charterer who was also indorsee of the bill of lading).

13 See PARA 359. See also PARA 328 et seq.

14 *Manchester Trust v Furness* [1895] 2 QB 539, 8 Asp MLC 57, CA; cf *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92.

15 See PARAS 358-359.

16 *The Draupner* [1909] P 219, CA; revsd on the question whether the holders of the bill of lading were in fact aware of the terms of the charterparty sub nom *The Draupner (Owners) v Draupner (Owners of Cargo)* [1910] AC 450, 11 Asp MLC 436, HL. The burden of proof lies on the shipowner: see *The Draupner*; *The St Cloud* (1863) 8 LT 54.

17 See PARA 357. See also PARA 328 et seq.

18 *Peek v Larsen* (1871) LR 12 Eq 378, 1 Asp MLC 163; cf *Tharsis Sulphur and Copper Mining Co v Culliford* (1873) 22 WR 46.

19 *Peek v Larsen* (1871) LR 12 Eq 378, 1 Asp MLC 163 (followed in *The Stornoway* (1882) 4 Asp MLC 529); *Gabarron v Kreeft*, *Kreeft v Thompson* (1875) LR 10 Exch 274, 3 Asp MLC 36. A refusal by the master to sign bills of lading at a lower rate of freight unless the difference between the chartered freight and the bill of lading freight is paid to him does not entitle the shipper to demand redelivery of his goods if he was aware of the existence of the charterparty when he shipped the goods, and intended that they should be shipped under the charterparty and that the difference between the chartered freight and the bill of lading freight (which the shipper had contracted to pay to the sub-charterers) should be paid by the sub-charterers to the shipowner before the bills of lading were signed: *Ralli Bros v Paddington Steamship Co Ltd (Mackintosh & Co, Third Parties)* (1900) 5 Com Cas 124.

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### 356. Position of consignee.

A person who becomes the lawful holder of a bill of lading<sup>1</sup> may, by virtue of becoming the holder of the bill, assert contractual rights against the carrier<sup>2</sup>. The original contract between the shipowner and the shipper, whether expressed in a charterparty<sup>3</sup> or otherwise<sup>4</sup>, is not transferred with the bill of lading, except in so far as it is incorporated in it<sup>5</sup>. As against the holder, the shipowner may not rely on any terms of the original contract which are not incorporated in the bill of lading<sup>6</sup>, as the holder is not an assignee of the original contract and is, therefore, not bound by its terms<sup>7</sup>. The shipowner must perform the contract contained in the bill of lading, and is not excused from performance by any exception not contained or incorporated in the bill of lading<sup>8</sup>, or by any agreement between himself and the shipper inconsistent with it<sup>9</sup>.

The holder is entitled to claim delivery on the terms of the bill of lading, if they differ from those of the charterparty<sup>10</sup>. Thus, as against the holder, the shipowner may not claim freight at any other rate than that specified in the bill of lading<sup>11</sup>, or assert a lien conferred by the charterparty but not incorporated in the bill of lading<sup>12</sup>, except in respect of sums due under the bill of lading<sup>13</sup>.

Where the liability of the shipowner depends on the authority of the person who signs the bill of lading to bind the shipowner, the fact that the holder knows of the charterparty must be taken into consideration, since, as against the shipowner, he may not rely on a bill of lading which he knows to be in excess of the authority possessed by the shipowner's agent<sup>14</sup>; but, if he does not know the terms of the charterparty, the mere knowledge of its existence does not prevent him from enforcing the bill of lading against the shipowner, even if the agent, in signing it, exceeded his actual authority<sup>15</sup>.

In these circumstances, the bill of lading must, however, be covered by the agent's usual authority<sup>16</sup>, and the holder must, at the time when it was transferred to him, have had no reason to suspect that such authority had not been properly exercised<sup>17</sup>.

1 As to the meanings of 'lawful holder of a bill of lading', 'holder of a bill of lading' and 'bill of lading' for this purpose see PARA 338.

2 See the Carriage of Goods by Sea Act 1924 s 2(1); and PARA 338.

3 *Oliver v Muggridge* (1859) 7 WR 164. The same principle applies where the bill of lading is indorsed by the shipper to the charterer himself: *Steamship Calcutta Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395.

4 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; *Leduc & Co v Ward* (1888) 20 QBD 475, 6 Asp MLC 290, CA; cf *The Emilien Marie* (1875) 2 Asp MLC 514 (where arrangements had been made with various shippers as to priorities in the case of short delivery).

5 See PARA 360 et seq.

6 See PARAS 355 note 16, 360.

7 See PARA 347.

8 *The Patria* (1871) LR 3 A & E 436, 1 Asp MLC 71; cf *The Northumbria* [1906] P 292, 10 Asp MLC 314 (where the exceptions in the charterparty were incorporated).

9 *Leduc & Co v Ward* (1888) 20 QBD 475, 6 Asp MLC 290, CA.

10 *Chappel v Comfort* (1861) 10 CBNS 802; *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA; *Red R Steamship Co v Allatini Bros* (1910) 11 Asp MLC 434, HL.

11 *Paul v Birch* (1743) 2 Atk 621; *Mitchell v Scaife* (1815) 4 Camp 298; *Foster v Colby* (1858) 3 H & N 705. In *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689, the court held that the shipowner could not

exercise his lien for more than the freight actually due on the bill of lading in respect of the goods, even though freight was payable 'as per charter' and the charter gave the ship a lien on cargo for freight.

12 *Gilkison v Middleton* (1857) 2 CBNS 134; *Tamvaco v Simpson* (1866) LR 1 CP 363, Ex Ch; cf *Chappel v Comfort* (1861) 10 CBNS 802 (demurrage).

13 See PARA 355.

14 *The Emilien Marie* (1875) 2 Asp MLC 514; *The Draupner (Owners) v Draupner (Cargo Owners)* [1910] AC 450, 11 Asp MLC 436, HL. The burden of proving knowledge of the charterparty rests on the shipowner: *The Draupner (Owners) v Draupner (Cargo Owners)*.

15 *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA; cf *Stumore, Weston & Co v Breen* (1886) 12 App Cas 698, HL.

16 As to the agent's usual authority see PARA 330.

17 *Small v Moates* (1833) 9 Bing 574. See also *Mitchell v Scaife* (1815) 4 Camp 298. Cf *Foster v Colby* (1858) 3 H & N 705; and PARA 345.

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### *(b) Authority of Master or Other Agent*

#### **357. Extent of authority.**

If the bill of lading is signed by an agent other than the master, such as a broker<sup>1</sup>, the existence of his authority to sign it is a question of fact, and the principal from whom his authority was derived, whether that principal is the shipowner or the charterer<sup>2</sup>, is liable on his signature, provided that the agent has not exceeded his authority<sup>3</sup>.

If, however, the bill of lading is signed by the master, the position is complicated by the existence of his implied authority to bind the shipowner<sup>4</sup>. It is, therefore, necessary to distinguish the following cases:

- 63 (1) where the charterparty is a demise charterparty<sup>5</sup>, the implied authority of the master to bind the shipowner is excluded, and his signature binds the charterer only<sup>6</sup>;
- 64 (2) where the charterparty does is not a demise charterparty, the master's implied authority to bind the shipowner by signing a bill of lading continues notwithstanding the charterparty<sup>7</sup>;
- 65 (3) where the master expressly signs the bill of lading as agent of the charterer and not as master, the shipowner is not liable<sup>8</sup>.

1 See PARA 328 note 2.

2 *Hayn v Culliford* (1878) 3 CPD 410, 4 Asp MLC 48 (affd without deciding this point (1879) 4 CPD 182, 4 Asp MLC 128, CA); *Wagstaff v Anderson* (1880) 5 CPD 171, 4 Asp MLC 290.

3 *Calcutta Steamship Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395; *The Nea Tyhi* [1982] 1 Lloyd's Rep 606 (where the charterers' agents had no actual authority to issue bills of lading stating that the cargo was shipped under deck when, in fact, it was shipped on deck, but did have ostensible authority to do so).

4 See PARA 330.

5 See PARA 210.

6 *Colvin v Newberry and Benson* (1832) 1 Cl & Fin 283, HL; *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 7 Asp MLC 263, HL; *Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif* [1982] 1 Lloyd's Rep 456 (where the charterers did not advise the plaintiffs that the proper party to be sued was the shipowner); cf *James v Jones* (1799) 3 Esp 27.

7 *The Emilien Marie* (1875) 2 Asp MLC 514.

8 *Harrison v Huddersfield Steamship Co Ltd* (1903) 19 TLR 386; cf *The Emilien Marie* (1875) 2 Asp MLC 514.

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### **358. Position between shipowner and persons not party to the charterparty.**

As regards persons not party to the charterparty, whether shippers, consignees or indorsees of the bill of lading, where the charterparty is not a demise charterparty, the shipowner, if he is the contractual carrier<sup>1</sup>, is bound by any bill of lading signed by the master within the usual authority of a master<sup>2</sup>, even if the master's authority is in fact limited by the charterparty<sup>3</sup>. He is exempt from liability only where the master has exceeded his usual authority<sup>4</sup>. A limitation of the master's authority contained in the charterparty is effective as regards all persons acquainted with it<sup>5</sup>.

1 See PARA 354.

2 *The Emilien Marie* (1875) 2 Asp MLC 514; *Compania Naviera Vasconzada v Churchill and Sim, Compania Naviera Vasconzada v Burton & Co* [1906] 1 KB 237, 10 Asp MLC 177, distinguishing *Cox v Bruce* (1886) 18 QBD 147, 6 Asp MLC 152, CA. As to the usual authority of the master see PARA 330.

3 *Mitchell v Scaife* (1815) 4 Camp 298.

4 *Reynolds v Jex* (1865) 7 B & S 86. A bill of lading representing goods to have been shipped or received for shipment, signed by the master and in the hands of the lawful holder acting in good faith, is conclusive evidence of such shipment or receipt as against the carrier: see the Carriage of Goods by Sea Act 1924 s 4; and PARA 317.

5 *The Draupner (Owners) v Draupner (Cargo Owners)* [1910] AC 450, 11 Asp MLC 436, HL.

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### **359. Differences between the terms of the charterparty and those of the bill of lading.**

As between the charterer and the shipowner, the master has no implied<sup>1</sup> authority to vary the terms of the contract contained in the charterparty, and he cannot, therefore, bind either of them by a variation in favour of the other<sup>2</sup>. The charterparty may, however, provide that the master is to sign bills of lading as presented by the charterer without prejudice to the charterparty<sup>3</sup>, and may further provide that the charterer is to indemnify the shipowner from all

the consequences or liabilities which may arise from the master signing bills of lading<sup>4</sup>. In this case it is the charterer's duty to tender a bill of lading which is not inconsistent with and not to the prejudice of the charterparty<sup>5</sup>; and, if he fails to discharge this duty and presents a bill of lading the signing of which involves the shipowner in liabilities to third persons, he must indemnify the shipowner<sup>6</sup>. Where the charterparty is varied, the charterer may not treat the master's signature as falling within his implied authority<sup>7</sup>; and, if the bill of lading is manifestly inconsistent with the charterparty, it is the master's duty to refuse to sign it<sup>8</sup>.

1 *Burgon v Sharpe* (1810) 2 Camp 529.

2 *Meyer v Dresser* (1864) 16 CBNS 646. See also *Pickernell v Jauberry* (1862) 3 F & F 217; *Pearson v Göschen* (1864) 17 CBNS 352; *The Canada* (1897) 13 TLR 238.

3 *Jones v Hough* (1879) 5 Ex D 115, 4 Asp MLC 248, CA. See also *Meyer v Dresser* (1864) 16 CBNS 646; *Reynolds v Jex* (1865) 7 B & S 86; *Turner v Haji Goolam Mahomed Azam* [1904] AC 826, 9 Asp MLC 588, PC (following *Hansen v Harrold Bros* [1894] 1 QB 612, 7 Asp MLC 464, CA); *Krüger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272, 10 Asp MLC 465, HL. If the charterparty provides that the master is to sign bills of lading in a prescribed form and that the cargo is to be discharged at a specified rate, and the prescribed form does not provide for any rate of discharge, the result will be that the cesser clause in the charterparty will not relieve the charterer from liability for demurrage if the cargo is not discharged at the rate specified in the charterparty: *Jenneson, Taylor & Co v Secretary of State for India in Council* [1916] 2 KB 702, 14 Asp MLC 41.

4 Such a term is not, however, necessary since it is to be implied from the charterer's request to the master to sign the particular bill of lading: *Elder, Dempster & Co v Dunn & Co* (1909) 11 Asp MLC 337, HL (where the cargo was incorrectly described through the charterer's default); applied in *Dawson Line Ltd v AG Adler für Chemische Industrie of Berlin* [1932] 1 KB 433, 18 Asp MLC 273, CA (where freight was payable on bill of lading weights, which were in fact correct). Cf *Strathlorne Steamship Co Ltd v Andrew Weir & Co* (1934) 40 Com Cas 168, CA (charterers bound to indemnify shipowners against claims by pledgees of goods which the master delivered on instructions of the charterers' agents without production of the bill of lading); *Thomson v Louis Dreyfus & Co* [1936] 3 All ER 687, 56 Ll L Rep 44, CA (shipowner compelled to deliver bags which were his property to the holder of a bill of lading owing to erroneous description of the cargo in the bill of lading as wheat in bags; charterer held liable to indemnify the shipowner in respect of the value of the bags); *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553, [1984] 2 Lloyd's Rep 466 (owners entitled to an implied indemnity against the consequences of the master signing the bills of lading); *Paros Shipping Corp v Nafta (GB) Ltd, The Paros* [1987] 2 Lloyd's Rep 269 (receivers alleging shortage in outturn); *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA (charterers presented inaccurate bills of lading for signature).

5 *Krüger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272 at 279, 10 Asp MLC 465 at 468, HL, per Lord Halsbury.

6 *The Arroyo* (1900) 16 TLR 255; *Milburn & Co v Jamaica Fruit Importing and Trading Co of London* [1900] 2 QB 540, 9 Asp MLC 122, CA.

7 *Meyer v Dresser* (1864) 16 CBNS 646.

8 *Krüger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272 at 278, 279, 10 Asp MLC 465 at 468, 469, HL, per Lord Halsbury and at 282, 469 per Lord Atkinson. The master is not entitled to refuse to sign a bill of lading which the charterer has a right under the charterparty to present: *Jones v Hough* (1879) 5 Ex D 115, 4 Asp MLC 248, CA. Cf *The Shillito* (1897) 3 Com Cas 44.

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### *(c) Incorporation of Charterparty Terms in Bill of Lading*

#### **360. Where contract to be found.**

As between the shipowner and the charterer, the contract of carriage is contained in the charterparty, in the absence of an agreement to vary it by the bill of lading or otherwise<sup>1</sup>; as regards other persons, it is prima facie to be found in the bill of lading<sup>2</sup>. The terms of the charterparty are not as such binding either on the shipper, where he is not the charterer, or on the consignee or indorsee of the bill of lading, where he is not the charterer, whether he knows of its existence<sup>3</sup> or not<sup>4</sup>. If, however, the consignee or indorsee knows the terms of the charterparty, as against the shipowner, he will be precluded from relying on a bill of lading which is outside the master's actual authority as defined by the charterparty<sup>5</sup>.

The terms of the charterparty may be incorporated in the bill of lading by express reference if a number of tests for incorporation established by the courts are satisfied<sup>6</sup>. The fact that the shipowner might have repudiated the charterparty as made without his authority will not preclude him from relying, as against the holder of the bill of lading, on those terms of the charterparty which are incorporated in the bill of lading<sup>7</sup>.

1 See PARA 353. As to bills of lading subject to the Hague-Visby Rules see art I(b); and PARA 372.

2 Even though the bill of lading was originally issued to the charterer (*Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689); but see *Small v Moates* (1833) 9 Bing 574 at 591 per Tindal CJ. As to the effect of a transfer of the bill of lading by the shipper to the charterer see PARA 356 note 3.

3 *Manchester Trust v Furness* [1895] 2 QB 539, 8 Asp MLC 57, CA; and see PARA 355.

4 *Sandeman v Scurr* (1866) LR 2 QB 86.

5 *Draupner (Owners) v Draupner (Cargo Owners)* [1910] AC 450, 11 Asp MLC 436, HL (the onus of proving that the consignee or indorsee knew of the terms of the charterparty is on the owner).

6 See PARAS 361, 362.

7 *Aktieselskabet Ocean v B Harding & Sons Ltd* [1928] 2 KB 371, 17 Asp MLC 465, CA.

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### **361. Tests for the incorporation of charterparty terms into bills of lading.**

Where a bill of lading contains a term incorporating a clause or clauses from a charterparty<sup>1</sup>, and the bill of lading constitutes the contract of carriage between the carrier and a cargo-interest who is not a party to the charterparty<sup>2</sup>, the charterparty clause is incorporated into the bill of lading if three conditions are satisfied<sup>3</sup>:

- 66 (1) the incorporation clause in the bill of lading<sup>4</sup> must aptly describe the charterparty clause sought to be incorporated; the incorporation clause may specifically identify the charterparty term sought to be incorporated, such an incorporation clause being strictly construed<sup>5</sup> and incorporation being limited to the clause described<sup>6</sup>; alternatively, the incorporation clause may be drawn in general terms, in which case it will, depending on the width of the incorporation clause<sup>7</sup>, prima facie<sup>8</sup> incorporate only those charterparty terms which are germane to the subject matter of the bill of lading contract, namely terms dealing with the shipment, carriage and discharge of the cargo, and the payment of the freight<sup>9</sup>;
- 67 (2) the charterparty clause sought to be incorporated must be intelligible within the context of the bill of lading<sup>10</sup>, and the courts will not manipulate the wording of

- the charterparty clause in order to give it a different meaning within the bill of lading from that of the plain words of the charterparty<sup>11</sup>;
- 68 (3) the charterparty clause must be consistent with all other clauses in the bill of lading<sup>12</sup>.

Only if all three conditions in heads (1) to (3) above are satisfied will the clause or clauses sought to be incorporated from the charterparty into the bill of lading be so incorporated.

1 Where no charterparty is specifically identified in the bill of lading, the incorporation clause in the bill of lading is taken to refer to the head charter: *Seateam & Co K/S A/S v Iraq National Oil Co, The Sevonja Team* [1983] 2 Lloyd's Rep 640 at 644; *Pacific Molasses Co and United Molasses Trading Co Ltd v Entre Rios Compania Naviera SA, The San Nicholas* [1976] 1 Lloyd's Rep 8 at 11, CA; *Navigazione Alta Italia SpA v Svenska Petroleum AB, The Nai Matteini* [1988] 1 Lloyd's Rep 452 at 459. The circumstances of the case may, however, suggest otherwise: see eg *Bangladesh Chemical Industries Corpn v Henry Stephens Shipping Co Ltd and Tex-Dilan Shipping Co Ltd, The SLS Everest* [1981] 2 Lloyd's Rep 389, CA (sub-voyage charterparty preferred to head time charterparty); *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri and The Lorfri* [1978] QB 927 at 942, [1978] 3 WLR 309 at 322, 323, [1978] 1 Lloyd's Rep 581 at 591 (on appeal [1978] QB 927, [1978] 3 All ER 1066, [1978] 2 Lloyd's Rep 132, CA; affd [1979] AC 757, [1979] 1 All ER 307, [1979] 1 Lloyd's Rep 201, HL). In matters of incorporation of contract terms the paramount requirement is that the contract is readily ascertainable, and provided that that is so a term set out in a recap telex is capable of being incorporated: see *Welex AG v Rosa Maritime Ltd, The Epsilon Rosa* [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep 509. However, where a bill of lading seeks to incorporate terms orally agreed between the parties, the bill of lading could not incorporate such terms: *Partenreederei M/S Heidberg v Grosvenor Grain and Feed Co Ltd, The Heidberg* [1994] 2 Lloyd's Rep 287 (considered in *Tradigrain SA v King Diamond Shipping SA, The Spiros C* [2000] 2 Lloyd's Rep 319 at 327, per Rix LJ). For cases in which contracts of sale successfully incorporated terms from charterparties not yet drawn up cf *Gill & Duffus SA v Rionda Futures Ltd* [1994] 2 Lloyd's Rep 67; *Ceval Alimentos SA v Agrimpex Trading Co Ltd, The Northern Progress (No 2)* [1996] 2 Lloyd's Rep 319; but see also *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep 160.

2 Where the bill of lading is in the hands of the charterer, the terms of the contract of carriage between the carrier and the charterer are contained in the charterparty: see PARA 360.

3 The tests for incorporation appear to have been first expressed in terms of these questions in *Astro Valiente Compania Naviera SA v Government of Pakistan Ministry of Food and Agriculture, The Emmanuel Colocotronis (No 2)* [1982] 1 Lloyd's Rep 286 at 289, where Staughton J divided the questions into two issues, viz the description issue and the consistency issue. Although the judgment of Staughton J was not followed, on other grounds, in *Skips A/S Nordheim v Syrian Petroleum Co Ltd and Petrofina SA, The Varenna* [1983] 2 Lloyd's Rep 592, CA, Staughton J's general approach to incorporation was followed by Donaldson MR in *Miramar Maritime Corpn v Holborn Oil Trading Ltd, The Miramar* [1984] 1 Lloyd's Rep 142 at 143, CA (affd [1984] AC 676, [1984] 2 All ER 326, [1984] 2 Lloyd's Rep 129, HL) and has become the standard manner in which questions of incorporation are analysed: see Scrutton on Charterparties (21st Edn, 2008) art 37.

4 'The operative words of incorporation must be found in the bill of lading itself': *Skips A/S Nordheim v Syrian Petroleum Co Ltd and Petrofina SA, The Varenna* [1983] 2 Lloyd's Rep 592 at 594, CA, per Donaldson MR. Thus, the terms in the charterparty regarding the incorporation of charterparty terms into bills of lading cannot affect bill of lading holders who are not party to the charterparty. See also *Garbis Maritime Corpn v Philippine National Oil Co, The Garbis* [1982] 2 Lloyd's Rep 283 at 288. For a contrary view see *Astro Valiente Compania Naviera SA v Government of Pakistan Ministry of Food and Agriculture, The Emmanuel Colocotronis (No 2)* [1982] 1 Lloyd's Rep 286 at 292 per Staughton J; *The Annefield* [1971] P 168 at 184, [1971] 1 All ER 394 at 406, [1971] 1 Lloyd's Rep 1 at 4, CA, per Denning MR.

5 *The Modena, Chiesman & Co v Modena (Owners)* (1911) 16 Com Cas 292, DC (where the words 'at charterer's risk' were held not to be incorporated).

6 Thus, a term that freight is to be paid as per the charterparty will not incorporate the lien for chartered freight given by the charterparty: *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689; and see *Faith v East India Co* (1821) 4 B & Ald 630. Nor does such a term incorporate charterparty terms relating to demurrage: *Chappel v Comfort* (1861) 10 CBNS 802; and see *Smith v Sieveking* (1855) 4 E & B 945; *Young v Moeller* (1855) 5 E & B 755, Ex Ch.

7 As to the construction of general words of incorporation see PARA 362.

8 Ie subject to the other tests yet to be explained.

9 *Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1, 12 Asp MLC 23, HL; *The Merak* [1965] P 223, [1965] 1 All ER 230, [1964] 2 Lloyd's Rep 527, CA; *The Annefield* [1971] P 168, [1971] 1 All ER 394, [1971] 1 Lloyd's Rep 1, CA; *Garbis Maritime Corp v Philippine National Oil Co, The Garbis* [1982] 2 Lloyd's Rep 283; *Balli Trading Ltd v Afalona Shipping Co Ltd, The Coral* [1993] 1 Lloyd's Rep 1.

10 Charterparty terms which are unintelligible and inapplicable within the context of the bill of lading are not incorporated into that document: *Porteus v Watney* (1878) 3 QBD 534 at 541, 4 Asp MLC 34 at 38, CA, per Brett LJ, explaining *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch. But see *Miramar Maritime Corp v Holborn Oil Trading Ltd, The Miramar* [1984] AC 676 at 685-686, [1984] 2 All ER 326 at 330, [1984] 2 Lloyd's Rep 129 at 133, HL, per Lord Diplock, for doubts expressed as to the literalist construction adopted in these cases. See also *India Steamship Co v Louis Dreyfus Sugar Ltd, The Indian Reliance* [1997] 1 Lloyd's Rep 52 at 57-58, per Rix J, for a case where the court worked hard, but without manipulation, to make the incorporated clause intelligible within the bill of lading.

11 *Miramar Maritime Corp v Holborn Oil Trading Ltd, The Miramar* [1984] AC 676, [1984] 2 All ER 326, [1984] 2 Lloyd's Rep 129, HL (where a demurrage clause was incorporated from the charterparty into the bill of lading, the liability to pay demurrage was not extended from 'the charterer', as stipulated in the charterparty, to the consignee or receiver under the bill of lading). See also *Siboti KS v BP France SA* [2003] EWHC 1278 (Comm), [2003] 2 Lloyd's Rep 364 at 374, per Gross J. In *Miramar Maritime Corp v Holborn Oil Trading Ltd, The Miramar* at 685, 686, 329, 330 and 132, 133 Lord Diplock indicated that a number of earlier cases, particularly *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch, and *Porteus v Watney* (1878) 3 QBD 534, 4 Asp MLC 34, CA, might need to be re-examined.

12 See PARA 363.

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### 362. The construction of general terms of incorporation.

Where the incorporation clause in the bill of lading is drawn in general terms, the courts will look to the width of those terms with a view to deciding whether they adequately describe the charterparty clause which it is sought to incorporate. Most of the decisions relate to the precise ambit of the word 'conditions' which is often used in general clauses of incorporation. Many of the decisions are, however, very old and may need to be treated with care in the light of more recent judicial approaches to incorporation<sup>1</sup>.

Where the bill of lading seeks to incorporate 'conditions' from the charterparty, the exceptions<sup>2</sup> to liability in the charterparty are not incorporated. The 'conditions' which are to be treated as incorporated are those which are to be performed by the person who has received the bill of lading and is taking delivery of the goods<sup>3</sup>, such as those relating to the payment of demurrage at the port of discharge<sup>4</sup>, or to discharge according to the custom of the port<sup>5</sup>, or to the payment of freight<sup>6</sup>, or to the manner of payment<sup>7</sup>. Liens for demurrage at the port of loading<sup>8</sup> or for dead freight<sup>9</sup> may also be incorporated.

Given general words of incorporation, terms such as arbitration clauses<sup>10</sup>, exclusive jurisdiction clauses<sup>11</sup> or cesser clauses<sup>12</sup>, which are intended to relate solely to the contract between the charterer and the shipowner, and are thus not applicable to a bill of lading at all, are, however, unlikely to be incorporated in the absence of express and specific incorporation<sup>13</sup>.

1 See PARA 361; *Miramar Maritime Corp v Holborn Oil Trading Ltd, The Miramar* [1984] AC 676 at 685, 686, [1984] 2 All ER 326 at 329, 330, [1984] 2 Lloyd's Rep 129 at 132, 133, HL.

2 *Russell v Niemann* (1864) 17 CBNS 163 (approved in *Taylor v Perrin* (1883) HL, not reported, but cited in *Serraino & Sons v Campbell* [1891] 1 QB 283 at 294, 295, 7 Asp MLC 48 at 50, 51, CA); *Diederichsen v Farquharson Bros* [1898] 1 QB 150, 8 Asp MLC 333, CA. See also *Hogarth Shipping Co Ltd v Blyth, Greene, Jourdain & Co Ltd* [1917] 2 KB 534, 14 Asp MLC 124, CA ('conclusive evidence' clause not incorporated in bill of

lading). 'Exceptions' may be expressly incorporated from the charterparty: *The Northumbria* [1906] P 292, 10 Asp MLC 314, DC.

3 *Taylor v Perrin* (1883) HL, not reported (see [1891] 1 QB 283 at 295 per Lord Blackburn); *Serraino & Sons v Campbell* [1891] 1 QB 283 at 289, 7 Asp MLC 48 at 51, CA, per Lord Esher MR; *East Yorkshire Steamship Co Ltd v Hancock* (1900) 5 Com Cas 266.

4 *Wegener v Smith* (1854) 15 CB 285; *Porteus v Watney* (1878) 3 QBD 534, 4 Asp MLC 34, CA; *Gullischen v Stewart Bros* (1884) 13 QBD 317, 5 Asp MLC 200, CA. It was held in a Scottish case that a provision in a bill of lading that the cargo should be delivered 'in accordance to C/P' was sufficient to make the bill of lading holder liable for demurrage at the port of discharge: *Rederij Erven H Sloots v E Chalmers & Co Ltd, The Soemba* [1956] 1 Lloyd's Rep 552. See also PARAS 290, 292.

5 *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1915 SC 956; revsd on ground that alleged custom had not been proved 1916 SC (HL) 134. As to the custom of the port see PARA 282.

6 *Red R Steamship Co v Allatini Bros* (1910) 11 Asp MLC 434, HL.

7 *Taylor v Perrin* (1883) unreported, HL: see [1891] 1 QB 283 at 294 per Lord Blackburn.

8 *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch (where it was held, however, that a further liability for damages for detention did not pass); *Harris v Jacobs* (1885) 15 QBD 247, 5 Asp MLC 531, CA (where the liability for damages for detention was held to pass, the clause being sufficiently wide). Demurrage at the port of loading may be excluded by express agreement, notwithstanding the bill of lading: *SS County of Lancaster Ltd v Sharp & Co* (1889) 24 QBD 158, 6 Asp MLC 448. As to demurrage see PARAS 287, 289 et seq.

9 *Kish v Taylor* [1912] AC 604 at 621, 622, 12 Asp MLC 217 at 221, HL, followed in *Aktieselskabet Ocean v B Harding & Sons Ltd* [1928] 2 KB 371, 17 Asp MLC 465, CA. As to dead freight see PARA 460.

10 *Hamilton & Co v Mackie & Sons* (1889) 5 TLR 677, CA, approved in *Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1, 12 Asp MLC 23, HL, followed in *The Njegos* [1936] P 90, 53 Ll L Rep 286. An arbitration clause, not being directly germane to the shipment, carriage and delivery of the cargo, may be incorporated in the bill of lading only by specific words, either in the bill of lading or in the charterparty, showing an intention to provide for arbitration: *The Annefield* [1971] P 168, [1971] 1 All ER 394, [1971] 1 Lloyd's Rep 1, CA, approving *The Njegos*, applying *Thomas & Co Ltd v Portsea Steamship Co Ltd*, and explaining the rule in *Hamilton & Co v Mackie & Sons*; *Daval Aciers d'Usinor et de Sacilor v Armare SRL, The Nerano* [1996] 1 Lloyd's Rep 1, CA. See also *Navigazione Alta Italia SpA v Svenska Petroleum AB, The Nai Matteini* [1988] 1 Lloyd's Rep 452; *Pride Shipping Corp v Chung Hwa Pulp Corp, The Oinoussin Pride* [1991] 1 Lloyd's Rep 126; *Partenreederei M/S Heidberg v Grosvenor Grain and Feed Co Ltd, The Heidberg* [1994] 2 Lloyd's Rep 287 (where it was held to be commercially unsound to hold that, on the proper construction of the bill of lading, it was capable of incorporating the terms of an oral contract). See also *The Delos* [2001] 1 Lloyd's Rep 703; and *Welex AG v Rosa Maritime Ltd, The Epsilon Rosa* [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep 509 (incorporation of arbitration clause).

As between a charterer holding a bill of lading and the shipowner, the arbitration clause in the charterparty is operative, the contract of carriage between these parties being contained in the charterparty: *Temperley Steam Shipping Co v Smyth & Co* [1905] 2 KB 791, 10 Asp MLC 123, CA, overruling *Runciman & Co v Smyth & Co* (1904) 20 TLR 625, DC, but distinguished in *Atlas Levante-Linie AG v Gesellschaft Fuer Getreidhandel AG and Becher, The Phonizien* [1966] 1 Lloyd's Rep 150. See also *Den of Airlie Steamship Co Ltd v Mitsui & Co Ltd and British Oil and Cake Mills Ltd* (1912) 12 Asp MLC 169, CA; *Denny, Mott and Dickson Ltd v Lynn Shipping Co Ltd* [1963] 1 Lloyd's Rep 339; *The Merak* [1965] P 223, [1965] 1 All ER 230, [1964] 2 Lloyd's Rep 527, CA; *Pacific Molasses Co and United Molasses Trading Co Ltd v Entre Rios Compania Naviera SA, The San Nicholas* [1976] 1 Lloyd's Rep 8, CA, applied in *Bangladesh Chemical Industries Corp v Henry Stephens Shipping Co Ltd and Tex-Dilan Shipping Co Ltd, The SLS Everest* [1981] 2 Lloyd's Rep 389, CA; *Mineracoas Brasilieras Reunidas v EF Marine SA, The Freights Queen* [1977] 2 Lloyd's Rep 140, DC; *Astro Valiente Compania Naviera SA v Government of Pakistan Ministry of Food and Agriculture, The Emmanuel Colocotronis (No 2)* [1982] 1 Lloyd's Rep 286, not followed in *Skips A/S Nordheim v Syrian Petroleum Co Ltd and Petrofina SA, The Varena* [1983] 2 Lloyd's Rep 592, CA. As to arbitration clauses generally see PARA 309.

11 See *Siboti KS v BP France SA* [2003] EWHC 1278 (Comm), [2003] 2 Lloyd's Rep 364 at 373-374 per Gross J.

12 *Gullischen v Stewart Bros* (1884) 13 QBD 317, 5 Asp MLC 200, CA. See PARAS 304-305.

13 See *Serraino & Sons v Campbell* [1891] 1 QB 283, 7 Asp MLC 48, CA; *Manchester Trust v Furness* [1895] 2 QB 539, sub nom *Manchester Trust Ltd v Furness, Withy and Co* 8 Asp MLC 57, CA.

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### **363. Inconsistent terms.**

A term of the charterparty which is, on the face of it, capable of being incorporated in the bill of lading must nevertheless be disregarded if it is inconsistent with an express term of the bill of lading<sup>1</sup>.

Thus, a provision in the charterparty providing for payment of freight on the ship's dead weight capacity cannot prevail against an express term in the bill of lading that freight is to be paid at a specified rate per ton, although the bill of lading also provides for payment of freight as per charterparty<sup>2</sup>, nor in such a case can the shipowner claim to exercise against the bill of lading holder a lien for the chartered freight contained in the charterparty except as regards freight due on the goods covered by the bill of lading<sup>3</sup>.

1 *Gardner v Trechmann* (1884) 15 QBD 154 at 157, 5 Asp MLC 558 at 559, CA, per Brett MR; *W and R Fletcher (New Zealand) Ltd v Sigurd Haavik A/S, The Vikfrost* [1980] 1 Lloyd's Rep 560, CA. Cf the construction of charterparties where there is apparent inconsistency or contradiction between the express terms of the contract and the general provisions expressly incorporated in it: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL; and PARA 228. Where a bill of lading is governed by the Hague-Visby Rules, a clause incorporated from the charterparty into the bill of lading which relieves the carrier of or lessens his liability under the Rules would be inconsistent with the bill of lading and would therefore be null and void under art III r 8: see PARA 395.

2 *Red R Steamship Co Ltd v Allatini Bros* (1909) 11 Asp MLC 192; and see *Brightman v Miller* (1908) Shipping Gazette, 9 June. Cf *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA.

3 *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689. See also **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1014 et seq.

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## **D. SEA WAYBILLS AND STRAIGHT BILLS OF LADING**

### **364. Sea waybills and straight bills of lading.**

A 'sea waybill' is a document which contains or evidences an undertaking by the carrier to the shipper to deliver the goods to the person who is for the time being identified as being entitled to delivery, or his duly authorised agent, on production of proof of identity at the port of discharge<sup>1</sup>. Thus, unlike a transferable bill of lading<sup>2</sup>, a sea waybill does not need to be presented to the carrier by the consignee at the port of discharge in order to obtain delivery of the goods. The use of a sea waybill may, therefore, eliminate the difficulties which arise when the vessel arrives at her destination before a bill of lading could reach the ultimate purchaser and receiver of the goods. Sea waybills look remarkably like bills of lading and are in many ways very similar to such documents; but there are a number of important differences.

First, like a bill of lading, a sea waybill will typically provide evidence of the terms of the contract of carriage agreed between the shipper and the carrier.

Second, as with a bill of lading, the consignee named as such on a sea waybill<sup>3</sup> has a contractual right of action against the carrier and may in certain circumstances become liable to the carrier under that contract. Thus a person who, without being an original party to the contract of carriage<sup>4</sup>, is the person to whom delivery of the goods to which a sea waybill relates<sup>5</sup> is to be made by the carrier in accordance with that contract has, by virtue of being the person to whom delivery is to be made, transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract<sup>6</sup>. The consignee who thus takes the benefit of the shipper's contract with the carrier will also become subject to its burdens if he:

- 69 (1) takes or demands delivery from the carrier of any of the goods to which the sea waybill relates<sup>7</sup>;
- 70 (2) makes a claim under the contract of carriage against the carrier in respect of any of those goods<sup>8</sup>; or
- 71 (3) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods<sup>9</sup>.

The fact that the consignee becomes so liable under the contract of carriage does not, however, extinguish the shipper's liabilities as an original party to the contract of carriage<sup>10</sup>. Nor does the fact that the consignee takes the benefit of the contract extinguish the rights of the shipper under the original contract<sup>11</sup>. Where a person with any interest or right in or in relation to goods to which a sea waybill relates sustains loss or damage in consequence of a breach of the contract of carriage but rights of suit in respect of that breach are vested in another person, the other person is entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised<sup>12</sup>.

Third, a sea waybill is not considered to be a document of title at common law<sup>13</sup>. This gives the document its main advantage over a bill of lading made out to order: the presentation of the document is not necessary for delivery of the goods, it being enough for the consignee to show to the carrier's satisfaction that he is the party named as the consignee. However, the fact that a sea waybill is not a document of title at common law also means that the right to claim the goods from the carrier cannot be transferred by the consignee to another party in the way it would if the document were a bill of lading made out to order. This being the case, sea waybills are not appropriate in trades where the goods are likely to be sold in transit.

Fourth, given that the sea waybill is not considered to be a document of title at common law, it is doubtful whether the Hague-Visby Rules apply to sea waybills other than by reason of their being specifically incorporated<sup>14</sup>.

Fifth, although a sea waybill is a receipt for the goods, the statutory provisions<sup>15</sup> whereby representations in bills of lading are, in favour of the lawful holder of the bill, conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment, do not apply to sea waybills<sup>16</sup>.

Sixth, although a sea waybill cannot be used to transfer the right of possession to the goods by indorsement, the named consignee may in certain circumstances have a better title than that of the true owner of the goods<sup>17</sup>.

1 See *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) paras 5.6, 5.7. Sea waybills are used where there is no intention of selling the goods while they are in transit. They are the equivalent of consignment notes (in land transport) and air waybills (in air transport).

2 It remains a moot point whether a straight bill of lading needs to be presented for delivery of the goods: *J/ MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423, [2005] 1 Lloyd's Rep 347 suggests that presentation is necessary, but the bill of lading in that case expressly said as much.

3 For these purposes, references to a 'sea waybill' are references to any document which is not a bill of lading but is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea and identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract: Carriage of Goods by Sea Act 1992 ss 1(3), 5(1). For these purposes, references to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference to a document's identifying a person is to be construed accordingly: s 5(3). As to the meaning of references to bills of lading see PARA 338. It was clearly intended by the draftsman of the Carriage of Goods by Sea Act 1992 that straight bills of lading be assimilated to sea waybills for the purposes of the Act: see *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) paras 2.5, 4.12.

4 For these purposes 'contract of carriage', in relation to a sea waybill, means the contract contained in or evidenced by that waybill: Carriage of Goods by Sea Act 1992 s 5(1)(a).

5 As to references to goods to which a document relates see PARA 317 note 12.

6 Carriage of Goods by Sea Act 1992 s 2(1)(b).

7 Carriage of Goods by Sea Act 1992 s 3(1)(a).

8 Carriage of Goods by Sea Act 1992 s 3(1)(b).

9 Carriage of Goods by Sea Act 1992 s 3(1)(c).

10 Carriage of Goods by Sea Act 1992 s 3(3).

11 Carriage of Goods by Sea Act 1992 s 2(5) proviso.

12 Carriage of Goods by Sea Act 1992 s 2(4).

13 See *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) para 5.6.

14 Nothing in the Carriage of Goods by Sea Act 1971 s 1 is to be taken as applying the Hague-Visby Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title: see s 1(4); PARA 367; and Scrutton on Charterparties (21st Edn, 2008) p 382. As for straight bills of lading, it is now clear that the Carriage of Goods by Sea Act 1971 applies to such documents whether or not the Hague-Visby Rules are incorporated into them: see *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423, [2005] 1 Lloyd's Rep 347 (either because they are 'documents of title' (per Lord Steyn and Lord Bingham) or because they are bills of lading (per Lord Rodger)).

15 Ie the Carriage of Goods by Sea Act 1992 s 4 and the Hague-Visby Rules art III r 4: see PARA 317.

16 The Carriage of Goods by Sea Act 1992 s 4 relates to transferable bills of lading only: see PARA 317. A sea waybill will, therefore, be only prima facie evidence of the receipt of the goods by the carrier. It is clear that s 4 does not apply to straight bills of lading: however if, as decided in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423, [2005] 1 Lloyd's Rep 347, straight bills of lading are governed by the Hague-Visby Rules, then the estoppel in art III r 4 (see PARA 380) would apply to straight bills of lading; but cf the Carriage of Goods by Sea Act 1971 s 1(6)(b) (see PARA 367), in relation to negotiable receipts incorporating the Hague-Visby Rules.

17 Ie by virtue of the Sale of Goods Act 1979 s 24, a sea waybill being both 'a warrant or order for the delivery of goods' and a 'document used in the ordinary course of business as proof of the ... control of goods' within the meaning of the Factors Act 1889 s 1(4) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 157).

## UPDATE

### 364-365 Sea waybills and straight bills of lading, Delivery orders

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## ***E. DELIVERY ORDERS***

### **365. Delivery orders.**

There are various kinds of delivery orders. A delivery order may be an order by the owner of the goods to the person in possession to deliver the goods to the person named in the order or a document in which the person in possession of goods undertakes that he will deliver them to a named person or the holder<sup>1</sup>.

The first type of order, usually known as a 'merchant's delivery order', does not purport to contain any undertaking by the carrier. It will typically involve an order by a seller promising his buyer that the goods will be delivered to him; or an order by the seller to his agent at the port of destination to deliver the goods to the holder; or even an undertaking that a trusted third party will issue a delivery order in his own name<sup>2</sup>. What it will not involve is an undertaking by the carrier that he, the party in whose possession the goods are, will deliver the goods to the person indicated in the order. Ship's delivery orders, however, are documents issued by or on behalf of shipowners while the goods are in their possession or under their control and which contain an undertaking that the goods will be delivered to the holder or to the order of a named person, or documents addressed to a shipowner requiring him to deliver to the order of a named person, or documents addressed to a shipowner requiring him to deliver to the order of a named person, the shipowner subsequently attorning to that person<sup>3</sup>.

Delivery orders are typically used where goods shipped in bulk and covered by one bill of lading are sold in parcels to more than one buyer, each of which requires the tender of a separate document against payment<sup>4</sup>. The merchant's bill of lading containing, as it does, no undertaking by the carrier to deliver the goods, this document is quite different from a bill of lading. The ship's delivery order, a carrier's document issued in respect of part of the goods covered by a bill of lading, has, however, some affinity to a bill of lading and it is necessary, therefore, to examine the precise relationship between the two documents.

First, the terms of the contract of carriage concluded between the shipper and the carrier will not normally be recorded in a ship's delivery order. Where, however, such a document is issued, it will often incorporate the terms of the bill of lading pursuant to which it has been issued.

Second, as with a bill of lading, the person to whom the carrier undertakes to deliver the goods has a direct, contractual claim to the goods under a contract of carriage with the carrier, and may in certain circumstances be liable on that contract towards the carrier.

A person to whom delivery of the goods to which a ship's delivery order<sup>5</sup> relates<sup>6</sup> is to be made in accordance with the undertaking contained in the order has, by virtue of being the person to whom delivery is to be made, transferred to and vested in him all rights of suit under the contract of carriage<sup>7</sup> as if he had been a party to that contract<sup>8</sup>. The rights so vested are vested subject to the terms of the order and, where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, are confined to rights in respect of the goods to which the order relates<sup>9</sup>. A person who thus takes the benefits of a ship's delivery order becomes subject to any liabilities towards the carrier on the terms of the contract of carriage under which the goods are carried if he:

- 72 (1) takes or demands delivery from the carrier of any of the goods to which the ship's delivery order relates<sup>10</sup>;
- 73 (2) makes a claim under the contract of carriage against the carrier in respect of any of those goods<sup>11</sup>; or
- 74 (3) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods<sup>12</sup>.

Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of these provisions in relation to that order exclude liabilities in respect of any goods to which the order does not relate<sup>13</sup>. The fact that the person entitled to delivery of the goods can, in the circumstances set out above, become liable to the carrier under the contract of carriage, does not, however, extinguish the shipper's liabilities as an original party to the contract of carriage<sup>14</sup>. Nor does it extinguish the rights of the shipper as an original party to the contract of carriage<sup>15</sup>. Where a person with any interest or right in or in relation to goods to which a ship's delivery order relates sustains loss or damage in consequence of a breach of the contract of carriage but rights of suit in respect of that breach are vested in another person, the other person is entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised<sup>16</sup>.

Third, a ship's delivery order is not considered to be a transferable document of title at common law<sup>17</sup>. Consequently, the right to delivery of the goods cannot be transferred by indorsement.

Fourth, given that a ship's delivery order is not considered to be a document of title at common law, it is doubtful whether the Hague-Visby Rules apply to ship's delivery orders other than by reason of their being specifically incorporated<sup>18</sup>.

Fifth, although a ship's delivery order is not a document of title at common law, the person entitled to the goods under the delivery order may in certain circumstances have a better title than that of the true owner of the goods<sup>19</sup>.

1 The term 'delivery order' is a loose one, capable, according to context, of comprising a number of different documents: see *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146 at 153 per Kerr J. As to delivery orders generally see eg *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293, [1949] 1 All ER 269, 82 Ll L Rep 270, HL; *Colin & Shields v W Weddel & Co Ltd* [1952] 2 All ER 337, [1952] 2 Lloyd's Rep 9, CA; *Cremer v General Carriers SA, The Dona Mari* [1974] 1 All ER 1, [1974] 1 WLR 341, [1973] 2 Lloyd's Rep 366; *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV*.

2 Merchant's delivery orders are not covered by the Carriage of Goods by Sea Act 1992.

3 See *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146 at 155 per Kerr J.

4 See *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) para 5.29. '[Supplying a ship's delivery order instead of a bill of lading] enable[s] a seller to split up a bulk consignment into smaller parcels and to sell them to different buyers while the goods are still at sea. A seller often has only one bill of lading for the whole consignment, and he cannot deliver that one bill of lading to each of the buyers because it contains more goods than the particular contract of sale, so in each of his contracts of sale the seller stipulates for the right to give a ship's delivery order. The bulk consignment can then be split up into small parcels each covered by a ship's delivery order instead of a bill of lading': *Colin & Shields v W Weddel & Co Ltd* [1952] 2 All ER 337 at 343, [1952] 2 Lloyd's Rep 9 at 19, CA, per Denning LJ.

5 For these purposes, references to a 'ship's delivery order' are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods, and is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person: Carriage of Goods by Sea Act 1992 ss 1(4), 5(1). As to references to bills of

lading see PARA 338. As to references to sea waybills see PARA 364. As to references to a person's being identified in a document see PARA 364 note 3.

6 As to references to goods to which a document relates see PARA 317 note 12.

7 For these purposes, 'contract of carriage', in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given: Carriage of Goods by Sea Act 1992 s 5(1)(b).

8 Carriage of Goods by Sea Act 1992 s 2(1)(c).

9 Carriage of Goods by Sea Act 1992 s 2(3).

10 Carriage of Goods by Sea Act 1992 s 3(1)(a).

11 Carriage of Goods by Sea Act 1992 s 3(1)(b).

12 Carriage of Goods by Sea Act 1992 s 3(1)(c).

13 Carriage of Goods by Sea Act 1992 s 3(2). Section 3(2) makes it clear that the person entitled to sue under a ship's delivery order does so on the terms of the undertaking contained in the order and that any such rights are confined to the goods covered by the order. Thus, where a bill of lading relates to 10,000 tonnes, and ten delivery orders each in respect of 1,000 tonnes are issued by the ship, the liabilities of each delivery order holder do not extend to the whole 10,000 tonnes but only to the amount covered by the delivery order.

14 Carriage of Goods by Sea Act 1992 s 3(3).

15 Carriage of Goods by Sea Act 1992 s 2(5) proviso.

16 Carriage of Goods by Sea Act 1992 s 2(4).

17 See *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) para 5.28; Scrutton on Charterparties (21st Edn, 2008) p 382.

18 Nothing in the Carriage of Goods by Sea Act 1971 s 1 is to be taken as applying the Hague-Visby Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title: see s 1(4); and PARA 367.

19 Ie by virtue of the Sale of Goods Act 1979 s 24, a ship's delivery order being both 'a warrant or order for the delivery of goods' and a 'document used in the ordinary course of business as proof of the ... control of goods' within the meaning of the Factors Act 1889 s 1(4) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 157).

## UPDATE

### 364-365 Sea waybills and straight bills of lading, Delivery orders

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## **F. TENDER OF SHIPPING DOCUMENTS UNDER LETTERS OF CREDIT**

### **366. The Uniform Customs and Practice for Documentary Credits.**

Commercial letters of credit (that is, bank undertakings to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit) generally incorporate the Uniform Customs and Practice for Documentary Credits<sup>1</sup>, which make specific provision in connection with the content of bills of lading and sea waybills. If a credit calls for a bill of lading or a non-negotiable sea waybill, that document must be the sole original bill of lading or non-negotiable sea waybill or the full set as indicated, must contain no indication that it is subject to a charterparty, must identify the carrier, the vessel and the ports of loading and discharge, must contain or refer to all applicable terms and conditions and must be signed by the carrier or master or their agents<sup>2</sup>. Virtually identical provisions apply in respect of a transport document covering two or more different modes of transport (a 'multimodal or combined transport document')<sup>3</sup>. Provision is also made in connection with transshipments<sup>4</sup>. A charter party bill of lading must be the sole original bill of lading or full set as indicated, must identify the vessel and the ports of loading and discharge, and must be signed by the owner, charterer or master or their agents<sup>5</sup>.

1 See the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600), as drafted and published by the International Chamber of Commerce: see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 925. As to the nature and operation of credits generally and under the Uniform Customs and Practice for Documentary Credits see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 923-966.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(a), 21(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 940, 941. The signature must be identified as that of the carrier, master or agent as the case may be; and if an agent signs he must indicate whether he has signed as agent for the carrier or for the master: see art 20; and PARA 354 note 11.

3 Uniform Customs and Practice for Documentary Credits (2007 Revision) art 19. See also PARA 499.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(b)-(d), 21(b)-(d); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 940, 941.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 19, 22(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 940, 941.

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## ***G. APPLICATION OF THE HAGUE-VISBY RULES***

### **(A) THE APPLICABLE LAW**

#### **367. Application of the Hague-Visby Rules.**

The Carriage of Goods by Sea Act 1924 gives effect to the Hague-Visby Rules, which have the force of law<sup>1</sup>. They apply to every bill of lading relating to the carriage of goods<sup>2</sup> between ports in two different states if the bill of lading is issued in a contracting state<sup>3</sup>, or the carriage is from a port in a contracting state, or the contract contained in or evidenced by the bill of lading provides that the rules or legislation of any state giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person<sup>4</sup>. The Hague-Visby Rules also have effect, and have the force of law, in relation to and in connection with the carriage of goods by sea in ships<sup>5</sup> where the port of shipment is a port in the United Kingdom<sup>6</sup>, whether or not the carriage is between ports in two different states<sup>7</sup>. Thus, although the Hague-Visby Rules apply primarily to voyages between different states, they will also apply to coastal voyages in these circumstances<sup>8</sup>.

Subject to their adoption by contract<sup>9</sup>, nothing in the Hague-Visby Rules is to be taken as applying to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for<sup>10</sup> the issue of a bill of lading or any similar document of title<sup>11</sup>.

The Hague-Visby Rules have the force of law<sup>12</sup> in relation to:

- 75 (1) any bill of lading if the contract contained in or evidenced by it expressly provides that the Hague-Visby Rules shall govern the contract<sup>13</sup>; and
- 76 (2) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Hague-Visby Rules are to govern the contract as if the receipt were a bill of lading<sup>14</sup>,

but subject, where head (2) above applies, to any necessary modifications<sup>15</sup>.

The Hague-Visby Rules apply from loading to discharge only<sup>16</sup>; the parties may make what terms they please prior to the loading on and subsequent to the discharge from the ship in which the goods are carried by sea. Again, the Hague-Visby Rules apply only where there is a contract of carriage, that is to say, a contract covered by a bill of lading or any similar document of title<sup>17</sup>, and do not apply to charterparties; but bills of lading issued under charterparties must comply with the terms of the Hague-Visby Rules<sup>18</sup>.

1 See the Carriage of Goods by Sea Act 1971 s 1(1), (2) (s 1(1) amended by the Merchant Shipping Act 1981 s 2(1)). As to the Hague-Visby Rules (ie the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924; TS 17 (1931); Cmd 3806), as amended by the Protocol (Brussels, 23 February 1968; TS 83 (1977); Cmd 6944) and by the Protocol (Brussels, 21 December 1979; Misc 18 (1980); Cmd 7969)) see PARA 206. The Carriage of Goods by Sea Act 1971 (and therefore the Hague-Visby Rules) applies, with modifications, in relation to the carriage of goods by hovercraft, other than passengers' baggage, as it applies in relation to goods on board or carried by ship: see the Hovercraft (Civil Liability) Order 1986, SI 1986/1305, art 4, Sch 2; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 386.

The Carriage of Goods by Sea Act 1971 continues in effect the alterations in the common law rights and liabilities of shipowners originally implemented by the Carriage of Goods by Sea Act 1924, but the rules of the common law remain applicable, except in so far as they are expressly modified by the 1971 Act: *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 at 340, 18 Asp MLC 266 at 270, HL, per Lord Atkin. Thus proof of the shipment of the cargo in good condition and delivery in damaged condition places upon the shipowner the burden of proving that the case falls within one of the immunities conferred upon him by the Hague-Visby Rules: see *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432 at 435-436; on appeal sub nom *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223 at 234, 32 Ll L Rep 91 at 95, HL, per Viscount Sumner.

2 As to the meaning of 'carriage of goods' see PARA 375; and as to the meaning of 'goods' see PARA 372 note 2.

3 As to the contracting states see PARA 368. See *Trafigura Beheer BV v Mediterranean Shipping Co SA, The MSC Amsterdam* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622 (South Africa enacted legislation based on the Hague-Visby Rules without being a contracting state; held Hague-Visby Rules did not apply).

4 Hague-Visby Rules art X. See further PARAS 373-374. As to the extension of the application of the Carriage of Goods by Sea Act 1971 to British possessions etc see PARA 369.

5 Thus the Hague-Visby Rules do not apply to carriage or storage prior to shipment on board a vessel or after the port of discharge but only to carriage between the ports named in the contract of carriage, albeit that the goods may have gone ashore pending transshipment under a clause in the contract permitting such transshipment: *Mayhew Foods Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317. A carrier or shipper may, however, enter into an agreement as respects the custody, care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried: see PARA 372. As to the meaning of 'ship' see PARA 374 note 6.

6 As to the United Kingdom see PARA 96 note 1. As to the extension of the application of the Hague-Visby Rules to carriage from ports in British possessions etc see PARA 369.

7 Carriage of Goods by Sea Act 1971 s 1(3). For these purposes, 'carriage of goods between ports in two different States' has the meaning given by the Hague-Visby Rules art X (see PARAS 373-374): Carriage of Goods by Sea Act 1971 s 1(3).

8 le by virtue of the Carriage of Goods by Sea Act 1971 s 1(3): see the text and notes 5-7.

9 le subject to the Carriage of Goods by Sea Act 1971 s 1(6): see the text and notes 12-15.

10 As to whether a bill of lading needs to be issued or whether it is enough that its issue be contemplated see *Parsons Corp v CV Scheepvaartonderneming Happy Ranger, The Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357 at 362 per Tuckley J; and *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 1 Lloyd's Rep 321.

11 Carriage of Goods by Sea Act 1971 s 1(4). A 'bill of lading or any similar document of title' includes a straight bill of lading: see *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423, [2005] 2 All ER 86, [2005] 1 Lloyd's Rep 347. As to the incorporation of the Hague-Visby Rules into charterparties see PARAS 206, 370.

12 le without prejudice to the Hague-Visby Rules art X(c): see PARA 373.

13 Carriage of Goods by Sea Act 1971 s 1(6)(a).

14 Carriage of Goods by Sea Act 1971 s 1(6)(b). Section 1(6)(b) applies only if the receipt expressly provides that the Hague-Visby Rules are to govern the contract as if the receipt were a bill of lading or contains similar wording, there being no reason to treat the words 'as if the receipt were a bill of lading' as having no statutory force. The receipt must expressly provide that all the Hague-Visby Rules are to govern the contract; the partial incorporation of those Rules does not comply with the Carriage of Goods by Sea Act 1971 s 1(6)(b): *Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise* [1989] 2 Lloyd's Rep 185, not following *McCarren & Co Ltd v Humber International Transport Ltd and Truckline Ferries (Poole) Ltd, The Vechscroon* [1982] 1 Lloyd's Rep 301.

15 Carriage of Goods by Sea Act 1971 s 1(6). In particular, the Hague-Visby Rules art III r 4 second sentence (see PARA 380) and art III r 7 (see PARA 382) are to be omitted: Carriage of Goods by Sea Act 1971 s 1(6). Quaere, however, whether after *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423, [2005] 1 Lloyd's Rep 347, a straight bill of lading, at any rate where it is not 'marked as' a non-negotiable receipt, attracts the estoppel contained in the Hague-Visby Rules art III r 4 despite the wording of the Carriage of Goods by Sea Act 1971 s 1(6)(b) (see the text and note 14). If and so far as the contract contained in or evidenced by a bill of lading or receipt within s 1(6)(a) or (b) (see the text and notes 12-14) applies to deck cargo or live animals, the Hague-Visby Rules as given the force of law by the Carriage of Goods by Sea Act 1971 s 1(6) have effect as if the Hague-Visby Rules art I(c) (meaning of 'goods': see PARA 372 note 2) did not exclude deck cargo and live animals: Carriage of Goods by Sea Act 1971 s 1(7). For this purpose 'deck cargo' means any cargo which by the contract of carriage is stated as being carried on deck and is so carried: s 1(7). As to deck cargo see PARAS 372 note 2, 455, 467.

16 See the definition of 'carriage of goods' in the Hague-Visby Rules art I(e): see PARA 375.

17 See the definition of 'contract of carriage' in the Hague-Visby Rules art I(b): see PARA 372. This is, however, subject to the Carriage of Goods by Sea Act 1971 s 1(6)(b): see the text and note 14.

18 See the Hague-Visby Rules art V; and PARA 396.

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### **368. Contracting states and the territories in respect of which they are contracting.**

If Her Majesty by Order in Council certifies that for the purposes of the Hague-Visby Rules<sup>1</sup>:

- 77 (1) a state specified in the Order is a contracting state, or is a contracting state in respect of any place or territory so specified<sup>2</sup>; or

- 78 (2) any place or territory specified in the Order forms part of a state so specified, whether a contracting state or not<sup>3</sup>,

that Order is conclusive evidence, except so far as it has been superseded by a subsequent Order, of the matters so certified<sup>4</sup>.

1 As to the Hague-Visby Rules see PARAS 206, 367, 371 et seq. An Order in Council under these provisions may be varied or revoked by a subsequent Order in Council: Carriage of Goods by Sea Act 1971 s 2(2).

2 Carriage of Goods by Sea Act 1971 s 2(1)(a).

3 Carriage of Goods by Sea Act 1971 s 2(1)(b).

4 Carriage of Goods by Sea Act 1971 s 2(1). In exercise of the power so conferred Her Majesty has made the Carriage of Goods by Sea (Parties to Convention) Order 1985, SI 1985/443 (amended by SI 2000/1103), which specifies that the contracting states are: the United Kingdom of Great Britain and Northern Ireland (as respects Great Britain and Northern Ireland, the Isle of Man, Bermuda, British Antarctic Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Falkland Islands Dependencies, Gibraltar, Hong Kong, Montserrat, Turks and Caicos Islands); the Kingdom of Belgium (as respects Belgium); the Republic of Croatia (as respects Croatia); the Kingdom of Denmark (as respects Denmark); the Republic of Ecuador (as respects Ecuador); the Arab Republic of Egypt (as respects Egypt); the Republic of Finland (as respects Finland); the French Republic (as respects France); Georgia (as respects Georgia); the German Democratic Republic (as respects the German Democratic Republic); Italy (as respects Italy); the Lebanese Republic (as respects Lebanon); the Kingdom of the Netherlands (as respects the Kingdom of the Netherlands in Europe); the Kingdom of Norway (as respects Norway); the Polish People's Republic (as respects Poland); the Republic of Singapore (as respects Singapore); Spain (as respects Spain); the Democratic Socialist Republic of Sri Lanka (as respects Sri Lanka); the Kingdom of Sweden (as respects Sweden); the Swiss Confederation (as respects Switzerland); the Syrian Arab Republic (as respects Syria); and the Kingdom of Tonga (as respects Tonga).

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### **369. Application to British possessions.**

The Carriage of Goods by Sea Act 1971 (and therefore the applicability of the Hague-Visby Rules<sup>1</sup>) has been extended<sup>2</sup>, subject to certain exceptions, adaptations and modifications, to Bermuda, the British Antarctic Territory, the British Virgin Islands, the Cayman Islands, the Falkland Islands and Dependencies, Montserrat and the Turks and Caicos Islands<sup>3</sup>.

Her Majesty may also by Order in Council<sup>4</sup> provide for the statutory provisions relating to the application of the Hague-Visby Rules to the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different states<sup>5</sup>, to have effect as if the reference therein to the United Kingdom included a reference to all or any of:

- 79 (1) the Isle of Man<sup>6</sup>;  
 80 (2) any of the Channel Islands specified in the Order<sup>7</sup>;  
 81 (3) any colony specified in the Order, not being a colony for whose external relations a country other than the United Kingdom is responsible<sup>8</sup>; and  
 82 (4) any country specified in the Order, being a country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of Her Majesty's government of the United Kingdom<sup>9</sup>.

At the date at which this volume states the law no such Order in Council had been made.

- 1 As to the Hague-Visby Rules see PARAS 206, 367, 371 et seq.
- 2 Ie by virtue of the Carriage of Goods by Sea Act 1971 s 4(1), which empowers Her Majesty by Order in Council to direct that the Act extends, subject to such exceptions, adaptations and modifications as may be specified in the Order, to any colony, not being a colony for whose external relations a country other than the United Kingdom is responsible, and to any country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of Her Majesty's government of the United Kingdom. As to the meaning of 'colony' see **COMMONWEALTH** vol 13 (2009) PARA 705. As to the meaning of 'Her Majesty's dominions' see **COMMONWEALTH** vol 13 (2009) PARA 707. An Order in Council under these provisions may contain such transitional and other consequential and incidental provisions as appear to Her Majesty to be expedient, including provisions amending or repealing any legislation about the carriage of goods by sea forming part of the law of any of the territories mentioned in the text (s 4(2)) and may be varied or revoked by a subsequent Order in Council (s 4(3)).
- 3 See the Carriage of Goods by Sea (Bermuda) Order 1980, SI 1980/1507, and the Carriage of Goods by Sea (Overseas Territories) Order 1982, SI 1982/1664.
- 4 An Order in Council under these provisions may be varied or revoked by a subsequent Order in Council: Carriage of Goods by Sea Act 1971 s 5(2).
- 5 Ie the Carriage of Goods by Sea Act 1971 s 1(3): see PARA 367.
- 6 Carriage of Goods by Sea Act 1971 s 5(1)(a). As to the Isle of Man see **COMMONWEALTH** vol 13 (2009) PARAS 799-800.
- 7 Carriage of Goods by Sea Act 1971 s 5(1)(b). As to the Channel Islands see **COMMONWEALTH** vol 13 (2009) PARAS 790-798.
- 8 Carriage of Goods by Sea Act 1971 s 5(1)(c).
- 9 Carriage of Goods by Sea Act 1971 s 5(1)(e).

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### **370. Construction.**

The application of the Hague-Visby Rules<sup>1</sup> is largely a matter of construction. The effect of the Carriage of Goods by Sea Act 1971 is to write certain standardised conditions of liability, that is the Hague-Visby Rules, into the contract of carriage<sup>2</sup>. In construing the Hague-Visby Rules, the court will apply the usual rules of construction<sup>3</sup>. If words occurring in the Hague-Visby Rules have had meanings assigned to them by judicial construction when used in contracts for the carriage of goods by sea before those Rules had the force of law, the proper approach to the construction of those words in those Rules is that there is no reason to suppose that the words should bear a different meaning in those Rules<sup>4</sup>. If the words have been judicially interpreted in other common law jurisdictions, the court will lean towards uniformity with such interpretation<sup>5</sup>. In general it may be said that the Rules are not intended as a code<sup>6</sup>; they are not meant altogether to supplant the contract of carriage, but only to control on certain topics the freedom of contract which the parties would otherwise have<sup>7</sup> and to standardise within certain limits the rights of the holders of bills of lading against shipowners<sup>8</sup>.

The Hague-Visby Rules are often incorporated into contracts of affreightment, both charterparties and bills of lading, which would not otherwise be regulated by them.

1 As to the Hague-Visby Rules see PARAS 206, 367, 371 et seq.

2 See *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 182, [1958] 1 All ER 725 at 750, [1958] 1 Lloyd's Rep 73 at 98, HL, per Lord Somervell of Harrow; and the cases cited in PARA 206 note 7.

3 As to the construction of documents generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq. As to the construction of charterparties see PARA 227 et seq. It is safer to abstain from imposing with regard to Acts of Parliament any further rules of construction than those applicable to all documents: see *Lamplugh v Norton* (1889) 22 QBD 452 at 459, CA, per Bowen LJ.

4 See *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807 at 837, [1961] 1 All ER 495 at 500, [1961] 1 Lloyd's Rep 57 at 68, HL, per Viscount Simonds, citing *Gosse Miller Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223 at 230, 32 Ll L Rep 91 at 93, HL, per Lord Hailsham LC and at 237 and 97 per Viscount Sumner. In *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 at 342, 343, 350, 18 Asp MLC 266 at 270, 272, HL, Lord Atkin and Lord Macmillan, whose words were cited with approval in *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 at 603, [1959] 2 All ER 740 at 744, [1959] 2 Lloyd's Rep 105 at 113, PC, placed greater emphasis on the need for uniformity of interpretation with other jurisdictions. See also *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57.

5 See *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 at 342, 343, 350, 18 Asp MLC 266 at 270, 272, HL, and the cases cited in note 4. On so universal a matter as commercial law it is particularly desirable that great common law jurisdictions should not lightly differ: see *Midland Silicones Ltd v Scruttons Ltd* [1961] 1 QB 106 at 127, 128, [1960] 2 All ER 737 at 745, [1960] 1 Lloyd's Rep 571 at 582, CA, per Pearce LJ. In *Brown & Co v T & J Harrison* (1927) 96 LJB 1025 at 1030, 1031, sub nom *RF Brown and Co Ltd v Harrison, Hourani v T & J Harrison* 17 Asp MLC 294 at 300, 302, CA, both Bankes LJ and Atkin LJ emphasised the importance of uniformity of interpretation with courts of the United States, in that instance, in relation to the Harter Act 1893 (see PARA 280 note 6). The modern approach to the interpretation of multilateral treaties is to adopt a 'purposive' approach consistent with the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 31.1 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 71 et seq): see *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, HL; *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, [1983] 1 Lloyd's Rep 1, HL. This trend towards uniformity was again approved in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807 at 840, 855, 874, [1961] 1 All ER 495 at 502, 512, 524-525, [1961] 1 Lloyd's Rep 57 at 69-70, 78, 88, HL. See also *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57.

6 See *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 at 342, 18 Asp MLC 266 at 270, HL, per Lord Atkin.

7 See *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at 247, [1950] 1 All ER 768 at 774, 83 Ll L Rep 385 at 394 per Devlin J; revsd on another point [1951] 1 KB 240, [1950] 2 All ER 618, 84 Ll L Rep 347, CA (where the observation was made in relation to the United States Carriage of Goods by Sea Act 1936).

8 *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807 at 879, [1961] 1 All ER 495 at 528, [1961] 1 Lloyd's Rep 57 at 91, HL, per Lord Hodson. Generally speaking, the tenor of the legislation is to place obligations on the carrier, especially in respect of the safety of the cargo. Even the immunities and rights conferred by the Hague-Visby Rules art IV (see PARA 385 et seq) are to be read subject to the obligations imposed by art III (see PARA 376 et seq).

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## (B) THE HAGUE-VISBY RULES

### (a) Applicability

#### 371. Overview of the Rules.

The content and effect of the Hague-Visby Rules<sup>1</sup> may be summarised as follows:

- 83 (1) the Rules contain certain rights and immunities in favour of the carrier which constitute his maximum protection<sup>2</sup>; he may surrender such protection, provided

- that such surrender is embodied in the bill of lading issued to the shipper<sup>3</sup>; but any clause, covenant or agreement in a contract of carriage relieving the carrier from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in his duties and obligations or lessening such liability otherwise than as provided in the Rules is null and void and of no effect<sup>4</sup>;
- 84 (2) the absolute undertaking on the part of the shipowner to provide a seaworthy ship which is implied at common law<sup>5</sup> is not to be implied<sup>6</sup>, and there is substituted for it an obligation before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy, and to man and equip her properly and make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation<sup>7</sup>; but, in the event of loss or damage occurring through unseaworthiness, the carrier must prove that he exercised due diligence to make the ship seaworthy<sup>8</sup>;
- 85 (3) the Rules permit deviation to save or to attempt to save life or property and any other reasonable deviation<sup>9</sup>;
- 86 (4) the Rules relieve the shipowner from liability for loss or damage<sup>10</sup> due to certain specified excepted perils<sup>11</sup>, and provide that he is also exempt from liability for loss or damage due to any other cause arising without the actual fault or privity of the carrier or without<sup>12</sup> the fault or neglect of the agents or servants of the carrier<sup>13</sup>;
- 87 (5) subject to these exceptions<sup>14</sup>, the carrier must take proper care of the goods and deliver them in the condition in which he received them<sup>15</sup>; and
- 88 (6) the Rules contain provisions limiting the amount of the carrier's liability in certain cases<sup>16</sup>.

The Rules also provide that in certain cases removal of the goods without notice of claim is prima facie evidence of discharge in the condition described in the bill of lading<sup>17</sup>, and provide a time limit for legal proceedings against the carrier and the ship in respect of loss or damage<sup>18</sup>.

1 As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

2 See the Hague-Visby Rules art IV; and PARA 385 et seq.

3 See the Hague-Visby Rules art V; and PARA 396.

4 See the Hague-Visby Rules art III r 8; and PARA 395.

5 As to the obligation at common law to provide a seaworthy ship see PARAS 418-422, 464 et seq.

6 As to the circumstances in which an absolute warranty of seaworthiness is not now to be implied see PARA 376.

7 See the Hague-Visby Rules art III r 1; and PARAS 376, 377. See also PARA 464.

8 See the Hague-Visby Rules art IV r 1; and PARA 385 et seq.

9 See the Hague-Visby Rules art IV r 4; and PARAS 378, 385.

10 The words 'loss or damage' have been held not to be restricted to physical loss of or damage to the goods, but to include consequential losses arising, eg from delay: *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL (decided under the United States Carriage of Goods by Sea Act 1936 s 4).

11 See the Hague-Visby Rules art IV r 2(a)-(p); and PARAS 388, 389.

12 For these purposes, the words 'or without' are not to be used disjunctively; they have the effect of 'and without': see *Brown & Co v T & J Harrison* (1927) 96 LJB 1025, sub nom *RF Brown and Co Ltd v T & J Harrison, Hourani v T & J Harrison* 17 Asp MLC 294, CA.

- 13 See the Hague-Visby Rules art IV r 2(q); and PARA 391.
- 14 le subject to the Hague-Visby Rules art IV.
- 15 See the Hague-Visby Rules art III r 2; and PARA 383.
- 16 See the Hague-Visby Rules art IV r 5; and PARA 394.
- 17 See the Hague-Visby Rules art III r 6; and PARAS 400, 401.
- 18 See the Hague-Visby Rules art III r 6; *Associated Herring Merchants v Reitsma* 1958 SLT (Sh Ct) 57.

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### **372. Application to contracts and defined terms.**

Subject to the provisions relating to the freedom to enter into a special agreement<sup>1</sup>, under every contract of carriage of goods<sup>2</sup> by sea, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, the carrier<sup>3</sup> is subject to the responsibilities and liabilities<sup>4</sup> and entitled to the rights and immunities<sup>5</sup>, set forth in the Hague-Visby Rules<sup>6</sup>.

The expression 'contract of carriage' applies only to contracts of carriage covered by a bill of lading<sup>7</sup> or any similar document of title<sup>8</sup>, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document of title, issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same<sup>9</sup>.

As between shipowner and charterer the contract of carriage is contained in the charterparty and the bill of lading is usually a mere receipt for the goods<sup>10</sup>. The Hague-Visby Rules do not, therefore, apply to a bill of lading unless and until it is negotiated by the charterer to a consignee or indorsee<sup>11</sup> or until the bill of lading is presented to the shipowner by a holder in such circumstances as to give rise to an implied contract between shipowner and holder on the terms of the bill of lading<sup>12</sup>. Shipowners may escape the application of the Hague-Visby Rules by issuing a notice to shippers that no bills of lading will be issued by them in a particular trade<sup>13</sup>.

1 le the provisions of the Hague-Visby Rules art VI: see PARA 397. As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

2 For these purposes, 'goods' includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried: Hague-Visby Rules art I(c).

A clause in a bill of lading giving the carrier liberty to carry goods on deck does not by itself amount to such a statement and does not, therefore, exclude the operation of the Hague-Visby Rules notwithstanding a contrary term in the bill of lading: see *Svenska Traktor Akt v Maritime Agencies (Southampton) Ltd* [1953] 2 QB 295, [1953] 2 All ER 570, [1953] 2 Lloyd's Rep 124; *Encyclopaedia Britannica Inc v The Hong-Kong Producer and Universal Marine Corp* [1969] 2 Lloyd's Rep 536 (US 2nd Cir) (seawater damage to cargo stowed on deck; short form bill of lading not mentioning on-deck stowage). See also *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd, The Pembroke* [1995] 2 Lloyd's Rep 290, NZ HC (carrier obliged to carry goods below deck; some cargo subsequently transferred above deck; carriers in breach of obligation to stow below deck); *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1. As to deck cargo see PARAS 455, 467.

3 For these purposes, 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper: Hague-Visby Rules art I(a); and see *Freedom General Shipping SA v Tokai Shipping Co Ltd, The Khian Zephyr* [1982] 1 Lloyd's Rep 73 at 75, 76 per Robert Goff J ('the function of ... [the Hague-Visby Rules] art I(a), in providing that the word 'carrier' includes the owner or charterer who enters into a contract of carriage with a shipper, is to legislate for the fact that you may get a case ... where the bills of lading are charterers' bills ... In those circumstances the effect of the definition in art I(a) is to ensure that the provisions which apply to the carrier ... apply not only to the shipowner ... but also to the charterers ...'). As to when the charterer is the contracting party see PARA 353. The use of the word 'includes' indicates that 'carrier' is not limited to owners and charterers and would embrace eg a forwarding agent when, as sometimes happens, he enters into a contract of carriage with the shipper. Where the rules are incorporated into a charterparty, 'carrier' means the carrier under the relevant contract of carriage: *Freedom General Shipping SA v Tokai Shipping Co Ltd, The Khian Zephyr* at 76 per Robert Goff J.

4 As to responsibilities and liabilities see PARA 376 et seq.

5 As to rights and immunities see PARA 385 et seq.

6 Hague-Visby Rules art II. Article II is 'the crucial article ... that gives the carrier all his rights and immunities': *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 415, [1954] 2 All ER 158 at 162, [1954] 1 Lloyd's Rep 321 at 327 per Devlin J. See also *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 at 174, [1956] 3 All ER 957 at 968, [1956] 2 Lloyd's Rep 379 at 393, HL; and *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57. See PARAS 283, 456; and *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] EWHC 483 (Comm), [2006] 2 Lloyd's Rep 66. The Hague-Visby Rules art II defines the scope of the operations to which the responsibilities, liabilities, rights and immunities in those Rules apply: *Cia Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos* [1990] 1 Lloyd's Rep 310, CA. See also *PS Chellaram & Co Ltd v China Ocean Shipping Co, The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493 at 498, 516 (NSW CA).

7 Bills of lading are usually issued after the goods have been shipped and are thus evidence of a pre-existing contract of carriage which the parties have agreed to be evidenced by a bill of lading. In practice such an agreement will usually not be express, but may readily be implied from the circumstances and the custom of shippers and shipowners as to the voyage and trade in question. Such a contract has been held to be 'covered' by a bill of lading even if no such document is ever issued in respect of it: *Hugh Mack & Co Ltd v Burns and Laird Lines Ltd* (1944) 77 Ll L Rep 377 (NI CA); *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 419, [1954] 2 All ER 158 at 162, [1954] 1 Lloyd's Rep 321 at 329; *Anticosti Shipping Co v Viateur St Amand* [1959] 1 Lloyd's Rep 352, Can SC; *Automatic Tube Co Pty Ltd and Email Ltd, Balfour Buzacott Division v Adelaide Steamship (Operations) Ltd, The Beltana* [1967] 1 Lloyd's Rep 531. See also *Parsons Corp v CV Scheepvaartonderneming Happy Ranger, The Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357. The circumstances or the custom of the trade (eg the British coasting trade) may negative any implied agreement to issue a bill of lading and in that case the contract of carriage will not be governed by the Hague-Visby Rules: see *Harland and Wolff Ltd v Burns and Laird Lines Ltd* 1931 SC 722, 40 Ll L Rep 286, Ct of Sess. This interpretation of the phrase 'covered by a bill of lading' makes it consistent with the Hague-Visby Rules art III r 3 (see PARA 379), which requires the shipowner on demand of the shipper to issue a bill of lading, and with art VI (see PARA 397), which authorises the parties to contract out of the Rules in certain cases 'provided no bill of lading has been or shall be issued': see *Harland and Wolff Ltd v Burns and Laird Lines Ltd* at 729 and at 289; and PARA 375.

A seller of goods under a fob contract who puts the goods on board a vessel nominated by or on behalf of the buyer becomes a party to the contract of affreightment to the extent that it covers this operation and is, therefore, entitled to the benefit of, and is bound by the obligations contained in, the Hague-Visby Rules: *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 426, [1954] 2 All ER 158 at 168, [1954] 1 Lloyd's Rep 321 at 333. As to bills of lading under fob (free on board) contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 351 et seq.

8 A 'bill of lading or any similar document of title' includes a straight bill of lading: see *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423, [2005] 2 All ER 86, [2005] 1 Lloyd's Rep 347. 'Similar document of title' presumably includes 'received for shipment' bills of lading, which were held to be bills of lading within the meaning of the Admiralty Court Act 1861 s 6 (repealed) in *The Marlborough Hill v Alex Cowan & Sons Ltd* [1921] 1 AC 444, 15 Asp MLC 163, PC. The decision was distinguished by McCardie J in *Diamond Alkali Export Corp v FI Bourgeois* [1921] 3 KB 443 at 452, 15 Asp MLC 455 at 459, which, however, was concerned with the documents required for the purposes of a cif contract. Moreover, while doubting that a 'received for shipment' bill was a bill of lading, McCardie J did not decide that it was not a document of title. In *The Maurice Desgagnes* [1977] 1 Lloyd's Rep 290, Can Fed Ct, a document issued by a freight forwarder was held not to be a bill of lading but a non-negotiable receipt. In *The Aegis Spirit* [1977] 1 Lloyd's Rep 93 (WD Wash), where containers were supplied by the time charterer for the carriage of cargo and they were damaged and a claim was brought against the shipowner, it was held that the Hague Rules did not apply for the containers were in no way represented collectively individually by documents of title. See also *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd* (1993) 113 ALR 677 (consignment note a 'bill of lading

or similar document of title'). As to bills of lading under cif (cost, insurance, freight) contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 324 et seq.

9 Hague-Visby Rules art I(b). Cf the Carriage of Goods by Sea Act 1971 s 1(4); and PARA 367. As to the responsibilities and liabilities to which the carrier is subject see PARA 376 et seq; and as to the rights and immunities to which he is entitled see PARA 385 et seq.

10 See PARA 353.

11 See PARA 333 et seq. On the transfer of the bill a new contract arises between the carrier and the holder of the bill of lading: see *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597 at 603, 55 Ll L Rep 159 at 174, HL.

12 See *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, 16 Asp MLC 262, CA; *The St Joseph* [1933] P 119, 18 Asp MLC 375; *The Torni* [1932] P 78 at 85, 86, 43 Ll L Rep 78 at 81, 82, CA.

13 *Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise* [1989] 2 Lloyd's Rep 185.

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### 373. Voyages to which the Rules apply.

The Hague-Visby Rules<sup>1</sup> apply where:

- 89 (1) the port of shipment of the voyage is a port in the United Kingdom<sup>2</sup>, whether or not the carriage is between ports in two different states<sup>3</sup>;
- 90 (2) whether or not the voyage is between ports in two different states, the contract contained in or evidenced by the bill of lading expressly provides that the Rules are to govern the contract<sup>4</sup>;
- 91 (3) whether or not the voyage is between ports in two different states, the contract for the carriage of goods by sea evidenced by a receipt which is a non-negotiable document marked as such expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading<sup>5</sup>;
- 92 (4) the voyage is between ports in two different states and the bill of lading is issued in a contracting state<sup>6</sup>;
- 93 (5) the voyage is between two different states and the carriage is from a port in a contracting state<sup>7</sup>;
- 94 (6) the voyage is between two different states and the contract contained in or evidenced by the bill of lading provides that the Rules or legislation of any state giving effect to them are to govern the contract<sup>8</sup>.

In the case of heads (4) to (6) above, the nationality of the ship, the carrier, the shipper, the consignee or any other interested person is immaterial<sup>9</sup>.

Where goods have been loaded on a ship under a single bill of lading and carriage by sea to a named port has begun, the period from loading to delivery at the named port may be considered to be one unbroken voyage notwithstanding any intervening period when the goods are on shore during a transshipment<sup>10</sup>.

1 As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

2 As to the United Kingdom see PARA 96 note 1.

3 See the Carriage of Goods by Sea Act 1971 s 1(3); and PARA 367.

4 See the Carriage of Goods by Sea Act 1971 s 1(6)(a); and PARA 367.

5 See the Carriage of Goods by Sea Act 1971 s 1(6)(b); and PARA 367.

6 See the Hague-Visby Rules art X(a); and PARA 374.

7 Hague-Visby Rules X(b).

8 Hague-Visby Rules X(c). The Carriage of Goods by Sea Act 1971 s 1(6) is expressed to be without prejudice to the Hague-Visby Rules art X(c): see the Carriage of Goods by Sea Act 1971 s 1(6); and PARA 367. If it is intended that a bill of lading is to be governed by the Rules, there must be a specific reference in it to the Carriage of Goods by Sea Act 1971 or some other Act giving those Rules the effect of law in another jurisdiction: *Hellenic Steel Co v Svolamar Shipping Co Ltd, The Komninos S* [1991] 1 Lloyd's Rep 370, CA (bills of lading not issued in a contracting state; the words 'all disputes to be referred to British courts' did not amount to a provision that the United Kingdom legislation giving the Hague-Visby Rules the force of law should govern the contract; the Rules were thus not incorporated).

9 Hague-Visby Rules art X. Article X continues to have effect as if references to a contracting state included references to a state that is a contracting state in respect of the Hague-Visby Rules without the amendments made by the Protocol (Brussels, 21 December 1979; Misc 18 (1980); Cmnd 7969) as well as to one that is a contracting state in respect of the Hague-Visby Rules as so amended, and the Carriage of Goods by Sea Act 1971 s 2 (see PARA 368) applies accordingly: Merchant Shipping Act 1995 Sch 13 para 45(1), (7).

10 *Mayhew Food Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317; cf *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep 595 (BC SC).

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### **374. Documents to which the Rules apply.**

The provisions of the Hague-Visby Rules<sup>1</sup> apply where a bill of lading<sup>2</sup> relating to the carriage of goods<sup>3</sup> between ports in two different states is issued<sup>4</sup> in a contracting state<sup>5</sup>, whatever may be the nationality of the ship<sup>6</sup>, the carrier<sup>7</sup>, the shipper, the consignee or any other interested person<sup>8</sup>. The provisions of the Rules are not applicable to charterparties but, if bills of lading are issued in the case of a ship under a charterparty, they must comply with the terms of the Rules<sup>9</sup>.

The Rules also have the force of law in relation to:

- 95 (1) any bill of lading if the contract contained or evidenced by it expressly provides that the Rules are to govern the contract<sup>10</sup>; and
- 96 (2) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading<sup>11</sup>,

but subject, where head (b) above applies, to any necessary modifications<sup>12</sup>.

1 As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

2 Incorporating a straight bill of lading: see *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423, [2005] 1 Lloyd's Rep 347; and PARA 364.

3 As to the meaning of 'carriage of goods' see PARA 375.

4 As to the need for the issue of a bill of lading see also *Parsons Corpn v CV Scheepvaartonderneming Happy Ranger, The Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357; *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 1 Lloyd's Rep 321; and PARA 372.

5 Hague-Visby Rules art X(a).

6 For these purposes, 'ship' means any vessel used for the carriage of goods by sea: Hague-Visby Rules art I(d). It is possible that this could include a lighter used in the loading or discharging of a sea-going vessel, if the operation of loading or discharging were the responsibility of the sea carrier; and this view is supported by the reasoning of Devlin J in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 416, [1954] 2 All ER 158 at 162, [1954] 1 Lloyd's Rep 321 at 327.

7 As to the meaning of 'carrier' see PARA 372 note 3.

8 Hague-Visby Rules art X. See also PARA 373 notes 8, 9.

9 See the Hague-Visby Rules art V; and PARA 396. The parties may nevertheless incorporate the Rules into a charterparty: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL; and PARA 370.

10 See the Carriage of Goods by Sea Act 1971 s 1(6)(a); and PARA 367.

11 See the Carriage of Goods by Sea Act 1971 s 1(6)(b); and PARA 367.

12 See the Carriage of Goods by Sea Act 1971 s 1(6); and PARA 367.

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### **375. Operations to which the Rules apply.**

The expression 'carriage of goods' covers the period from the time when the goods<sup>1</sup> are loaded on<sup>2</sup> to the time when they are discharged from the ship<sup>3</sup>. The words 'when the goods are loaded on' do not refer to a precise moment of time but merely define the first in the series of operations which constitute the carriage of the goods by sea and the words 'when they are discharged' denote the last in that series of operations<sup>4</sup>. 'Carriage' will also usually cover operations such as stowage<sup>5</sup> and lashing carried out after the goods have been loaded but before the ship sets sail<sup>6</sup> and may cover a period of transshipment<sup>7</sup>. Where goods are transferred from a ship to lighters, the discharge is complete when the goods have been so transferred and the carriage by sea is then ended<sup>8</sup>.

Nothing contained in the Rules<sup>9</sup> prevents a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea<sup>10</sup>.

1 As to the meaning of 'goods' see PARA 372 note 2.

2 *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, [1954] 2 All ER 158, [1954] 1 Lloyd's Rep 321. The French text reads 'le chargement des marchandises à bord du navire'. 'Loaded on board' would be a more exact translation and 'loaded in' a more idiomatic one. As to the right to have recourse to the French text of the Hague-Visby Rules see PARA 206. As to the Rules generally see PARAS 206, 367 et seq.

3 Hague-Visby Rules art I(e). As to the meaning of 'ship' see PARA 374 note 6. See also *Rambler Cycle Co Ltd v Peninsular and Oriental Steam Navigation Co, Sze Hai Tong Bank Ltd (first third party), Southern Trading Co (second third party)* [1968] 1 Lloyd's Rep 42 (Malaysia Fed Ct); *East and West Steamship Co v Hossain Bros* [1968] 2 Lloyd's Rep 145 (Pakistan SC); *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd* [1973] 2 Lloyd's Rep 469, Can SC.

4 See *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 416, [1954] 2 All ER 158 at 162, [1954] 1 Lloyd's Rep 321 at 328 ('the function of [the Hague Rules] art I(e) is, I think, only to assist in the definition of contract of carriage ... It is natural to divide such a contract into periods ...'), following *Goodwin, Ferreira & Co Ltd v Lamport and Holt Ltd* (1929) 34 Ll L Rep 192, 18 Asp MLC 38.

5 See *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57.

6 See *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd, The Fantasy* [1992] 1 Lloyd's Rep 235, CA (cargo loaded in containers for carriage on deck; charterers liable for bad stowage of the deck cargo prior to the voyage). As to deck cargo see PARAS 455, 467.

7 As to transhipment see *Mayhew Food Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317; and PARA 373.

8 See *The Arawa* [1977] 2 Lloyd's Rep 416 at 425 obiter per Brandon J ('while there is no direct English authority on the matter ... I am of the opinion that ... discharge was completed, so that the sea carriage ended, when the goods were transferred from the ship to the lighters ... This view seems to me to accord with the ordinary and natural meaning of the words 'when they are discharged from the ship' ... The other view, that the lighterage was all part of the operation of discharge, so that the sea carriage did not end until the goods had been carried in the lighters to the wharf and landed there, would involve giving an unnaturally extended meaning to the words referred to, and I do not see any good reason for doing so'); on appeal [1980] 2 Lloyd's Rep 135, CA. See also *Seven Seas Transportation Ltd v Pacifico Union Marina Corp'n, The Oceanic Amity* [1984] 2 All ER 140, [1984] 1 Lloyd's Rep 588, CA.

9 The actual words of the Hague-Visby Rules are 'Nothing herein contained', a phrase which does not appear to be an adequate reproduction of the French text, viz 'Aucune disposition de la présente convention'.

10 Hague-Visby Rules art VII; and see *Robert Simpson Montreal Ltd v Canadian Overseas Shipping Ltd, The Prins Willem III* [1973] 2 Lloyd's Rep 124 (Que Cour du Banc de la Reine) (cargo pilfered after it had been discharged into a shed by the stevedores; carrier's liability held to have been effectively excluded). Wright J appears to have taken the view that 'discharge' in the Hague-Visby Rules art II means discharge from the ship's tackle: see *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432 at 434, 17 Asp MLC 385 at 386; *Lindsay Blee Depots Ltd v Motor Union Insurance Co Ltd* (1930) 37 Ll L Rep 220 (not decided under the Carriage of Goods by Sea Act 1924 (repealed)), but this view was by implication rejected by Devlin J in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, [1954] 2 All ER 158, [1954] 1 Lloyd's Rep 321 (carrier held responsible for damage to goods dropped from the ship's tackle before crossing the ship's rail). See also *Trafigura Beheer BV v Mediterranean Shipping Co SA, The MSC Amsterdam* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622 at 630-632 per Longmore LJ.

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### *(b) Duties Regarding the Ship and the Voyage*

#### **376. Responsibilities as to seaworthiness.**

There is not to be implied in any contract for the carriage of goods<sup>1</sup> by sea to which the Hague-Visby Rules<sup>2</sup> apply<sup>3</sup> any absolute undertaking by the carrier<sup>4</sup> of the goods to provide a seaworthy ship<sup>5</sup>.

Before and at the beginning of the voyage<sup>6</sup>, the carrier is bound to exercise due diligence<sup>7</sup> to make the ship seaworthy<sup>8</sup>. The words 'before and at the beginning of the voyage' mean the

period from at least the beginning of the loading until the ship starts on her voyage<sup>9</sup>, that is to say the obligation extends over the whole period and is not broken up, as is the common law obligation, by any doctrine of stages.

'Voyage' means the contractual voyage from the port of loading to the port of discharge<sup>10</sup>. Where the voyage is divided into stages regarding, for example, bunkering, the carrier's obligation is to exercise due diligence before and at the beginning of the voyage to have the vessel adequately bunkered for the first stage and to arrange for adequate bunkers of the proper kind at intermediate ports so that the contractual voyage may be performed<sup>11</sup>.

The obligation to exercise due diligence 'to make the ship seaworthy'<sup>12</sup> replaces the absolute obligation at common law to provide a seaworthy ship<sup>13</sup>. The shipowner's obligation is limited to due diligence in his capacity as carrier and to such duties as appertain to a prudent and careful carrier acting as such by the servants, agents and independent contractors in his employment; but within this limitation the carrier's obligation is to see, if not with his own eyes, at any rate by the eyes of proper competent servants, agents or independent contractors for whose diligence he makes himself responsible, that the ship really is seaworthy; and, if any one of those servants, agents or independent contractors is negligent, he will be liable<sup>14</sup>.

The carrier is not, in general, responsible for acts or omissions before the ship comes into his possession or control but, if he builds a ship, he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions, such as requiring the builder to satisfy Lloyd's Register or some other reputable classification society, or by himself engaging skilled naval architects and inspectors<sup>15</sup>. Similarly, if he buys a ship, he may be required to show that he has taken suitable steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service to which he puts her<sup>16</sup>. He is not liable for damage due to bad work by the shipbuilders' workmen which could not have been detected by competent inspectors, whether employed by him or by the builders, or for damage due to defective design which was in accordance with the then current standards of knowledge<sup>17</sup>.

1 As to the meaning of 'carriage of goods' see PARA 375; and as to the meaning of 'goods' see PARA 372 note 2.

2 As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

3 I.e. by virtue of the Carriage of Goods by Sea Act 1971. These words make it clear that, where the Rules are incorporated by contract, eg into a charterparty, rather than by statute, the contract may import an absolute obligation of seaworthiness. As to the implied undertaking of seaworthiness at common law see PARAS 418, 464 et seq.

4 As to the meaning of 'carrier' see PARA 372 note 3.

5 Carriage of Goods by Sea Act 1971 s 3. As to the meaning of 'ship' see PARA 374 note 6.

6 This phrase does not impose the duty, which exists at common law under the doctrine of stages, of making the ship seaworthy at any later stage of the voyage: see PARA 469. It is not clear whether the Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules have superseded the common law except where that is the necessary implication; but, in connection with the undertaking of seaworthiness, the absolute warranty of seaworthiness is not to be implied in contracts to which the Rules apply by virtue of the Act: see above. Cf *May v Hamburg-Amerikanische Packetfahrt A/G, The Isis* (1934) 48 Ll L Rep 35 at 37 (decided under the Harter Act 1893: see PARA 280 note 6). The words 'before and at the beginning of the voyage' may seem to refer to matters arising at the port of loading, but, if the shipowner has failed to exercise due diligence at an earlier stage (eg during repairs to the ship), as a result of which failure the ship is unseaworthy at the port of loading, the failure to exercise due diligence is one for which the shipowner is responsible: see *W Angliss & Co (Australia) Pty Ltd v Peninsular and Oriental Steam Navigation Co* [1927] 2 KB 456 at 462, 463, 28 Ll L Rep 202 at 214 per Wright J. See also *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807, [1961] 1 All ER 495, [1961] 1 Lloyd's Rep 57, HL; *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd, The Fantasy* [1992] 1 Lloyd's Rep 235, CA; *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc, The Kriti Rex* [1996] 2 Lloyd's Rep 171 (especially at 187-190).

7 Whether due diligence has been exercised is a matter of fact in each case: see eg *Northumbrian Shipping Co Ltd v E Timm & Son Ltd* [1939] AC 397, [1939] 2 All ER 648, 19 Asp MLC 290, HL (failure to provide sufficient

bunker fuel); *The Assunzione* [1956] 2 Lloyd's Rep 468 (failure in the ship's steering gear); *Goulondris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74, [1957] 3 All ER 100, [1957] 2 Lloyd's Rep 207 (blowing out of a boiler tube); *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1959] 1 QB 74, [1958] 3 All ER 261, [1958] 2 Lloyd's Rep 255 (fault in vessel's design); *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589, [1959] 2 All ER 740, [1959] 2 Lloyd's Rep 105, PC (thawing out frozen scupper pipes by the use of an acetylene torch); *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807, [1961] 1 All ER 495, [1961] 1 Lloyd's Rep 57, HL (failure to see that valve was properly tightened); *Union of India v Reederij Amsterdam NV* [1963] 2 Lloyd's Rep 223, HL (failure in a vessel's reduction gear); *Sears Roebuck & Co v American President Lines Ltd, The President Monroe* [1972] 1 Lloyd's Rep 385 (ND Cal) (failure to notice that the coamings of a deep tank hatch were defective); *International Produce Inc and Greenwich Mills Co v SS Frances Salman, Swedish Gulf Line A/B and Companhia de Navegacao Maritima Netumar, The Frances Salman* [1975] 2 Lloyd's Rep 355 (SDNY) (failure to see that a vessel's sanitary water system was in order); *Houlden & Co Ltd v SS Red Jacket and American Export Lines Ltd, The Red Jacket* [1978] 1 Lloyd's Rep 300 (SDNY) (permitting a faulty container, which was part of a ship's equipment and liable to break loose, to remain on board); *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336 (failure to examine the shell plating of a vessel); *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc, The Kriti Rex* [1996] 2 Lloyd's Rep 171 (failure in main engine).

8 Hague-Visby Rules art III r 1(a). 'The word 'unseaworthiness' [in art III r 1(a)] is clearly used so as to embrace all aspects of unseaworthiness': *Ben Line Steamers Ltd v Pacific Steam Navigation Co, The Benlawers* [1989] 2 Lloyd's Rep 51 at 60 per Hobhouse J. The undertaking of seaworthiness at common law includes under cargoworthiness an undertaking that the vessel should be reasonably fit to receive and carry the cargo and deliver it at the specified destination; if the vessel's condition is such that she is not reasonably fit for those tasks, the undertaking is broken: *Empresa Cubana Importada de Alimentos 'Alimport' v lasmos Shipping Co SA, The Good Friend* [1984] 2 Lloyd's Rep 586 (where the condition of the vessel constituted a major and permanent obstacle to completion of the contract voyage and the ship was held to be unseaworthy).

9 *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589, [1959] 2 All ER 740, [1959] 2 Lloyd's Rep 105, PC; *Western Canada Steamship Co Ltd v Canadian Commercial Corp* [1960] 2 Lloyd's Rep 313, Can SC.

10 *The Makedonia, Owners of Cargo Laden on Makedonia v Makedonia (Owners)* [1962] P 190, [1962] 2 All ER 614, [1962] 1 Lloyd's Rep 316.

11 See note 10.

12 The distinction between the words 'to make the ship seaworthy' and the obligation expressed as 'to provide a seaworthy ship' was emphasised in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807 at 841, [1961] 1 All ER 495 at 503, [1961] 1 Lloyd's Rep 57 at 70, HL.

13 See PARAS 418, 464 et seq. This limitation of the implied undertaking of seaworthiness is more apparent than real, however, because the statutory obligation involves that not merely the shipowner personally but all his servants and agents must exercise due diligence. In most cases, if the vessel is unseaworthy, due diligence cannot have been used by the owner, his servants or agents; if due diligence has been used the vessel in fact will be seaworthy: see *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] 2 All ER 855 at 857, 64 Ll L Rep 87 at 89, CA, per Mackinnon LJ; affd [1940] AC 997, [1940] 3 All ER 405, HL. See also *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807 at 839, [1961] 1 All ER 495 at 502, [1961] 1 Lloyd's Rep 57 at 69, HL, per Viscount Simmonds, at 852, at 510 and at 76 per Lord Merriman, at 866, at 519 and at 84 per Lord Radcliffe, at 873, at 524 and at 88 per Lord Hodson, approving this statement; and see, to the same effect, *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538 at 547, PC.

14 *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807, [1961] 1 All ER 495, [1961] 1 Lloyd's Rep 57, HL, applying *GE Dobell & Co v Steamship Rossmore Co Ltd* [1895] 2 QB 408, 8 Asp MLC 33, CA.

15 *W Angliss & Co (Australia) Pty Ltd v Peninsular and Oriental Steam Navigation Co* [1927] 2 KB 456 at 462, 17 Asp MLC 311 at 318, explained in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807 at 841, 859, 867, 870, 877, [1961] 1 All ER 495 at 503, 515, 520, 522, 527, [1961] 1 Lloyd's Rep 57 at 70, 80, 84, 86, 90, HL. See also *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105 at 130; *Minister of Materials v Wold Steamship Co Ltd* [1952] 1 Lloyd's Rep 485 at 502.

16 See note 15.

17 *W Angliss & Co (Australia) Pty Ltd v Peninsular and Oriental Steam Navigation Co* [1927] 2 KB 456, 17 Asp MLC 311.

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### **377. Responsibilities as to manning, equipping and supplying ship.**

Before and at the beginning of the voyage<sup>1</sup>, the carrier<sup>2</sup> is bound to exercise due diligence<sup>3</sup> properly to man, equip and supply the ship<sup>4</sup> and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods<sup>5</sup> are carried, fit and safe for their reception, carriage and preservation<sup>6</sup>.

1 As to this expression see PARA 376 note 6.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 Whether due diligence has been exercised is a matter of fact in each case: see eg *The Makedonia, Owners of Cargo Laden on Makedonia v Makedonia (Owners)* [1962] P 190, [1962] 2 All ER 614, [1962] 1 Lloyd's Rep 316 (failure to instruct engineers in the operation of an oil fuel system); *President of India v West Coast Steamship Co, The Portland Trader* [1964] 2 Lloyd's Rep 443, US Ct App (failure to equip a tramp vessel with radar and loran); *Robin Hood Flour Mills Ltd v NM Paterson & Sons Ltd, The Farrandoc* [1967] 2 Lloyd's Rep 276, Can Ex Ct (engagement of an incompetent engineer and failure to provide a plan of the piping in a vessel's engine room); *Fisons Fertilizers Ltd and Fisons Ltd v Thomas Watson (Shipping) Ltd* [1971] 1 Lloyd's Rep 141 (Mayor's and City of London Ct) (failure to check a valve in the forward hold suction line causing a hold to be unsafe for the carriage of the cargo); *American Smelting and Refining Co v SS Irish Spruce and Irish Shipping Ltd, The Irish Spruce* [1976] 1 Lloyd's Rep 63 (SDNY) (failure to equip a tramp vessel with radar and loran and to have on board the latest Admiralty List of Radio Signals); cf *Associated Bulk Carriers Ltd v Shell International Petroleum Co Ltd, The Nordic Navigator* [1984] 2 Lloyd's Rep 182 (term in the charterparty that the master was bound to keep the tanks, pipes and pumps of the vessel always clean for the specified cargo did not contain the words 'exercise due diligence'; obligation held to be absolute). See also *Eridania SpA v Rudolf A Oetker, The Fjord Wind* [2000] 2 Lloyd's Rep 191; and *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd, The Eurasian Dream* [2002] EWHC 118 (Comm), [2002] 1 Lloyd's Rep 719.

4 Hague-Visby Rules art III r 1(b). As to the Hague-Visby Rules generally see PARAS 206, 367 et seq. As to the meaning of 'ship' see PARA 374 note 6.

5 As to the meaning of 'goods' see PARA 372 note 2.

6 Hague-Visby Rules art III r 1(c). It is submitted that the obligation under art III r 1(c) does not arise until the ship arrives at the port of loading: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 156, [1958] 1 All ER 725 at 733, [1958] 1 Lloyd's Rep 73 at 82, HL, per Viscount Simonds (decided under the United States Carriage of Goods by Sea Act 1936).

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### **378. Excusable deviations.**

The deviations from the proper course of the voyage permitted at common law<sup>1</sup> are extended by the Hague-Visby Rules<sup>2</sup> to deviations which occur in saving or attempting to save life or property at sea<sup>3</sup>. Moreover, any other reasonable deviations are permitted so that deviations to save or attempt to save life or property, or other reasonable deviations, will not be regarded as infringements either of the Rules or of the contract of carriage<sup>4</sup>. This particular provision gives

rise to a number of difficult problems of construction to which, as yet, only the following tentative solutions may be offered:

- 97 (1) it seems that the method of ascertaining the proper route for the voyage is the same as at common law and that a liberty to deviate contained in bills of lading governed by the Carriage of Goods by Sea Act 1971 will be construed according to the ordinary principles; the question whether deviations not otherwise permitted can be validly permitted by the contract of affreightment has been raised but not decided<sup>5</sup>;
- 98 (2) it seems that, in providing that permitted deviations are not to be infringements of the contract of carriage, only contracts of carriage governed by the Carriage of Goods by Sea Act 1971 are covered<sup>6</sup>;
- 99 (3) it seems that, on the question whether a particular deviation is to be regarded as reasonable or not, each case must be judged on its merits<sup>7</sup>, but that prima facie a deviation which is contrary to the interests of any party to the contract of affreightment must be regarded as unreasonable<sup>8</sup>;
- 100 (4) it seems that a reasonable deviation can be a deviation planned before the voyage begins or the bills of lading are signed<sup>9</sup>;
- 101 (5) it seems that an act of negligent navigation in the course of carrying out a reasonable deviation will not render the deviation itself unreasonable<sup>10</sup>;
- 102 (6) it seems that the effect of a deviation which is not permitted is to deprive the carrier and the ship of the immunities and protections otherwise conferred by the Rules<sup>11</sup>, as well as of the benefit of any exceptions provided in the contract of affreightment<sup>12</sup>.

1 As to permitted deviation and deviation generally see PARA 248 et seq.

2 le by the Hague-Visby Rules art IV r 4: see PARA 385. As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

3 See the Hague-Visby Rules art IV r 4; and PARA 385.

4 See the Hague-Visby Rules art IV r 4; and PARA 385. As to the meaning of 'contract of carriage' see PARA 372.

5 See *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, [1956] 3 All ER 957, [1956] 2 Lloyd's Rep 379, HL. As to the construction of these clauses see PARA 250. The parties must clearly be free to agree the route for the voyage, and deviation clauses have, in general, been treated under the Hague-Visby Rules as defining the route, and, therefore, have been regarded as valid: see eg *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424, 17 Asp MLC 447; *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 18 Asp MLC 266, HL (where the questions discussed were whether the clauses covered the deviation which had occurred, not whether the clauses were void). It was contended in *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* that what is now the Hague-Visby Rules art IV r 2 (see PARA 388 et seq) must be read subject to the overriding obligation imposed upon the carrier by art III r 2, 'properly to carry' the cargo (see PARA 383), and that it was accordingly a breach of contract to deliver cargo at any port other than that designated by the contract of affreightment, notwithstanding a clause giving permission to do so in certain eventualities which had in fact occurred, but the House of Lords considered that 'properly' as used in art III r 2 meant in accordance with a sound system and had no geographical significance (see *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* at 166, 963 and 388 per Viscount Kilmuir LC); the contention was accordingly rejected. In any case the alternative port for delivery was to be regarded as a substituted method of performance and did not amount to a deviation: *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* at 171, 967, 391 per Lord Morton of Henryton and at 175, 969 and 393 per Lord Somervell of Harrow.

6 This construction might at first sight make the use of the words 'infringement ... of the contract of carriage' tautologous, but it seems impossible to argue that contracts outside the Carriage of Goods by Sea Act 1971 altogether can be affected. The words may have been inserted to prevent a contention that the bill of lading contract as a whole had been avoided: see *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660, 10 Asp MLC 431, CA. See also generally the cases cited in PARA 248 et seq.

7 *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 18 Asp MLC 266, HL; *Accinanto Ltd v A/S J Ludwig Mowinckels, The Ocean Liberty* [1953] 1 Lloyd's Rep 38 (US 4th Cir); *Thiess Bros (Queensland) Pty Ltd v*

*Australian Steamship Pty Ltd* [1955] 1 Lloyd's Rep 459 (NSW SC); *Georgia-Pacific Corp v Marilyn L Elvapores Inc, Evans Products Co and Retla Steamship Co, The Marilyn L* [1972] 1 Lloyd's Rep 418 (ED Va) (where the master had not followed the route suggested by the Pacific Weather Analysis); *Danae Shipping Corp v TPAO and Guven Turkish Insurance Co Ltd, The Daffodil B* [1983] 1 Lloyd's Rep 498 (vessel deviated to Lavrion, instead of proceeding on her voyage to Piraeus, to get a generator repaired; deviation held to be reasonable for Lavrion was just as safe as Piraeus, if not safer, in that, if the vessel had become disabled in a crowded seaway while approaching Piraeus, the danger of collision with other vessels would have been as great, if not greater, than if she had become disabled on entering Lavrion).

8 See *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 18 Asp MLC 266, HL. Unfortunately there was a wide variety of opinion among the judges who decided the case as to the tests for reasonableness to be applied. The vessel in that case, on a voyage from Cardiff to the Mediterranean, put into St Ives, which was off her route, in order to disembark two engineers who had been engaged upon some tests. Having done so, she hugged the coast instead of returning directly to the proper route, and, while doing so, struck a reef and was lost. Both in the House of Lords and in the courts below it was held unanimously that the vessel had deviated unreasonably, but there was a difference of opinion as to whether this occurred when she turned from her course to put into St Ives or only after she had left that port. Moreover, different rationes decidendi were expressed by different judges. While some took the view (eg in the House of Lords, Lord Buckmaster) that the deviation must be in the interests of both the shipowner and the cargo owner in order to be reasonable, others took the view that the fact that it was in the interest of the shipowner only did not make it unreasonable ipso facto (eg Lords Warrington and Atkin). It seems generally to have been accepted that joint interest is an important factor to be taken into account (see especially per Lords Atkin and Macmillan) and this point has subsequently been regarded as dominant in an Australian case: see *Thiess Bros (Queensland) Pty Ltd v Australian Steamship Pty Ltd* [1955] 1 Lloyd's Rep 459 (where a vessel deviated to obtain bunkers for a subsequent voyage); and a similar view had previously been expressed by Wright J in *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424 at 431, 17 Asp MLC 447 at 449. 'The true test seems to be what ... a prudent person controlling the voyage at the time [would decide to do] having in mind all the relevant circumstances existing at the time': *Stag Line Ltd v Foscolo, Mango & Co Ltd* at 343 and at 270 per Lord Atkin.

9 *Lyric Shipping Inc v Intermetals Ltd, The Al Taha* [1990] 2 Lloyd's Rep 117.

10 *Lyric Shipping Inc v Intermetals Ltd, The Al Taha* [1990] 2 Lloyd's Rep 117.

11 le by the Hague-Visby Rules art IV rr 1, 2: see PARAS 385, 388 et seq.

12 Although this has not been expressly held, it was basic to the decision in *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 18 Asp MLC 266, HL (see especially at 340 and at 269), as to the other decisions on deviation given under the Hague-Visby Rules. However, although the view that the carrier loses the benefit of all provisions of the Rules in his favour is consistent with the view that an unlawful deviation prevents the carrier from relying on any exceptions or limitations, the view that he does not lose the benefit of the limitation period of one year provided by art III r 6 (see PARA 401), or of the exclusions in art IV r 2 (see PARA 388 et seq), or of the limitation of the amount recoverable per package under art IV r 5 (see PARA 394), is consistent with the approach that fundamental breaches of contract do not prevent the party in breach from relying on exceptions and limitations, although it is not clear whether this approach is applicable to unlawful deviations: see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, [1980] 1 Lloyd's Rep 545, HL; *Kenya Rlys v Antares Co Pte Ltd, The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424, CA; *State Trading Corp of India Ltd v M Golodetz Ltd (now Transcontinental Affiliates Ltd)* [1989] 2 Lloyd's Rep 277, CA; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1. For an analysis of the law relating to deviation see CP Mills *The future of deviation in the law of the carriage of goods* [1983] LMCLQ 587; C Debattista *Fundamental Breach and Deviation in the Carriage of Goods by Sea* [1989] JBL 22; S Baughen *Does deviation still matter?* [1991] LMCLQ 70. See also PARA 83 note 3.

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### *(c) Duties Regarding the Issue of Documents*

#### **379. Duty to issue a bill of lading.**

After receiving the goods<sup>1</sup> into his charge, the carrier<sup>2</sup>, or the master or agent of the carrier, must, on demand<sup>3</sup> of the shipper, issue to the shipper a bill of lading showing among other things:

- 103 (1) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage<sup>4</sup>;
- 104 (2) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper<sup>5</sup>;
- 105 (3) the apparent order and condition of the goods<sup>6</sup>.

No carrier, master or agent of the carrier is bound, however, to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking<sup>7</sup>.

1 As to the meaning of 'goods' see PARA 372 note 2.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 See also PARAS 317, 325. The requirement that the shipowner is to issue a bill of lading on demand shows that contracts of carriage covered by a bill of lading in the Hague-Visby Rules art I (see PARAS 372, 374) mean contracts of carriage under which the shipper is entitled to a bill of lading: *Harland and Wolff Ltd v Burns and Laird Lines Ltd* 1931 SC 722, 40 Ll L Rep 286, Ct of Sess; and see PARA 372 note 7. This right appears not to be limited to a demand for a 'shipped' bill of lading, but might in appropriate circumstances include a 'received for shipment' bill of lading: *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 420, [1954] 2 All ER 158 at 164, [1954] 1 Lloyd's Rep 321 at 329 per Devlin J. The Hague-Visby Rules art III r 3 applies only if the shipper demands such a bill of lading, so that a bill of lading which does not show the apparent order and condition of the cargo will, in the absence of such demand, be effective: *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at 57, PC.

4 Hague-Visby Rules art III r 3(a). As to the Rules generally see PARAS 206, 367 et seq.

5 Hague-Visby Rules art III r 3(b). The master is not bound to show both the number of packages and the weight; if the number is stated, the words 'weight unknown' may properly be inserted: *Pendle and Rivett Ltd v Ellerman Lines Ltd* (1927) 29 Ll L Rep 133 at 136; *Oricon Waren-Handels GmbH v Intergraan NV* [1967] 2 Lloyd's Rep 82; cf *Noble Resources Ltd v Cavalier Shipping Corp*, *The Atlas* [1996] 1 Lloyd's Rep 642 (where the bills of lading provided 'all particulars (weight, measure, marks, numbers, quantity, contents, value ...) unknown' or, as the case might be, 'weight ... quantity unknown'). See also *Agrosin Private Ltd v Highway Shipping Co Ltd, The Mata K* [1998] 2 Lloyd's Rep 614. As to the effect of a bill of lading see PARA 380.

6 Hague-Visby Rules art III r 3(c). As to whether a master is obliged to sign bills of lading as presented see *Garbis Maritime Corp v Philippine National Oil Co, The Garbis* [1982] 2 Lloyd's Rep 283; *Boukadoura Maritime Corp v SA Marocaine de l'Industrie et du Raffinage, The Boukadoura* [1989] 1 Lloyd's Rep 393. The master's duty under the Hague-Visby Rules art III r 3(c) is to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master, and neither art III r 3(c) nor the common law require the provision of a contractual guarantee of absolute accuracy as to the order and condition of the cargo or of its apparent order and condition: *The David Agmashenebeli (cargo owners) v The David Agmashenebeli (owners), The David Agmashenebeli* [2002] EWHC 104 (Comm), [2002] 2 All ER (Comm) 806, [2003] 1 Lloyd's Rep 92.

A mate's receipt is merely an acknowledgment that the ship has taken delivery of the cargo; it is a simple receipt, not a negotiable instrument and, if the master or mate signs it without qualification, it is prima facie evidence of receipt in good order and condition: *Naviara Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA. As to mates' receipts see PARA 324.

7 Hague-Visby Rules art III r 3 proviso.

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### 380. Effect of bill of lading.

A bill of lading duly issued<sup>1</sup> is prima facie evidence of the receipt by the carrier<sup>2</sup> of the goods<sup>3</sup> as described<sup>4</sup> in it<sup>5</sup>. Proof to the contrary is, however, not admissible when the bill of lading has been transferred to a third person acting in good faith<sup>6</sup>.

If the number of packages or pieces is stated in the bill of lading but the words 'weight unknown' is inserted, the bill of lading is prima facie evidence of the number but not of the weight<sup>7</sup>; and, if neither the number of packages or pieces nor the weight is inserted, or if both are inserted but both are qualified, the bill of lading is prima facie evidence neither of the number nor of the weight<sup>8</sup>. Nor may any such estoppel be founded on a bill of lading in which the statement of the order and condition of the goods is in qualified terms<sup>9</sup>.

1 He issued in accordance with the Hague-Visby Rules art III r 3: see PARA 379. As to the Rules generally see PARAS 206, 367 et seq.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 As to the meaning of 'goods' see PARA 372 note 2.

4 He as described in accordance with the Hague-Visby Rules art III r 3(a), (b) and (c): see PARA 379.

5 Hague-Visby Rules art III r 4. The same would appear to follow where a cargo claim is governed by English law but not by the Rules: see the Carriage of Goods by Sea Act 1924 s 4; and PARA 317.

6 See note 5.

7 *Pendle and Rivett Ltd v Ellerman Lines Ltd* (1927) 29 Ll L Rep 133; *Oricon Waren-Handels GmbH v Intergraan NV* [1967] 2 Lloyd's Rep 82.

8 *Noble Resources Ltd v Cavalier Shipping Corpn, The Atlas* [1996] 1 Lloyd's Rep 642, where Longmore J said at 646 that 'if the bills provide 'weight . . . number . . . quantity unknown' . . . they 'show' nothing at all because the shipowner is not prepared to say what the number or weight is. He can, of course, be required to show it under the Hague-Visby Rules art III r 3 (see PARA 379) but, unless and until he does so, the provisions of art III r 4 as to prima facie evidence cannot come into effect'. See however *Conoco (UK) Ltd v Limni Maritime Co Ltd, The Sirina* [1988] 2 Lloyd's Rep 613, where Phillips J at 615 said that 'where the discrepancy between cargo actually loaded and cargo alleged to have been loaded is so great that it . . . give[s] rise to the implication that the quantity loaded was not wildly at odds with the bill of lading quantity'. See also *Rederiaktiebolaget Gustav Erikson v Ismail, The Herroe and The Askoe* [1986] 2 Lloyd's Rep 281, where Hobhouse J held, at 283, that an additional signature and stamp placed by the master against the figures in the description box superseded the 'weight and quantity' clause.

9 *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at 57, PC.

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### 381. Liability of shipper.

The shipper<sup>1</sup> is deemed to have guaranteed to the carrier<sup>2</sup> the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him; and the shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars<sup>3</sup>. The carrier's right to such indemnity does not in any way limit his responsibility and liability under the contract of carriage<sup>4</sup> to any person other than the shipper<sup>5</sup>.

1 Where a person in whom rights are vested by virtue of the Carriage of Goods by Sea Act 1924 s 2(1) (see PARAS 338, 364, 365) takes or demands delivery from the carrier of any goods, makes a claim against the carrier in respect of any of those goods or is a person who took or demanded delivery from the carrier of any of those goods, he becomes subject to the same liabilities under the contract as if he had been a party to that contract: see s 3(1); and PARAS 342, 364, 365. It appears, however, that any such person would not be held liable to the shipowner under the Hague-Visby Rules art III r 5 (see the text and notes 2-5) and that liability under the implied guarantee would be limited to the shipper only: see *Aegean Sea Traders Corp v Repsol Petroleo SA, The Aegean Sea* [1998] 2 Lloyd's Rep 39 at 69-70, per Thomas J; and PARA 342. As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 Hague-Visby Rules art III r 5.

4 As to the meaning of 'contract of carriage' see PARA 372.

5 Hague-Visby Rules art III r 5.

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### **382. Issue of a 'shipped' bill of lading.**

After the goods<sup>1</sup> are loaded, the bill of lading to be issued by the carrier<sup>2</sup>, master or agent of the carrier to the shipper<sup>3</sup> must, if the shipper so demands, be a 'shipped' bill of lading<sup>4</sup>. If, however, the shipper has previously taken up any document of title to such goods, he must surrender the same as against the issue of the 'shipped' bill of lading, but, at the option of the carrier, such document of title may be noted at the port of shipment by the carrier, master or agent with the name or names of the ship<sup>5</sup> or ships upon which the goods have been shipped and the date or dates of shipment and, when so noted, if it shows the specified particulars<sup>6</sup>, it is deemed to constitute a 'shipped' bill of lading<sup>7</sup>.

1 As to the meaning of 'goods' see PARA 372 note 2.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 As to the duty to issue a bill of lading see PARA 379.

4 Hague-Visby Rules art III r 7. As to the Rules generally see PARAS 206, 367 et seq.

5 As to the meaning of 'ship' see PARA 374 note 6.

6 I.e. the particulars mentioned in the Hague-Visby Rules art III r 3: see PARA 379.

7 Hague-Visby Rules art III r 7. Article III r 7 is apparently intended to enable a shipper who has taken a 'received for shipment' bill of lading or similar document to insist on a 'shipped' bill of lading being substituted for it: cf PARA 372 note 8.

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*(d) Duties Regarding the Cargo*

**383. Care of cargo.**

Subject to the provisions conferring protection on the carrier<sup>1</sup> in certain circumstances<sup>2</sup>, he must<sup>3</sup> properly and carefully load, handle, stow<sup>4</sup>, carry, keep, care for and discharge the goods<sup>5</sup> carried<sup>6</sup>. 'Properly', in this connection, is not simply synonymous with 'carefully', but means in accordance with a sound system<sup>7</sup>. The obligation to load the cargo properly and carefully applies to deck cargo unless it is being carried outside the terms of the Carriage of Goods by Sea Act 1971 altogether<sup>8</sup>. The obligation to care for the goods in the course of the voyage, expressed in the words 'handle, stow, carry, keep, care for' appears to be the same as at common law<sup>9</sup>. The words 'properly discharge' have no geographical significance; thus they do not import an obligation to carry the cargo to the port of discharge<sup>10</sup>, but mean 'delivery from the ship's tackle in the same apparent order and condition as on shipment'<sup>11</sup>. Whether the carrier is in breach of his obligation is a question of fact in each case<sup>12</sup>.

1 As to the meaning of 'carrier' see PARA 372 note 3.

2 If subject to the Hague-Visby Rules art IV: see PARA 385. As to the Rules generally see PARAS 206, 367 et seq.

3 The Hague-Visby Rules art III r 2 does not actually impose an obligation but rather lists the operations to which the Rules will apply: see *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 418, [1954] 2 All ER 158 at 163, [1954] 1 Lloyd's Rep 321 at 329 per Devlin J ('I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide'), approved in *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 at 170, 173, 174, [1956] 3 All ER 957 at 966, 968, [1956] 2 Lloyd's Rep 379 at 390, 391, 393, HL; *Balli Trading Ltd v Afalona Shipping Co Ltd, The Coral* [1993] 1 Lloyd's Rep 1, CA (where it was agreed that loading and stowing should be carried out by the charterer, and the charterer thereby warranted that he would use reasonable care and skill in performing his obligation, any responsibility for bad stowage falling, therefore, on him; but it did not inevitably follow that, where the clause was incorporated in a bill of lading and the owner agreed with the shipper that the charterer would load, stow and trim the cargo at the latter's expense, that the shipper's only right of recourse in the event of bad stowage would be against the charterer).

4 See *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57; and PARAS 456, 467.

5 As to the meaning of 'goods' see PARA 372 note 2.

6 Hague-Visby Rules art III r 2; and see *Balli Trading Ltd v Afalona Shipping Co Ltd, The Coral* [1993] 1 Lloyd's Rep 1, CA.

7 *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 at 166, [1956] 3 All ER 957 at 963, [1956] 2 Lloyd's Rep 379 at 388, HL, per Viscount Kilmuir LC. See also *Gatoil International Inc v Tradax Petroleum Ltd, Gatoil International Inc v Panatlantic Carriers Corp, The Rio Sun* [1985] 1 Lloyd's Rep 350 (owner did not act carelessly or inconsistently with standard practice in failing to heat cargo at the beginning of the voyage, it not being general practice to heat crude oil cargoes); *Caltex Refining Co Pty Ltd v BHP Transport Ltd, The Iron Gipsland* (1993) 34 NSWLR 29 (failure to adopt a sound system for the carriage of goods in the light of knowledge which the carrier has or ought to have about the nature of the goods amounts to a failure to comply with the Hague-Visby Rules art III r 2), following *Albacora SRL v Westcott and Laurance Line Ltd* [1966] 2 Lloyd's Rep 53, HL; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd, The Bunga Seroja* [1994] 1 Lloyd's Rep 455 (NSW SC) (vessel experienced heavy weather when crossing the Great

Australian Bight; consignment of coils stowed below deck damaged; shipowners not liable; no evidence of failure to establish a sound system for loading the vessel). Cf PARA 378 note 5.

8 *Svenska Traktor Akt v Maritime Agencies (Southampton) Ltd* [1953] 2 QB 295, [1953] 2 All ER 570, [1953] 2 Lloyd's Rep 124. As to deck cargo see also PARA 372 note 2.

9 *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218 at 235 per McNair J.

10 *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 at 166, [1956] 3 All ER 957 at 963, [1956] 2 Lloyd's Rep 379 at 388, HL.

11 *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432 at 434, 17 Asp MLC 385 at 386 per Wright J. As to discharge into lighters see PARA 375. Admission or proof that the cargo was shipped in good order and condition and has been delivered from the ship's tackle damaged is prima facie evidence of a breach of contract by the shipowner and the onus is then on him to show that the damage was due to one of the causes specified in the Hague-Visby Rules art IV: see especially PARA 385 note 6. If, or to the extent that, the cause of damage is unexplained, the shipowner will be liable: see *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* at 434, 437 and at 386, 387 per Wright J; and see in that case on appeal sub nom *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223 at 234, 32 Ll L Rep 91 at 95, HL, per Lord Sumner; and *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416 at 424, sub nom *Silver and Layton v Ocean Steamship Co* 35 Ll L Rep 49 at 51, CA, per Scrutton LJ. Apparently, any usual manner and place of discharge is authorised by the Hague-Visby Rules art III: see *Goodwin, Ferreira & Co Ltd v Lamport and Holt Ltd* (1929) 34 Ll L Rep 192 at 193, 194; *Marcelino Gonzalez y Compania S en C v James Nourse Ltd* [1936] 1 KB 565, 18 Asp MLC 590.

12 See eg *Blackwood Hodge (India) Pte Ltd v Ellerman Lines Ltd and Ellerman and Bucknall Steamship Co Ltd* [1963] 1 Lloyd's Rep 454 (electric shovel); *Albacora SRL v Westcott and Laurance Line Ltd* [1966] 2 Lloyd's Rep 53, HL (cargo of wet salted fish); *Jahn (t/a CF Otto Weber) v Turnbull Scott Shipping Co Ltd and Nigerian National Line Ltd, The Flowergate* [1967] 1 Lloyd's Rep 1 (cocoa); *Chris Foodstuffs (1963) Ltd v Nigerian National Shipping Line Ltd* [1967] 1 Lloyd's Rep 293, CA (coco yams); *David McNair & Co Ltd and David Oppenheimer Ltd and Associates v The Santa Malta* [1967] 2 Lloyd's Rep 391, Can Ex Ct (melons, garlic and onions); *Crelinsten Fruit Co v The Mormacsaga, The Mormacsaga* [1969] 1 Lloyd's Rep 515, Can Ex Ct (oranges); *Heinrich C Horn v Cia de Navegacion Fruco SA and JR Atkins (trading as Alabama Fruit and Produce Co), The Heinz Horn* [1970] 1 Lloyd's Rep 191 (US 5th Cir) (bananas); *Charles Goodfellow Lumber Sales Ltd v Verreault, Hovington and Verreault Navigation Inc* [1971] 1 Lloyd's Rep 185, Can SC (lumber); *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd* [1973] 2 Lloyd's Rep 469, Can SC (cargo on barge); *Bruck Mills Ltd v Black Sea Steamship Co, The Grumant* [1973] 2 Lloyd's Rep 531, Can Fed Ct (apple concentrate); *William D Branson Ltd and Tomas Alcazar SA v Jadranska Slobodna Plovidba (Adriatic Tramp Shipping), The Split* [1973] 2 Lloyd's Rep 535, Can Fed Ct (melons); *Crelinsten Fruit Co and William D Branson Ltd v Maritime Fruit Carriers Co Ltd, The Lemoncore* [1975] 2 Lloyd's Rep 249 (Fed Ct) (apples and pears); *Nissan Automobile Co (Canada) Ltd v Owners of the Vessel Continental Shipper, The Continental Shipper* [1976] 2 Lloyd's Rep 234, Fed CA (cars); *The Washington* [1976] 2 Lloyd's Rep 453, Can Fed Ct (plate glass); *The Lucky Wave* [1985] 1 Lloyd's Rep 80 (galvanised steel wire); *Gatoil International Inc v Tradax Petroleum Ltd, Gatoil International Inc v Panatlantic Carriers Corp, The Rio Sun* [1985] 1 Lloyd's Rep 350 (crude oil); *The Saudi Prince (No 2)* [1988] 1 Lloyd's Rep 1, CA (ceramic tiles).

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### **384. Inflammable, explosive or dangerous goods.**

Goods<sup>1</sup> of an inflammable, explosive or dangerous nature<sup>2</sup> to the shipment of which the carrier<sup>3</sup>, master or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation; and the shipper of such goods is liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment<sup>4</sup>.

If any such goods, shipped with such knowledge and consent, become a danger to the ship<sup>5</sup> or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier<sup>6</sup> except to general average, if any<sup>7</sup>.

1 As to the meaning of 'goods' see PARA 372 note 2.

2 The words 'goods of . . . [a] dangerous nature' are to be given a broad interpretation and are not restricted to goods which are liable to cause direct physical damage, but include goods which are liable to cause indirect physical damage to other cargo by causing its loss by dumping at sea: *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, [1998] 1 All ER 495, HL. See also *The Athanasia Comminos and Georges Chr Lemos* (1979) [1990] 1 Lloyd's Rep 277 (dangerous cargo of coal producing methane gas). As to what is meant by 'dangerous cargo' at common law see PARA 260.

3 As to the meaning of 'carrier' see PARA 372 note 3.

4 Hague-Visby Rules art IV r 6. As to the Rules generally see PARAS 206, 367 et seq. The exceptions in art IV r 6 are subject to the overriding obligation in art III r 1 (see PARAS 376-377); and, if the shipowners are in breach of their obligations thereunder to exercise due diligence to make the ship seaworthy, they are not entitled to invoke the indemnity under art IV r 6: *Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1994] 2 Lloyd's Rep 506, CA.

5 As to the meaning of 'ship' see PARA 374 note 6.

6 Where the dangerous goods are shipped with consent, the Hague-Visby Rules art IV r 6 is silent as to the shipper's responsibility for any damages resulting. In *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 KB 240, [1950] 1 All ER 768, 83 Ll L Rep 385 (revsd [1951] 1 KB 255, [1950] 2 All ER 618, 84 Ll L Rep 347, CA), where turpentine was shipped with the knowledge of the master who did not waive any of the rights of his owner in respect of it, and the dangerous character of this cargo led to additional time being taken on the discharge, it was held that the shipper was liable to pay for this notwithstanding the absence of words in the provision making him responsible.

7 Hague-Visby Rules art IV r 6.

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### *(e) Exclusions and Limitations of Liability*

#### **385. Rights and immunities.**

The parties to a contract of carriage<sup>1</sup> have the following rights and immunities<sup>2</sup>:

- 106 (1) neither the carrier<sup>3</sup> nor the ship<sup>4</sup> is liable for loss or damage<sup>5</sup> arising or resulting from unseaworthiness unless caused by want of due diligence<sup>6</sup> on the part of the carrier to make the ship seaworthy<sup>7</sup>, and to secure that the ship is properly manned, equipped and supplied and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods<sup>8</sup> are carried<sup>9</sup> fit and safe for their reception, carriage and preservation<sup>10</sup>;
- 107 (2) neither the carrier nor the ship is responsible for loss or damage arising or resulting from certain specified acts or perils<sup>11</sup>;
- 108 (3) the shipper is not responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants<sup>12</sup>;
- 109 (4) any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, will not be deemed to be an infringement or breach of the

- Hague-Visby Rules or of the contract of carriage and the carrier is not liable for any loss or damage resulting therefrom<sup>13</sup>;
- 110 (5) neither the carrier nor the ship is in any event liable or becomes liable for loss or damage to goods in an amount exceeding 666.67 units of account per package or unit or two units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, or such greater maximum as may be agreed between the parties, unless the nature and value of the goods<sup>14</sup> were declared before shipment and inserted in the bill of lading<sup>15</sup>;
- 111 (6) where goods of an inflammable, explosive or dangerous nature are shipped and the carrier, master or agent of the carrier has not, with knowledge of their nature and character, consented to their shipment, they may be landed at any place, destroyed or rendered innocuous without compensation by the carrier and the shipper is to be liable for all damages and expenses resulting from such shipment<sup>16</sup>.

1 As to the meaning of 'contract of carriage' see PARA 372.

2 le under the Hague-Visby Rules art IV: see the text and notes 3-16 and PARA 386 et seq. As to the Rules generally see PARAS 206, 367 et seq.

3 As to the meaning of 'carrier' see PARA 372 note 3.

4 As to the meaning of 'ship' see PARA 374 note 6.

5 Loss or damage is not limited to physical damage: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 186, [1958] 1 All ER 725 at 752, [1958] 1 Lloyd's Rep 73 at 100, HL; and PARA 387 note 7.

6 Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence is to be on the carrier or other person claiming exemption under the Hague-Visby Rules art IV: art IV r 1. See also *Phillips Petroleum Co v Cabanelli Naviera SA, The Theodegmon* [1990] 1 Lloyd's Rep 52; *The Antigoni* [1991] 1 Lloyd's Rep 209, CA. As to the burden of proving due diligence see PARA 387.

7 As to the conditional exemption from liability for unseaworthiness see further PARA 387.

8 As to the meaning of 'goods' see PARA 372 note 2.

9 le in accordance with the Hague-Visby Rules art III r 1: see PARAS 376, 377.

10 Hague-Visby Rules art IV r 1; and see *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Cia Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210.

11 See the Hague-Visby Rules art IV r 2; and PARA 388 et seq.

12 See the Hague-Visby Rules art IV r 3; and PARA 393.

13 Hague-Visby Rules art IV r 4. As to excusable deviation see PARA 378.

14 If the nature and value are knowingly misstated by the shipper in the bill of lading, neither the carrier nor the ship is responsible for loss or damage in connection with or to the goods: see the Hague-Visby Rules art IV r 5(h); and PARA 394.

15 See the Hague-Visby Rules art IV r 5; and PARA 394.

16 See the Hague-Visby Rules art IV r 6; and PARA 384.

### 386. Protection afforded.

The Hague-Visby Rules<sup>1</sup> grant immunities<sup>2</sup> or protection to the carrier in respect of much of his common law liability and confer on him certain rights, for example to limit his liability<sup>3</sup> and to take steps to prevent damage occurring through the presence of dangerous goods among the cargo<sup>4</sup>. The carrier's right to claim the benefit of these immunities or exceptions is the converse of the duties imposed on him<sup>5</sup> by the Rules. The carrier's duty to exercise due diligence before and at the beginning of the voyage<sup>6</sup> is an overriding obligation, so that, if it is not fulfilled and its non-fulfilment is the cause of the damage, the immunities conferred by the Rules<sup>7</sup> cannot be relied on<sup>8</sup>. A reasonable construction of the Rules accordingly requires, where otherwise a broad interpretation of provisions conferring immunities<sup>9</sup> would go far towards nullifying a provision containing a duty<sup>10</sup>, that a narrower interpretation should be placed on the provisions conferring immunities<sup>11</sup>.

Where cargo is shipped in good order and condition, but is delivered damaged in a manner which could have been prevented, there is sufficient evidence of a breach by the carrier of his obligations under the Rules<sup>12</sup> to shift to him the onus of bringing the cause of damage within one of the exceptions<sup>13</sup> to liability<sup>14</sup>. Independently of the Rules, a cargo owner seeking to make the carrier liable has first to make out a prima facie case of liability sufficient to cast on the carrier the obligation of proving that the damage was caused by some matter falling within an exception<sup>15</sup>. Where the cargo owner wishes to deprive the carrier of the protection apparently afforded to him<sup>16</sup>, it is for the cargo owner to establish affirmatively that the ship was unseaworthy and that the unseaworthiness caused the damage<sup>17</sup>, in which case the burden of proving the exercise of due diligence<sup>18</sup> falls on the carrier claiming exemption<sup>19</sup>.

The defences provided for in the Hague-Visby Rules apply in any action against the carrier<sup>20</sup> in respect of loss or damage to goods<sup>21</sup> covered by a contract of carriage<sup>22</sup>, whether the action is founded in contract or in tort<sup>23</sup>.

1    I.e. the Hague-Visby Rules art IV: see PARA 384 et seq. As to the Rules generally see PARAS 206, 367 et seq.

2    'Immunities' seems to be used in this context in the sense of exceptions from liability of the kind usually found in contracts of affreightment. Most of the exceptions set out in the Hague-Visby Rules art IV, especially those set out in art IV r 2 (see PARA 388 et seq), still appear in bills of lading and are common form in charterparties. Some common contractual exceptions, eg barratry and theft, are, however, not specifically mentioned, although they would appear to be covered by the general exception provided in art IV r 2(q) (see PARA 391).

3    See the Hague-Visby Rules art IV r 5; and PARA 394.

4    See the Hague-Visby Rules art IV r 6; and PARA 384.

5    I.e. under the Hague-Visby Rules art III: see PARA 376 et seq.

6    I.e. his obligation under the Hague-Visby Rules art III r 1: see PARAS 376, 377.

7    I.e. by the Hague-Visby Rules art IV.

8    *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 at 602-603, [1959] 2 All ER 740 at 744, [1959] 2 Lloyd's Rep 105 at 113, PC, per Lord Somervell of Harrow. In the case of latent defects (see the Hague-Visby Rules art IV r 2(p); and PARA 389) which are not discoverable by due diligence, it becomes immaterial, so it seems, to consider whether due diligence (required by art IV r 1: see PARA 385), taken together with art III r 1 (see PARAS 376-377), was exercised or not, because, ex hypothesi, if it had been exercised, it would have been useless: see *Corporacion Argentina de Productores de Carnes v Royal Mail Lines Ltd* (1939) 64 Ll L Rep 188 at 192 per Branson J. The Hague-Visby Rules art IV rr 5, 6 appear, however, to be less closely connected with the obligations imposed by art III: see PARAS 396-397. In regard to the long list of perils and risks covered by the immunities granted to the carrier by art IV r 2, there is no settled policy laid down in art IV as to the observance of due care as a condition of the immunity in question, but in general it would appear that, if the excepted peril which caused the loss was enabled to operate through the carrier's lack

of due diligence, he will forfeit the protection of art IV r 2. Quaere whether unjustified deviation, unauthorised carriage of goods on deck or similar fundamental breach of the contract would now displace the rights and immunities granted by art IV: see PARA 378 note 12.

9 le the provisions of the Hague-Visby Rules art IV.

10 le a provision of the Hague-Visby Rules art III: see PARA 376 et seq.

11 See *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1928] 1 KB 717 at 743, 17 Asp MLC 385 at 395, CA, per Greer LJ (revsd sub nom *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223, 17 Asp MLC 549, HL) cited in *CH Smith & Sons Fellmongery Pty Ltd v Peninsular and Oriental Steam Navigation Co* (1938) 60 Ll L Rep 419 at 432. A negligence or exception clause in a statute (eg the Hague-Visby Rules art IV r 2(a) given the force of law by the Carriage of Goods by Sea Act 1971 (see PARA 367)) ought, as in a contract, to be strictly construed: see *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424 at 439, 17 Asp MLC 447 at 453 per Wright J.

12 le under the Hague-Visby Rules art III r 2: see PARA 383.

13 le the exceptions in the Hague-Visby Rules art IV r 2: see PARA 388 et seq. 'Exception' is the term used in art IV r 2(q) (see PARA 391) but it may conveniently be used more generally: cf *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424 at 437, 17 Asp MLC 447 at 452 per Wright J.

14 See *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223 at 234, 17 Asp MLC 549 at 553, HL, per Viscount Sumner.

15 See *Minister of Food v Reardon Smith Line Ltd* [1951] 2 TLR 1158 at 1162, [1951] 2 Lloyd's Rep 265 at 271 per McNair J (decided under the Australian Sea Carriage of Goods Act 1924).

16 le under the Hague-Visby Rules art IV r 1: see PARA 385.

17 See *Minister of Food v Reardon Smith Line Ltd* [1951] 2 TLR 1158, [1951] 2 Lloyd's Rep 265.

18 le under the Hague-Visby Rules art IV r 1: see PARA 385.

19 See *W Angliss & Co (Australia) Pty Ltd v Peninsular and Oriental Steam Navigation Co* [1927] 2 KB 456, 17 Asp MLC 311; *Charles Goodfellow Lumber Sales Ltd v Verreault, Hovington and Verreault Navigation Inc* [1971] 1 Lloyd's Rep 185, Can SC (where it was held that the production of a certificate of seaworthiness signed by an inspector appointed by the Department of Transport was not sufficient to discharge the burden of proof that due diligence had been exercised by the shipowners). As to the shifting of the burden of proof see *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336 at 339 per Lloyd J.

20 As to the meaning of 'carrier' see PARA 372 note 3.

21 As to the meaning of 'goods' see PARA 372 note 2.

22 As to the meaning of 'contract of carriage' see PARA 372.

23 Hague-Visby Rules art IV bis r 1.

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### **387. Carriers' specific immunities; unseaworthiness.**

The undertaking of seaworthiness implied at common law is not to be implied in contracts to which the Hague-Visby Rules apply by virtue of the Carriage of Goods by Sea Act 1971<sup>1</sup>, the carrier being instead bound at the beginning of the voyage to exercise due diligence to make the ship seaworthy<sup>2</sup>. This qualified exemption from liability also appears in the provision of the Rules<sup>3</sup> under which neither the carrier<sup>4</sup> nor the ship<sup>5</sup> is liable<sup>6</sup> for loss or damage<sup>7</sup> arising or resulting from unseaworthiness<sup>8</sup> unless the unseaworthiness was caused by want of due

diligence on the part of the carrier to make the ship seaworthy, that is to say, unless there was a failure on the carrier's part to observe the dominant obligation placed upon him by the Rules<sup>9</sup>.

The burden of establishing loss or damage from unseaworthiness lies in the first instance on the cargo owner or other person putting forward the claim<sup>10</sup>. Should the carrier or other person claiming exemption then claim the immunity given to him<sup>11</sup>, he must discharge the burden of proving that he and the persons for whom he is responsible<sup>12</sup> exercised due diligence<sup>13</sup>.

1 See the Carriage of Goods by Sea Act 1971 s 3; and PARAS 371, 376. As to the Rules generally see PARAS 206, 367 et seq.

2 See the Hague-Visby Rules art III r 1(a); and PARA 376.

3 See the Hague-Visby Rules art IV r 1; and PARA 385.

4 As to the meaning of 'carrier' see PARA 372 note 3.

5 This extends the immunity to actions in rem against the ship. As to the meaning of 'ship' see PARA 374 note 6. It is perhaps significant that the word 'ship' and not 'shipowner' is used, which makes it very doubtful whether a shipowner could take advantage of the Hague-Visby Rules art IV, where the bill of lading had been issued by a charterer, as in *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, 16 Asp MLC 351, HL. See also *Midland Silicones Ltd v Scruttons Ltd* [1961] 1 QB 106, [1960] 2 All ER 737, [1960] 1 Lloyd's Rep 571, CA. The expression 'neither the carrier nor the ship' is also used in the Hague-Visby Rules art IV rr 2, 5; but in the second paragraph of art IV r 1 (see PARA 385) the expression used is 'carrier or other person' (in the French text 'toute autre personne'), but it would not appear that this can widen the area of the exemption given by art IV r 1. As to the right to have recourse to the French text of the Hague-Visby Rules see PARA 206.

6 In the Hague-Visby Rules art IV 'liable' is sometimes used (as in rr 1, 4 and 5), but sometimes 'responsible' is used instead (as in rr 2 and 3). In the French text the word is always 'responsable', so it would not appear that any difference is intended. Cf art VII (see PARA 375), where both words are used conjointly.

7 The character of the loss or damage is not qualified by the words used in the Hague-Visby Rules art IV r 1, nor is it confined to the cargo. It would appear prima facie, therefore, to protect the carrier and the ship against a claim arising from a breach of the transport obligations of the contract, such as the late arrival of the ship, as well as from a claim for loss of or damage to the cargo. In *Imperial Smelting Corp Ltd v Joseph Constantine Steamship Line Ltd* [1940] 1 KB 812, [1940] 2 All ER 46, Atkinson J, as reported in (1940) 66 Ll L Rep 147 at 165, took a narrower view of the words stating that they only refer to 'damage or injury to goods'. In *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd* [1957] 2 QB 233 at 253-254, [1957] 1 All ER 673 at 680, Devlin J said that this view was obiter, but he also said that it had been approved obiter by Lord Maugham in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 175, [1941] 2 All ER 165 at 179, 70 Ll L Rep 1 at 14, HL, but it must be regarded as doubtful whether Lord Maugham did give his approval. Devlin J himself took a wider view of the meaning of the words, considering that there was no justification for limiting them to damage of a physical kind; he said that the character of the compensation claimed must bear some relation to the goods and must not be too remote. He seems to have thought that it would include loss of market through delay. In *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL, the House of Lords confirmed that the wider view is correct: 'the loss or damage is not limited to physical damage to the goods ... and it must arise in relation to the 'loading, handling, stowage, carriage, custody, care and discharge of such goods': see at 186, 752 and 100 per Lord Somervell of Harrow.

8 As to the meaning of 'unseaworthiness' at common law see PARAS 418-422, 464 et seq. The concept of seaworthiness was too well grounded in English law to be given a different meaning under the Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules and the previously accepted meaning has been acted upon by the courts in the subsequent cases: cf *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223, 17 Asp MLC 549, HL; *Minister of Materials v Wold Steamship Co Ltd* [1952] 1 Lloyd's Rep 485; *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807, [1961] 1 All ER 495, [1961] 1 Lloyd's Rep 57, HL.

9 Want of due diligence appears to be the equivalent of negligence, the effect of which in destroying the protection of exceptions clauses in the contract of affreightment has already been considered: see PARA 280. There is authority for the view that a mere error of judgment does not amount to negligence: see *Madras Electrical Supply Co v Peninsular and Oriental Steam Navigation Co* (1924) 18 Ll L Rep 93 at 97, CA, per Scrutton LJ.

10 Ie by the Hague-Visby Rules art III: see PARA 376 et seq.

11 le by the Hague-Visby Rules art IV.

12 The problem of how far the carrier's responsibility extends, one of the most troublesome under the Hague-Visby Rules, has been considered in a number of cases: see PARA 376 et seq (where the cases are fully discussed).

13 See the Hague-Visby Rules art IV r 1; and PARA 385 note 6. As to the shifting burden of proof in these cases, which appears to operate in the same way as at common law, see *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep 265 at 272 obiter per McNair J. Under the Harter Act 1893 (see PARA 280 note 6) the rule as to the burden of proof was otherwise: see *Moore v Lunn* (1923) 39 TLR 526, 15 Ll L Rep 114, CA.

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### 388. Immunity in respect of navigation or management of ship.

Neither the carrier<sup>1</sup> nor the ship<sup>2</sup> is responsible for loss or damage arising or resulting from any act, neglect or default<sup>3</sup> of the master, mariner, pilot or the servants of the carrier in the navigation<sup>4</sup> or in the management of the ship<sup>5</sup>. The carrier is not given protection in respect of his own personal acts, neglects or defaults, which, in relation to corporations, would include the decisions of those in actual control of the corporation<sup>6</sup>. The management of the ship covers acts and decisions relating to the handling of the ship as a navigational unit and does not extend to those done or taken in relation to the safe custody of the cargo<sup>7</sup>. The burden of proving that the loss or damage complained of was due to one of the causes specified in the Hague-Visby Rules<sup>8</sup> is on the carrier, whichever exception is in question<sup>9</sup>.

1 As to the meaning of 'carrier' see PARA 372 note 3.

2 As to the meaning of 'ship' see PARAS 374 note 6, 387 note 5.

3 The extent of this expression has not yet been judicially decided. The cases so far decided have been concerned with negligence, eg *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223, 32 Ll L Rep 91, HL, but 'acts' might conceivably cover other torts.

4 As to the meaning of 'navigation' see *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2001] 1 AC 638 at 656-659, [2001] 1 All ER 403 at 420-423, [2001] 1 Lloyd's Rep 147 at 159-160, HL, per Lord Hobhouse.

5 Hague-Visby Rules art IV r 2(a). As to the Rules generally see PARAS 206, 367 et seq. Where the Rules are incorporated in a charterparty, the immunities conferred may extend to a wider range of activities than those specified in art II (see PARA 372): *Seven Seas Transportation Ltd v Pacifico Union Marina Corpn, The Satya Kailash and The Oceanic Amity* [1984] 2 All ER 140, [1984] 1 Lloyd's Rep 588, CA (vessel chartered to lighten cargo from mother ship; immunities extended to damage to mother ship), applying *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL, and *Australian Oil Refining Pty Ltd v RW Miller & Co Pty Ltd* [1968] 1 Lloyd's Rep 448, Aust HC.

6 See *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713, 13 Asp MLC 81 at 83, HL; and PARA 274 note 3.

7 The meaning of 'management' in the Hague-Visby Rules art IV r 2(a) has provided one of the main legal controversies under this legislation: see eg *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223, 32 Ll L Rep 91, HL; and PARA 383 (where the Hague (now the Hague-Visby) Rules art III r 2 is discussed). The phrase 'navigation or management of the ship' has a long history in the courts, both in Great Britain and in the United States of America, where it appears in the Harter Act 1893 (see PARA 280 note 6); the relevant cases extend from *The Ferro* [1893] P 38, 7 Asp MLC 309 to *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd*; and see PARA 280 note 17 (where the relevant authorities are cited and discussed). See also *International Packers Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218; *Leval & Co Inc v Colonial Steamships Ltd* [1961] 1 Lloyd's Rep 560, Can SC (decided under the Canadian Water Carriage of Goods Act 1936); *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd, The Chyebassa* [1967] 2 QB

250, [1960] 3 All ER 593, [1966] 2 Lloyd's Rep 193, CA (stevedores stealing storm valve cover plate); *Georgia-Pacific Corp v Marilyn L Elvapores Inc, Evans Products Co and Retla Steamship Co, The Marilyn L* [1972] 1 Lloyd's Rep 418 (ED Va) (failure to adjust the metacentric height of the vessel); *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd* [1973] 2 Lloyd's Rep 469, Can SC (failure to secure cargo on barge); *International Produce Inc and Greenwich Mills Co v SS Frances Salman, Swedish Gulf Line A/B and Companhia de Navegacao Maritima Netumar, The Frances Salman* [1975] 2 Lloyd's Rep 355 (SDNY) (failure to drain fresh water system); *The Washington* [1976] 2 Lloyd's Rep 453, Can Fed Ct (failure to alter course to get away from storm centre); *The Bulknes* [1979] 2 Lloyd's Rep 39 (surreptitious opening of hatch by a member of the crew); *Metals and Ores Pte Ltd v Cia de Vapores Stelvi SA, The Tolmidis* [1983] 1 Lloyd's Rep 530 (allowing vessel to exceed her permitted draught). In *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* the House of Lords took the view that 'management' should receive the construction which had been previously put on it by the United Kingdom courts: see *PARA 370*. See also *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] EWHC 483 (Comm), [2006] 2 Lloyd's Rep 66.

8 le the Hague-Visby Rules art IV: see *PARAS 385 et seq, 389 et seq.*

9 See *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432 at 435, 436, 17 Asp MLC 385 at 386 (affd sub nom *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223 at 234, 32 Ll L Rep 91 at 95, HL, per Viscount Sumner). Where the evidence shows that the damage was partly due to one of these excepted causes and partly to causes not excepted, the shipowner is only relieved from liability for such damage as he can prove to be due to the excepted cause: *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223 at 241, 32 Ll L Rep 91 at 98, HL; applied in *White & Son (Hull) Ltd v Hobsons Bay (Owners)* (1933) 47 Ll L Rep 207 at 212, DC; and see *PARA 386*.

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### **389. Other protection conferred on the carrier.**

Neither the carrier<sup>1</sup> nor the ship<sup>2</sup> is responsible for loss or damage arising or resulting from:

- 112 (1) fire, unless caused by the actual fault or privity of the carrier<sup>3</sup>;
- 113 (2) perils, dangers and accidents of the sea or other navigable waters<sup>4</sup>;
- 114 (3) act of God<sup>5</sup>;
- 115 (4) act of war<sup>6</sup>;
- 116 (5) act of public enemies<sup>7</sup>;
- 117 (6) arrest or restraint of princes, rulers or people, or seizure under legal process<sup>8</sup>;
- 118 (7) quarantine restrictions<sup>9</sup>;
- 119 (8) act or omission of the shipper or owner of the goods, his agent or representative<sup>10</sup>;
- 120 (9) strikes, lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general<sup>11</sup>;
- 121 (10) riots and civil commotions<sup>12</sup>;
- 122 (11) saving or attempting to save life or property at sea<sup>13</sup>;
- 123 (12) wastage in bulk or weight or any other loss or damage arising from inherent defect<sup>14</sup>, quality or vice of the goods<sup>15</sup>;
- 124 (13) insufficiency of packing<sup>16</sup>;
- 125 (14) insufficiency or inadequacy of marks<sup>17</sup>;
- 126 (15) latent defects not discoverable by due diligence<sup>18</sup>; or
- 127 (16) any other cause within the general exception<sup>19</sup>.

1 As to the meaning of 'carrier' see *PARA 372* note 3.

2 As to the meaning of 'ship' see PARAS 374 note 6, 387 note 5.

3 Hague-Visby Rules art IV r 2(b). As to the Rules generally see PARAS 206, 367 et seq. Cf the Merchant Shipping Act 1995 s 186(1)(a); the Carriage of Goods by Sea Act 1971 s 6(4); PARA 399; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059. Where there is no actual fault or privity, it would appear that the carrier is not liable, even if there had been a failure in respect of the obligation as regards seaworthiness, unless that failure caused the fire, when the protection of this provision will be lost: see *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 at 602, 603, [1959] 2 All ER 740 at 744, [1959] 2 Lloyd's Rep 105 at 113, PC; and see *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd, The Apostolis* [1996] 1 Lloyd's Rep 475. The burden of proof that there was no actual fault or privity is on the carrier: see *Asiatic Petroleum Co Ltd v Lennard's Carrying Co Ltd* [1914] 1 KB 419, 12 Asp MLC 381, CA; *Royal Exchange Assurance v Kingsley Navigation Co Ltd* [1923] AC 235, 16 Asp MLC 44, PC.

4 Hague-Visby Rules art IV r 2(c). As to perils of the sea see PARA 271; and see eg *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd, The Chyebassa* [1967] 2 QB 250, [1966] 3 All ER 593, [1966] 2 Lloyd's Rep 193, CA; *GE Crippen and Associates Ltd v Vancouver Tug Boat Co Ltd* [1971] 2 Lloyd's Rep 207, Can Fed Ct; *United States of America v Eastmount Shipping Corp, The Susquehanna* [1975] 1 Lloyd's Rep 216 (SDNY); *Bruck Mills Ltd v Black Sea Steamship Co, The Grumant* [1973] 2 Lloyd's Rep 531, Can Fed Ct; *William D Branson Ltd and Tomas Alcazar SA v Jadranska Slobodna Plovidba (Adriatic Tramp Shipping), The Split* [1973] 2 Lloyd's Rep 535, Can Fed Ct; *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd* [1973] 2 Lloyd's Rep 469, Can SC; *International Produce Inc and Greenwich Mills Co v SS Frances Salman, Swedish Gulf Line A/B and Companhia de Navegacao Maritima Netumar, The Frances Salman* [1975] 2 Lloyd's Rep 355 (SDNY); *The Washington* [1976] 2 Lloyd's Rep 453, Can Fed Ct; *The Tilia Gorthon* [1985] 1 Lloyd's Rep 552 (loss not due to perils of the sea because weather was by no means exceptional in the North Atlantic at the time of year concerned).

5 Hague-Visby Rules art IV r 2(d). As to acts of God see PARA 268.

6 Hague-Visby Rules art IV r 2(e). Questions as to acts of war have arisen chiefly in marine insurance cases: see **INSURANCE** vol 25 (2003 Reissue) PARA 336. In contracts of affreightment 'war' has been given a wider interpretation covering acts of hostility among belligerent powers committed without any formal declaration of hostilities having been made: see *Kawasaki Kisen Kaisha Ltd v Bantham Steamship Co Ltd* [1939] 2 KB 544, [1939] 1 All ER 819, 63 Ll L Rep 155, CA.

7 Hague-Visby Rules art IV r 2(f). This exception appears to be the equivalent of the normal English exception of the Queen's enemies: see PARA 269.

8 Hague-Visby Rules art IV r 2(g); and see PARA 270.

9 Hague-Visby Rules art IV r 2(h); and see *Empresa Cubana Importada de Alimentos 'Alimport' v Iasmos Shipping Co SA, The Good Friend* [1984] 2 Lloyd's Rep 586 (where a cargo of soya bean meal was infested with two kinds of insect which were the subject of quarantine in Cuba; but, on the evidence, the loss was due to the shipowners' failing to inspect the trucking of the vessel and was thus in breach of the Hague-Visby Rules art III r 1). As to controls on the import of animals see **ANIMALS** vol 2 (2008) PARA 1081 et seq.

10 Hague-Visby Rules art IV r 2(i). See eg *Ismail v Polish Ocean Lines* [1976] QB 893, [1976] 1 All ER 902, [1976] 1 Lloyd's Rep 489, CA (where the shipper's agent assured the master that a cargo of potatoes was packed in suitable bags so that no dunnage was required, and the cargo arrived in a damaged condition); *The Mekhanik Evgrafov and Ivan Derbenev* [1987] 2 Lloyd's Rep 634 (damaged newsprint; shipowners unable to rely on this exception because they had not proved that the loss occurred in this way). The most likely acts or omissions are those relating to the packing or marking of the goods, but there are specific provisions relating to these: see the text and note 16. Whether these exceptions would go so far as to protect a carrier from his liability to other cargo owners for loss or damage to their goods resulting eg from shipment of dangerous goods (see PARAS 105-107, 260; the Hague-Visby Rules art IV r 3; and PARAS 385, 393) is not certain, but seems probable in view of *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, sub nom *Silver and Layton v Ocean Steamship Co* 35 Ll L Rep 49, CA, unless, as in that case, there is an estoppel: see note 16. An inspection of goods at the time of receipt for shipment may go no further than apparent undamaged condition, admission of which on acceptance for shipment is not an admission of fitness for carriage by sea in respect of eg inherent defect showing no apparent sign: see *Wm Fergus Harris & Son Ltd v China Mutual Steam Navigation Co Ltd* [1959] 2 Lloyd's Rep 500 at 502 (Mayor's Court).

11 Hague-Visby Rules art IV r 2(j). This exception is more widely drawn than the usual strikes clause: cf PARA 300.

12 Hague-Visby Rules art IV r 2(k). As to riots and civil commotions see PARA 299; and **INSURANCE** vol 25 (2003 Reissue) PARAS 596-597.

13 Hague-Visby Rules art IV r 2(l). This exception is more widely drawn than is usual: see PARA 249. Deviations to save property are permitted where the Rules apply (see PARAS 378, 385), and the exception provided here is directed to protecting the carrier and ship for loss or damage incurred during such an operation.

14 See the cases cited in PARA 273 notes 2, 3.

15 Hague-Visby Rules art IV r 2(m). This exception appears to cover the common law peril of inherent vice (see PARA 273; and **INSURANCE** vol 25 (2003 Reissue) PARA 353), and does not appear to extend the scope of the common law exception. It has been held that, if the carrier succeeds in showing that the damage complained of was caused by the inherent quality or vice of the cargo itself, he will not fail because he is unable to name the particular quality or vice; the negation of other causes may establish inherent vice: see *FO Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1927) 137 LT 266, HL (decided on the similar exception in the Australian Sea-Carriage of Goods Act 1904, where the carriers escaped liability for a bad out-turn of Tasmanian apples by proving internal breakdown). In *White & Son (Hull) Ltd v Hobsons Bay (Owners)* (1933) 47 Ll L Rep 207 at 210, 211, DC, however, the carriers failed to discharge the onus of establishing inherent vice and were held liable in damages in respect of a cargo of apples found to be overripe on discharge.

16 Hague-Visby Rules art IV r 2(n). See eg *GE Crippen and Associates Ltd v Vancouver Tug Boat Co Ltd* [1971] 2 Lloyd's Rep 207, Can Fed Ct (peat moss); *Nissan Automobile Co (Canada) Ltd v Owners of the Vessel Continental Shipper, The Continental Shipper* [1976] 2 Lloyd's Rep 234, Fed CA (uncrated cars); *The Lucky Wave* [1985] 1 Lloyd's Rep 80 (damage to the cargo of galvanised steel held not to be due to insufficiency of packing). As to the carrier's right to refuse to accept for carriage goods which are improperly or insufficiently packed see PARA 437; and as to the shipper's responsibility for the accuracy of the marks see the Hague-Visby Rules art III r 3; and PARA 379. It seems that the immunity conferred by the Rules extends to damage caused by another parcel in the same ownership, if the packing of the other parcel, though adequate to protect its own contents, is such as to make it dangerous to cargo stowed near it (*Silver and Layton v Ocean Steamship Co* (1929) 34 Ll L Rep 149 at 155), and may even extend to damage from insufficiently packed articles not in the same ownership (*Goodwin, Ferreira & Co Ltd v Lamport and Holt Ltd* (1929) 34 Ll L Rep 192 at 196).

17 Hague-Visby Rules art IV r 2(o). See eg *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, [1958] 1 All ER 264, [1957] 2 Lloyd's Rep 591.

18 Hague-Visby Rules art IV r 2(p). See eg *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336 (latent defect in the shell plating of the vessel); *Kuo International Oil Ltd v Daisy Shipping Co Ltd, The Yamatogawa* [1990] 2 Lloyd's Rep 39 (design defect in reduction gear); and PARA 390.

19 For the general exception see PARA 391.

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### 390. Latent defect not discoverable by due diligence.

A defect in the ship<sup>1</sup> herself or in her equipment and machinery, including refrigerating machinery, would generally mean that she was unseaworthy; and a failure on the part of the carrier<sup>2</sup> or those for whom he is responsible<sup>3</sup> to exercise due diligence in respect of this would amount to a breach of the duty imposed by the Hague-Visby Rules<sup>4</sup> and prevent the exceptions established by those Rules<sup>5</sup> from operating. At first sight, therefore, this exception<sup>6</sup> appears to be redundant, but the words of the exception 'latent' defects not discoverable by due diligence' are widely framed, and might cover latent defects in apparatus used by the carrier in loading or discharging which is not part of the equipment of the ship herself.

1 As to the meaning of 'ship' see PARAS 374 note 6, 387 note 5.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 The words 'not discoverable by due diligence' are not qualified as to the persons made responsible, but it seems unlikely that they are limited to a personal obligation on the carrier: cf *The Dimitrios N Rallias* (1922) 13 Ll L Rep 363, CA (clause excepting latent defects not resulting from want of due diligence of the owner or of the ship's husband or manager; rust discoverable by competent person on survey not 'latent'). In the general exception (see PARA 391) the responsibility of the carrier for the acts and defaults of his servants and agents is expressly provided for. It is submitted that the same considerations apply for these purposes as in the case of the Hague-Visby Rules art IV r 1: see PARA 385. As to the Rules generally see PARAS 206, 367 et seq.

4 le by the Hague-Visby Rules art III r 1: see PARAS 376, 377.

5 le by the Hague-Visby Rules art IV r 1: see PARA 385.

6 le the exception in the Hague-Visby Rules art IV r 2(p): see PARA 389.

7 Prior to the enactment of the Hague (now the Hague-Visby) Rules, it had been held that a clause in a bill of lading providing that 'any latent defects in the hull ... shall not be considered unseaworthiness provided the same do not result from want of due diligence ...' did not except a defect which was discoverable by the exercise of ordinary care, since such a defect was not 'latent': see *The Dimitrios N Rallias* (1922) 13 Ll L Rep 363 at 365, CA, per Lord Sterndale MR (where 5/16 inch rust between the flange of the frame of a hold and the plating was held not to be a latent defect). Accordingly the words 'not discoverable by due diligence' appear to be tautologous in the Hague-Visby Rules art IV r 2(p).

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### **391. General exception in respect of other causes.**

In addition to the specific exceptions<sup>1</sup>, there is a general exception by which neither the carrier<sup>2</sup> nor the ship<sup>3</sup> is responsible for loss or damage arising or resulting from any other cause without the actual fault or privity of the carrier, or without the fault or neglect of his agents or servants<sup>4</sup>. The burden of proof is, however, on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier, nor the fault or neglect of his agents or servants, contributed to the loss or damage<sup>5</sup>.

In the above provision, it would not appear that the words 'any other cause' are limited to causes ejusdem generis to the other specified exceptions<sup>6</sup>. In connection with this exception, the faults and neglects of the carrier's agents or servants are expressly mentioned, and the responsibility of the carrier would not appear to extend further<sup>7</sup>. An independent contractor may, however, be employed by the carrier to fulfil his duties in connection with loading or discharging and will, in those circumstances, be treated as his agent<sup>8</sup>.

The burden of proof is expressly placed on the person claiming protection to show that neither the actual fault or privity of the carrier nor the fault or neglect of his agents or servants contributed to the loss or damage<sup>9</sup>.

1 le the exceptions contained in the Hague-Visby Rules art IV r 2(a)-(p): see PARAS 388, 389. As to the Rules generally see PARAS 206, 367 et seq.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 As to the meaning of 'ship' see PARAS 374 note 6, 387 note 5.

4 Hague-Visby Rules art IV r 2(q); and see PARA 389. See eg *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd, The Chyebassa* [1967] 2 QB 250, [1966] 3 All ER 593, [1966] 2 Lloyd's Rep 193, CA (where the shipowners were held not to be liable for damage to the cargo owing to the stevedores' stealing a storm valve cover plate at a port of call); *GE Crippen and Associates Ltd v Vancouver Tug Boat Co Ltd* [1971] 2 Lloyd's Rep 207, Can Fed Ct (where it was held that the shipowners were not liable for there was no negligence in

stowing the cargo of peat moss in the state of knowledge at the time with regard to stowing that type of cargo). In the phrase 'or without the fault or neglect of his agents etc' the word 'or' is to be read conjunctively and as equivalent to 'and without etc': see *Brown & Co v T & J Harrison* (1927) 96 LJB 1025, sub nom *RF Brown and Co Ltd v Harrison, Hourani v T & J Harrison* 17 Asp MLC 294, CA; *Jack L Israel Ltd v Ocean Dynamic Lines SA and Ocean Victory Ltd, The Ocean Dynamic* [1982] 2 Lloyd's Rep 88 (where a cargo of cherries was found to contain broken glass and the shipowners failed to prove that neither their actual fault or privity nor the fault of their servants or agents contributed to the loss). See also *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432 at 435, 17 Asp MLC 385 at 386 per Wright J.

5 Hague-Visby Rules art IV r 2(q). See eg *City of Baroda (Cargo Owners) v Hall Line Ltd* (1926) 42 TLR 717, 25 Ll L Rep 437; and note 9.

6 Ie those mentioned in the Hague-Visby Rules art IV r 2(a)-(p). See also *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538 at 549, 550, PC; *Brown & Co v T & J Harrison* (1927) 96 LJB 1025, sub nom *RF Brown and Co Ltd v Harrison, Hourani v T & J Harrison* 17 Asp MLC 294, CA (where the loss was by pilferage, but it was apparently not contended that this was not within the rule); *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd, The Chyebassa* [1967] 2 QB 250 at 274, [1966] 3 All ER 593 at 598, [1966] 2 Lloyd's Rep 193 at 202, CA, per Salmon LJ.

7 Cf the carrier's responsibility in connection with seaworthiness (see PARA 387) and in respect of latent defects (see PARA 390).

8 See *Brown & Co v T & J Harrison* (1927) 96 LJB 1025, sub nom *RF Brown and Co Ltd v Harrison, Hourani v T & J Harrison* 17 Asp MLC 294, CA (cited in note 6) (where the carrier was held liable for pilferage by stevedore's men engaged in discharging cargo). As to the carrier's position in respect of stevedores see PARA 457.

9 It is not necessary that such fault or neglect should have caused the loss or damage; it is sufficient that it should have contributed to it. The difficulty in which the carrier may thus be put, by requiring in effect the proof of a negative, is well illustrated in *Heyn v Ocean Steamship Co Ltd* (1927) 27 Ll L Rep 334 (where the carrier was unable to disprove the complicity of the servants of a stevedore employed to discharge the ship with the thieves who had pilfered the cargo). However, in *Goodwin Ferreira & Co Ltd v Lamport and Holt Ltd* (1929) 34 Ll L Rep 192 (where machinery fell out of an insecurely nailed crate while it was being unloaded from the ship, thus holing a lighter and causing damage to goods lying in it) the carrier succeeded in satisfying the court that his servants were not to blame. See also *The City of Baroda* (1926) 25 Ll L Rep 437 at 442; *Pendle and Rivett Ltd v Ellerman Lines Ltd* (1927) 29 Ll L Rep 133; *Jack L Israel Ltd v Ocean Dynamic Lines SA and Ocean Victory Ltd, The Ocean Dynamic* [1982] 2 Lloyd's Rep 88 (shipowners failed to discharge the burden of proof).

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### **392. Whether protection is afforded where loss due to carrier's prior default.**

Most of the exceptions are in terms which were already familiar in contracts of affreightment and had been the subject of judicial decision<sup>1</sup>. Generally speaking<sup>2</sup>, as at common law, those exceptions will only excuse the carrier from liability if the perils against which they give protection have not operated as a result of prior default or negligence by the carrier, his servant or agent<sup>3</sup>; again, as at common law, the burden of proof of such negligence seems probably, in the absence of express provision to the contrary<sup>4</sup>, to be upon the person alleging it, that is to say, normally upon the cargo owner<sup>5</sup>.

1 See PARAS 388-391.

2 Certain of the provisions contained in the Hague-Visby Rules art IV r 2, eg art IV r 2(a), (b), (q) (see PARAS 388, 389, 391), deal with the point in express terms, and are, therefore, outside the scope of the proposition suggested in the text. As to the Rules generally see PARAS 206, 367 et seq.

3 See *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589, [1959] 2 All ER 740, [1959] 2 Lloyd's Rep 105, PC; *Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1994] 2 Lloyd's Rep 506, CA.

4 See the Hague-Visby Rules art IV r 2(q) (see PARA 391), which puts the burden on the carrier. Article IV r 2(b) (see PARA 389) would also appear to do so by implication.

5 *Albacora SRL v Westcott and Laurance Line Ltd* [1966] 2 Lloyd's Rep 53, HL. The inference seems to be that in other cases the burden is on the cargo owner: see *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416 at 435, 18 Asp MLC 74 at 81, CA, per Greer LJ. There are, however, dicta to the opposite effect: see *Goodwin, Ferreira & Co Ltd v Lamport and Holt Ltd* (1929) 34 Ll L Rep 192; *FO Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1927) 27 Ll L Rep 221, 395, HL.

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### **393. Immunities conferred on the shipper.**

The shipper<sup>1</sup> is not responsible for loss or damage sustained by the carrier<sup>2</sup> or the ship<sup>3</sup> arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants<sup>4</sup>. Although this immunity is conferred in wide terms, it will not excuse the shipper for breach of express undertakings in the contract of affreightment<sup>5</sup>; nor would it appear to reduce the shipper's responsibility for the accuracy of the marks, number, quantity and weight furnished by him at the time of shipment<sup>6</sup>.

1 As to the meaning of 'shipper' cf PARA 381 note 1.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 As to the meaning of 'ship' see PARA 374 note 6.

4 Hague-Visby Rules art IV r 3. As to the incorporation of art IV r 3 into a time charterparty see *The Athanasia Comminos and Georges Chr Lemos* (1979) [1990] 1 Lloyd's Rep 277. As to the Rules generally see PARAS 206, 367 et seq. See also PARA 385.

5 *Leeds Shipping Co Ltd v Duncan Fox & Co Ltd* (1932) 37 Com Cas 213 (payment due under a demurrage clause; decided under the Australian Sea Carriage of Goods Act 1924). Similarly, it would not excuse liability for damages for detention of a vessel beyond her lay days.

6 As to his responsibility under the Hague-Visby Rules art III r 5: see PARA 381.

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### **394. Limitation of carrier's liability.**

Unless the nature and value of the goods<sup>1</sup> have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier<sup>2</sup> nor the ship<sup>3</sup> is in any event<sup>4</sup> liable or becomes liable for any loss or damage to or in connection with<sup>5</sup> the goods in an amount exceeding 666.67 units of account<sup>6</sup> per package<sup>7</sup> or unit or two units of account per kilogramme of gross weight of the goods lost or damaged<sup>8</sup>, whichever is the higher<sup>9</sup>. If embodied in the bill

of lading, that declaration is prima facie evidence but is not binding or conclusive on the carrier<sup>10</sup>.

The total amount recoverable must be calculated by reference to the value of such goods at the place and time at which they are discharged from the ship in accordance with the contract or should have been so discharged<sup>11</sup>. The value of the goods must be fixed according to the commodity exchange price, or, if there is no such price, according to the current market price, or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality<sup>12</sup>.

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport is deemed the number of packages or units for these purposes as far as those packages or units are concerned<sup>13</sup>. If the number of packages or units is not so enumerated, the article of transport is to be considered the package or unit<sup>14</sup>.

Neither the carrier<sup>15</sup> nor the ship is so entitled to the benefit of the limitation of liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result<sup>16</sup>.

By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts<sup>17</sup> may be fixed, provided that no maximum amount so fixed is less than the appropriate maximum mentioned<sup>18</sup> above<sup>19</sup>. Neither the carrier nor the ship is, however, liable in any event for loss or damage to, or in connection with, the goods if the nature or value of them has been knowingly misstated by the shipper in the bill of lading<sup>20</sup>.

The limits of liability provided for in the Hague-Visby Rules apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage<sup>21</sup>, whether the action is founded in contract or in tort<sup>22</sup>.

1 As to the meaning of 'goods' see PARA 372 note 2.

2 As to the meaning of 'carrier' see PARA 372 note 3; but see note 15.

3 As to the meaning of 'ship' see PARAS 374 note 6, 387 note 5.

4 The expression 'in any event' is used twice in the Hague-Visby Rules art IV r 5: see also the text to note 20. The words mean what they say and there is no reason for giving them anything other than their natural meaning, which is 'in every case' (a view supported by the French wording 'en aucun cas'): *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1. As a matter of construction the words 'in any event' are not intended to refer only to those events which gave rise to exemptions under the Hague-Visby Rules art IV, and the seriousness or otherwise of the breach is irrelevant: *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda*. See also *Iligan Integrated Steel Mills Inc v SS John Weyerhaeuser, The John Weyerhaeuser* [1975] 2 Lloyd's Rep 439 (US 2nd Cir) (where it was held that the carrier was entitled to limit his liability to the stated sum per package or unit even if he had failed to exercise due diligence to make the ship seaworthy); and PARA 248 note 8. As to the Hague-Visby Rules generally see PARAS 206, 367 et seq. As to the effect of deviation see PARAS 378, 385.

5 The words 'in connection with' are presumably intended to widen the compensation recoverable by the cargo owner beyond material loss or damage of or to the goods to such heads as loss of market by delay: cf PARA 378 note 12; and see *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 at 169, [1956] 3 All ER 957 at 965, [1956] 2 Lloyd's Rep 379 at 390, HL, per Lord Morton of Henryton (where the phrase in the context of the Hague Rules art III r 8 was under consideration).

6 The unit of account mentioned in the Hague-Visby Rules art IV r 5 is the special drawing right as defined by the International Monetary Fund: art IV r 5(d) (substituted by the Merchant Shipping Act 1995 Sch 13 para 45(1), (5)(c)). The amounts mentioned in the Hague-Visby Rules art IV r 5(a) must be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the court seised of the case: art IV r 5(d) (as so substituted): pursuant to this requirement it is provided that the value on a particular day of one special drawing right is to be treated for the purposes of art IV as equal to such a sum in sterling as the International Monetary Fund has fixed as being the equivalent of one special drawing right for that day or, if no sum has been fixed for that day, for the last day before that day for which a sum has been so

fixed (Carriage of Goods by Sea Act 1971 s 1A(1) (added by the Merchant Shipping Act 1995 Sch 13 para 45(1), (3))). A certificate given by or on behalf of the Treasury stating that a particular sum in sterling has been so fixed for a particular day or that no sum has been so fixed for a particular day and that a particular sum in sterling has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day, is conclusive evidence of those matters for these purposes; and a document purporting to be such a certificate must in any proceedings be received in evidence and, unless the contrary is proved, is deemed to be such a certificate: s 1A(2) (as so added). The Treasury may charge a reasonable fee for any certificate so given; and any fee so received by the Treasury must be paid into the Consolidated Fund: s 1A(3) (as so added). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 711.

7 In *Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd* [1938] 1 KB 459 at 467, [1937] 4 All ER 304 at 308, 59 Ll L Rep 23 at 27 (decided under the Harter Act 1893 (see PARA 280 note 6) which does not contain the word 'unit', which is no doubt apt to indicate an unboxed vehicle), Goddard J said that 'package' must indicate something packed and consequently the term was not applicable to an unboxed motor vehicle. 'Package' has been held to cover six cartons of 40 television tuners strapped to pallet boards (*Standard Electrica SA v Hamburg Sudamerikanische Dampfschiffahrts Gesellschaft and Columbus Lines Inc* [1967] 2 Lloyd's Rep 193 (US 2nd Cir)); a 42 feet long cruiser carried in a cradle (*Island Yachts Inc v Federal Pacific Lakes Line* [1972] 1 Lloyd's Rep 426 (ND Ill)); and a bundle containing 22 tin ingots (*Primary Industries Corp v Barber Lines A/S and Skilos A/S Tropic, The Fernland* [1975] 1 Lloyd's Rep 461 (Civ Ct NY)). Cf *International Factory Sales Service Ltd v The Ship Aleksandr Serafimovich and Far Eastern Steamship Co, The Aleksandr Serafimovich* [1975] 2 Lloyd's Rep 346, Can Fed Ct, where sewing machine heads were shipped in cartons fixed to pallets, and it was held that each carton was a 'package' for the description of the goods in the bill of lading; the numbering of the cartons and their visibility from outside the pallet showed that this was the intention of the parties. As to the practice of carriers receiving cargo from shippers in a 'palletised' form or a 'containerised' form see *Owners of cargo lately on board the River Gurara v Nigerian National Shipping Line Ltd, The River Gurara* [1998] QB 610, [1997] 4 All ER 498, [1997] 1 Lloyd's Rep 225, CA. Where, however, the shipowners chose to classify an uncrated yacht as 'unpacked', it could not be regarded as a 'package' and they could not limit their liability: *Van Breems v International Terminal Operating Co Inc and Holland America Line, The Prinses Margriet* [1974] 1 Lloyd's Rep 599 (SDNY). An electrical transformer bolted to a skid (*Hartford Fire Insurance Co v Pacific Far East Inc, The Pacific Bear* [1974] 1 Lloyd's Rep 359 (US 9th Cir)) and 'lift-on, lift-off tanks' supplied by the shipowner for the carriage of liquid latex (*Shinko Boeki Co Ltd v SS Pioneer Moon and United States Lines Inc, The Pioneer Moon* [1975] 1 Lloyd's Rep 199 (US 2nd Cir)) have been held not to be 'packages'. Where a tractor and generating set were shipped on board and lost overboard whilst being discharged, each was held to be a 'unit': *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd* [1973] 2 Lloyd's Rep 469, Can SC.

8 The expression 'goods lost or damaged' refers to two categories of goods, those that are 'lost' in the sense of vanished, gone, disappeared, destroyed, and those that are 'damaged' in the sense of not being lost, but surviving in damaged form, and should be distinguished from the traditional construction in contract and tort cases of 'loss or damage' as expressing a distinction between economic (loss) and physical (damage) harm: see *Serena Navigation Ltd v Dera Commercial Establishment, The Limnos* [2008] EWHC 1036 (Comm), [2008] 2 Lloyd's Rep 166.

9 Hague-Visby Rules art IV r 5(a) (amended by the Merchant Shipping Act 1995 Sch 13 para 45(5)(a), (b)). Actual insertion of the value in the bill of lading is necessary, and the fact that the shipowner knows the value is immaterial: *Anticosti Shipping Co v Viateur St Amand* [1959] 1 Lloyd's Rep 352, Can SC. The carrier may not, however, limit his liability where there is no space in the bill of lading for the insertion of the value: *Sommer Corp v Panama Canal Co* [1974] 1 Lloyd's Rep 287 (US 5th Cir); *General Electric Co v MV Lady Sophie* [1979] 2 Lloyd's Rep 173 (SDNY). Clauses which are intended to protect the shipowner, provided that he honours his obligation to stow goods under deck, do not apply if he is in breach of that obligation: *Wibau Maschinenfabrik Hartman SA v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494.

10 Hague-Visby Rules art IV r 5(f).

11 Hague-Visby Rules art IV r 5(b). See *Trafigura Beheer BV v Mediterranean Shipping Co SA, The MSC Amsterdam* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622 at 630-632 per Longmore LJ.

12 Hague-Visby Rules art IV r 5(b).

13 Hague-Visby Rules art IV r 5(c); and see *Owners of cargo lately on board the River Gurara v Nigerian National Shipping Line Ltd, The River Gurara* [1998] QB 610, [1997] 4 All ER 498, [1997] 1 Lloyd's Rep 225, CA.

14 Hague-Visby Rules art IV r 5(c).

15 In the Hague-Visby Rules art IV r 5(e) 'carrier' refers to the carrier himself and does not include his servants or agents, except in so far as employees are to be regarded as constituting part of the alter ego of the carrier: *Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise* [1989] 2 Lloyd's Rep 185.

- 16 Hague-Visby Rules art IV r 5(e).
- 17 Ie mentioned in the Hague-Visby Rules art IV r 5(a): see above.
- 18 See note 9.
- 19 Hague-Visby Rules art IV r 5(g).
- 20 Hague-Visby Rules art IV r 5(h). It would clearly be inequitable if this provision were held to be avoided by a deviation: see note 4.
- 21 As to the meaning of 'contract of carriage' see PARA 372.
- 22 Hague-Visby Rules art IV bis r 1.

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### **395. Avoidance of clause relieving carrier of liability.**

Any clause, covenant or agreement in a contract of carriage<sup>1</sup> relieving the carrier<sup>2</sup> or the ship<sup>3</sup> from liability for loss or damage to, or in connection with, goods<sup>4</sup> arising from negligence, fault or failure in the duties and obligations in the Hague-Visby Rules<sup>5</sup>, or lessening such liability otherwise than as provided in the Rules, is null and void and of no effect<sup>6</sup>.

A benefit of insurance in favour of the carrier or similar clause is deemed to be a clause relieving the carrier from liability<sup>7</sup>.

- 1 As to the meaning of 'contract of carriage' see PARA 372.
- 2 As to the meaning of 'carrier' see PARA 372 note 3.
- 3 As to the meaning of 'ship' see PARA 374 note 6.
- 4 As to the meaning of 'goods' see PARA 372 note 2.
- 5 Ie the duties and obligations in the Hague-Visby Rules art III: see PARA 376 et seq. As to the Rules generally see PARAS 206, 367 et seq.
- 6 Hague-Visby Rules art III r 8. A clause giving liberty to tranship is not annulled by art III r 8 (*Marcelino Gonzalez y Compania S en C v James Nourse Ltd* [1936] 1 KB 565 at 574, 18 Asp MLC 590 at 591 (where it was held that a liberty to tranship or land and reship on board the same or any other vessel or vessels included liberty to discharge by means of lighters at the port of destination)); and the Hague-Visby Rules art III r 8 has been held not to avoid a very widely drawn clause giving the ship liberty in certain events to discharge the cargo at any safe and convenient port other than the port of destination (*GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, [1956] 3 All ER 957, [1956] 2 Lloyd's Rep 379, HL) or a clause placing the duty of stowage on the charterer (*Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57). Since a clause in a contract of carriage which is inconsistent with the carrier's minimum obligations under the Hague-Visby Rules art III is by art III r 8 completely avoided, it has become common practice to insert in bills of lading and similar documents a clause known as the 'clause paramount', by which any provision in it which is repugnant to art III is void to the extent of the repugnancy but no further: see *Finagra (UK) Ltd v OT Africa Line Ltd* [1998] 2 Lloyd's Rep 622, QB; and PARA 401 note 6. A clause limiting a claim to the invoice value of the goods, if lower than the statutory minimum, is void: *Nabob Foods Ltd v Cape Corso (Owners)* [1954] 2 Lloyd's Rep 40, Can Ex Ct. A clause in a bill of lading governed by the Carriage of Goods by Sea Act 1971 limiting the carrier's liability to the amount stated in the original Hague Rules (which is considerably lower) is void: *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, sub nom *The Morviken* [1983] 1 Lloyd's Rep 1, HL. Other clauses which have been held to be void are those stating that (1) the carrier would not be liable for any damage unless the shipper proved negligence or

lack of due diligence on the carrier's part (*Encyclopaedia Britannica Inc v The Hong-Kong Producer and Universal Marine Corp* [1969] 2 Lloyd's Rep 536 (US 2nd Cir)); (2) the carrier's liability was excluded for 'bags or bales burst, torn or stained and the consequences thereof' (*Bruck Mills Ltd v Black Sea Steamship Co, The Grumant* [1973] 2 Lloyd's Rep 531, Can Fed Ct); (3) the carrier would not be liable for 'deterioration' in a cargo of melons (*William D Branson Ltd and Tomas Alcazar SA v Jadranska Slobodna Plovidba (Adriatic Tramp Shipping), The Split* [1973] 2 Lloyd's Rep 535, Can Fed Ct); (4) the carrier was relieved of his obligation to load or unload, and had a mandate to appoint stevedores to carry out functions on the carrier's behalf (*The Saudi Prince (No 2)* [1988] 1 Lloyd's Rep 1, CA); (5) if a container had not been packed or filled by or on behalf of the carrier, then, notwithstanding any provision of law to the contrary, 'a container was to be considered a package or unit even though it had been used to consolidate the goods ...' (*Owners of cargo lately on board the River Gurara v Nigerian National Shipping Line Ltd, The River Gurara* [1998] QB 610, [1997] 4 All ER 498, [1997] 1 Lloyd's Rep 225, CA). See also *The Benarty* [1984] 2 Lloyd's Rep 244, CA (an exclusive jurisdiction clause referring disputes to a jurisdiction in which the limit on liability is less than that provided by the Hague-Visby Rules is valid and does not offend against art III r 8); *Government of Sierra Leone v Marmaro Shipping Co Ltd, Government of Sierra Leone v Margaritis Marine Co Ltd, The Amazona and Yayamaria* [1989] 2 Lloyd's Rep 130, CA (clause in bill of lading required suit for arbitration to be brought within 30 days; clause not rendered void by the Hague-Visby Rules art III r 8).

7 See note 6.

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### **396. Carrier's right to limit or assume liability.**

A carrier<sup>1</sup> is at liberty to surrender in whole or in part all or any of his rights and immunities<sup>2</sup> or to increase any of his responsibilities and obligations<sup>3</sup> under the Hague-Visby Rules<sup>4</sup>, provided that such surrender or increase is embodied in the bill of lading issued to the shipper<sup>5</sup>. The Rules are not applicable to charterparties<sup>6</sup>; but, if bills of lading are issued in the case of a ship<sup>7</sup> under a charterparty, they must comply with the terms of the Rules<sup>8</sup>. Nothing in the Rules is to be held to prevent the insertion in a bill of lading of any lawful provision regarding general average<sup>9</sup>.

1 As to the meaning of 'carrier' see PARA 372 note 3.

2 As to rights and immunities see PARA 385 et seq.

3 As to responsibilities and obligations see PARA 376 et seq.

4 As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

5 Hague-Visby Rules art V. The surrender must be clearly stated; it is not to be inferred from the needless repetition of another immunity: *The Touraine* [1928] P 58 at 66, 17 Asp MLC 413 at 415.

6 The parties may nevertheless incorporate the Rules into a charterparty: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, [1958] 1 Lloyd's Rep 73, HL.

7 As to the meaning of 'ship' see PARA 374 note 6.

8 Hague-Visby Rules art V.

9 Hague-Visby Rules art V. It is apprehended that 'lawful' means lawful apart from the Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules. As to general average see PARA 605 et seq; and **INSURANCE** vol 25 (2003 Reissue) para 420 et seq.

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### **397. Special agreements.**

Notwithstanding the provisions of the Hague-Visby Rules<sup>1</sup>, a carrier<sup>2</sup>, master or agent of the carrier and a shipper, in regard to any particular goods<sup>3</sup>, are at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier<sup>4</sup> for such goods, and as to the rights and immunities<sup>5</sup> of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation<sup>6</sup> is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or is issued and that the terms agreed are embodied in a receipt which must be a non-negotiable document and must be marked as such<sup>7</sup>. Any agreement so entered into has full legal effect<sup>8</sup>.

These provisions do not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement<sup>9</sup>.

1 The Hague-Visby Rules arts I-V: see PARAS 372 et seq. As to the Rules generally see PARAS 206, 367 et seq.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 As to the meaning of 'goods' see PARA 372 note 2.

4 As to responsibilities and liabilities see PARA 376 et seq.

5 As to rights and immunities see PARA 385 et seq.

6 The word 'stipulation' relates to the carrier's obligation of seaworthiness and not to the terms of carriage: see *Hugh Mack & Co Ltd v Burns and Laird Lines Ltd* (1944) 77 Ll L Rep 377, NI CA.

7 Hague-Visby Rules art VI. It will be observed that art VI authorises the parties to contract out of the Rules provided that no bill of lading has been or is to be issued. By art I(b) (see PARA 372) the Rules apply only to contracts of carriage covered by a bill of lading or similar document of title. Arts I(b), VI may be reconciled by construing 'contracts of carriage covered by a bill of lading' in art I(b) as meaning 'contracts of carriage under which the shipper is entitled to demand a bill of lading evidencing the contract': *Harland and Wolff Ltd v Burns and Laird Lines Ltd* 1931 SC 722 at 729, 40 Ll L Rep 286 at 289, Ct of Sess. If the shipper is not by express or implied agreement or usage of the trade entitled to demand a bill of lading, the Hague-Visby Rules art VI will have no application and it will not be necessary to issue this receipt: see *Harland and Wolff Ltd v Burns and Laird Lines Ltd*.

8 Hague-Visby Rules art VI.

9 Hague-Visby Rules art VI proviso.

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### **398. Actions against carrier's servants or agents.**

If an action in respect of loss or damage to goods<sup>1</sup> covered by a contract of carriage<sup>2</sup> is brought against a servant or agent of the carrier<sup>3</sup>, such servant or agent not being an independent contractor, such servant or agent is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under the Hague-Visby Rules<sup>4</sup>. The aggregate of the amounts recoverable<sup>5</sup> from the carrier, and such servants and agents, must in no case exceed the limit provided for in the Rules<sup>6</sup>. A servant or agent of the carrier is nevertheless not entitled so to avail himself of the defences and limits of liability if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result<sup>7</sup>.

1 As to the meaning of 'goods' see PARA 372 note 2.

2 As to the meaning of 'contract of carriage' see PARA 372.

3 As to the meaning of 'carrier' see PARA 372 note 3.

4 Hague-Visby Rules art IV bis r 2. As to the Rules generally see PARAS 206, 367 et seq.

5 It is apprehended that 'recoverable' should read 'recovered': cf *Socap International Ltd v Marc Rich & Co AG* [1990] 2 Lloyd's Rep 175.

6 Hague-Visby Rules art IV bis r 3.

7 Hague-Visby Rules art IV bis r 4. See also *Cia Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos* [1990] 1 Lloyd's Rep 310 at 316, CA, obiter per Bingham LJ ('if a servant or agent of the carrier damages the goods by wilful or reckless misconduct, he cannot rely on the provisions of [the Hague-Visby Rules] art IV (art IV bis r 4), although still perhaps able to rely on the time bar').

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### **399. Global limitation of liability.**

The provisions of the Hague-Visby Rules<sup>1</sup> do not affect the rights and obligations of the carrier<sup>2</sup> under any statute for the time being in force relating to the limitation of the liability<sup>3</sup> of owners of sea-going vessels<sup>4</sup>; nor do the Rules affect the provisions of any international Convention or national law governing liability for nuclear damage<sup>5</sup>.

1 As to the Hague-Visby Rules generally see PARAS 206, 367 et seq.

2 As to the meaning of 'carrier' see PARA 372 note 3.

3 For these purposes, the Merchant Shipping Act 1995 s 186 (which entirely exempts shipowners and others in certain circumstances of loss of, or damage to, goods: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059) is a provision relating to limitation of liability: Carriage of Goods by Sea Act 1971 s 6(4) (substituted by the Merchant Shipping Act 1995 Sch 13 para 45(1), (4)).

4 Hague-Visby Rules art VIII. See *The Benarty* [1984] 2 Lloyd's Rep 244, CA (an exclusive jurisdiction clause referring disputes to a jurisdiction in which the limit on liability is less than that provided by the Rules is valid and does not offend against art III r 8 (see PARA 395)).

5 Hague-Visby Rules art IX. As to the applicable international Convention see the Vienna Convention on Civil Liability for Nuclear Damage and an Optional Protocol concerning the Compulsory Settlement of Disputes (Vienna, 21 May 1963; Misc 9 (1964); Cmnd 2333); and **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1347.

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*(f) Time Limits*

**400. Obligation of consignee to give written notice of loss or damage to carrier.**

Unless notice of loss or damage and the general nature of such loss or damage is given in writing to the carrier<sup>1</sup> or his agent at the port of discharge before or at the time of removal of the goods<sup>2</sup> into the custody of the persons entitled to delivery of them under the contract of carriage<sup>3</sup>, or, if the loss or damage is not apparent, within three days, such removal is prima facie evidence of delivery by the carrier of the goods as described in the bill of lading<sup>4</sup>. The notice in writing need not be given, however, if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection<sup>5</sup>.

In the case of any actual or apprehended loss or damage, the carrier and the receiver must give all reasonable facilities to each other for inspecting and tallying the goods<sup>6</sup>.

1 As to the meaning of 'carrier' see PARA 372 note 3.

2 As to the meaning of 'goods' see PARA 372 note 2.

3 As to the meaning of 'contract of carriage' see PARA 372.

4 Hague-Visby Rules art III r 6. As to the Rules generally see PARAS 206, 367 et seq. Since the burden of proving damage rests by the general principles of English law on the owner of the goods in any event, quare whether this provision has any legal effect.

5 Hague-Visby Rules art III r 6.

6 Hague-Visby Rules art III r 6.

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**401. Action for loss or damage; time limits.**

The carrier<sup>1</sup> and the ship<sup>2</sup> are in any event<sup>3</sup> discharged from all liability whatsoever<sup>4</sup> in respect of the goods<sup>5</sup>, unless suit<sup>6</sup> is brought within one year of their delivery<sup>7</sup>, or of the date when the goods should have been delivered<sup>8</sup>. The suit may be brought in any competent jurisdiction, not necessarily in the jurisdiction where the matter is ultimately decided<sup>9</sup>; and the suit must be brought in the name of a party who has title to sue<sup>10</sup>. The one-year period may, however, be extended if the parties so agree after the cause of action has arisen<sup>11</sup>.

An action for indemnity against a third person may, however, be brought even after the expiry of the period of one year so provided if brought within the time allowed by the law of the court seised of the case; but the time allowed must be not less than three months, commencing from

the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself<sup>12</sup>.

1 As to the meaning of 'carrier' see PARA 372 note 3.

2 As to the meaning of 'ship' see PARA 374 note 6.

3 As to the meaning of 'in any event' see PARA 394 note 4.

4 The Hague-Visby Rules art III r 6 (see the text and notes 5-12) operates as a complete discharge of a suit because of the fact that the claim has ceased to exist: *Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1994] 2 Lloyd's Rep 506, CA. See also *Aries Tanker Corp v Total Transport Ltd, The Aries* [1977] 1 All ER 398, [1977] 1 WLR 185, [1977] 1 Lloyd's Rep 334, HL. As to the Rules generally see PARAS 206, 367 et seq.

5 Quaere whether the words 'in respect of the goods' limit the operation of the time limit in the Hague-Visby Rules art III r 6 where the Rules are incorporated into a charterparty: see eg *Interbulk Ltd v Ponte Dei Sospiri Shipping Co, The Standard Ardour* [1988] 2 Lloyd's Rep 159; *Cargill International SA v CPN Tankers (Bermuda) Ltd, The Ot Sonja* [1993] 2 Lloyd's Rep 435, CA, applying *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74, [1957] 3 All ER 100, [1957] 2 Lloyd's Rep 207 (the words 'loss or damage' in a charterparty extended to loss or damage related to goods and the time limit operated where goods to which the loss or damage related had never been loaded on the ship). As to the meaning of 'goods' see PARA 372 note 2.

6 See *Allianz Versicherungs AG v Fortuna Co Inc, The Baltic Universal* [1999] 2 All ER 625, [1999] 1 Lloyd's Rep 497, QB (whether written notice invoking arbitration agreement satisfies the time-bar); see also *Thyssen Inc v Calypso Shipping Corp SA* [2000] 2 All ER (Comm) 97, [2000] 2 Lloyd's Rep 243.

7 As to the inclusion of a shorter (nine-month) contractual time-bar in a contract in which the Hague-Visby Rules were incorporated see *Finagra (UK) Ltd v OT Africa Line Ltd* [1998] 2 Lloyd's Rep 622, QB.

8 Hague-Visby Rules art III r 6. The underlying purpose of art III r 6 is that the time limit will lead to the prompt pursuit of litigation and promote certainty and predictability in judicial decisions: *Kenya Rlys v Antares Co Pte Ltd, The Antares (No 2)* [1986] 2 Lloyd's Rep 633 (affd sub nom *Kenya Rlys v Antares Co Pte Ltd, The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424, CA) (cargo wrongfully stowed on deck); *Fort Sterling Ltd v South Atlantic Cargo Shipping NV, The Finnrose* [1994] 1 Lloyd's Rep 559 (to permit fresh proceedings would run counter to the whole purpose of the Hague-Visby Rules art III r 6). See also *D/S A/S Idaho v Peninsular and Oriental Steam Navigation Co, The Strathnewton* [1983] 1 Lloyd's Rep 219, CA; *Sabah Flour and Feedmills v Comfez Ltd* [1987] 2 Lloyd's Rep 647; *Government of Sierra Leone v Marmaro Shipping Co Ltd, Government of Sierra Leone v Margaritis Marine Co Ltd, The Amazona and Yayamaria* [1989] 2 Lloyd's Rep 130, CA (the Hague-Visby Rules art III r 6 had to be given a purposive construction; a defendant was not able to set up a time bar when the plaintiff had commenced the very suit to which the parties had agreed); *Cia Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos* [1990] 1 Lloyd's Rep 310, CA (cargo-owners sought to found their action on the carriers' alleged misconduct rather than on breaches of the Rules because they let the one-year period elapse without bringing suit); *The Havhelt* [1993] 1 Lloyd's Rep 523 (exclusive jurisdiction clause; proceedings not competent proceedings and did not amount to a suit within the meaning of the Hague-Visby Rules art III r 6).

A cargo owner's defence to a shipowner's claim for a general average contribution, on the ground that the ship was unseaworthy or that the shipowner did not exercise due diligence to make her seaworthy, is not barred by art III r 6: see *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74, [1957] 3 All ER 100, [1957] 2 Lloyd's Rep 207 (where it was held that what is now the Hague-Visby Rules art III r 6 brings about only a discharge of liabilities, not a barring of defences).

9 *The Nordglimt* [1987] 2 Lloyd's Rep 470, applying *Hispanica de Petroleos SA and Cia Iberica Refinadera de Petroleos SA v Vencedora Oceanica Navegacion SA, The Kapetan Markos NL* [1986] 1 Lloyd's Rep 211, CA, and distinguishing *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216, [1963] 2 Lloyd's Rep 479.

10 *Transworld Oil (USA) Inc v Minos Cia Naviera SA, The Leni* [1992] 2 Lloyd's Rep 48 (plaintiff incorrectly described); but see *Continental Fertilizer Co Ltd v Pionier Shipping CV, The Pionier* [1995] 1 Lloyd's Rep 223 (errors of detail in the pleaded case could not have the effect of rendering the suit one which failed to satisfy the requirements of the Hague-Visby Rules art III r 6). The commencement of arbitration proceedings is 'suit brought': *The Merak* [1965] P 223, [1965] 1 All ER 230, [1964] 2 Lloyd's Rep 527, CA.

11 Hague-Visby Rules art III r 6.

12 Hague-Visby Rules art III r 6 bis. Article III r 6 bis applies whenever the contract of carriage under which the indemnity is sought is governed by the Hague-Visby Rules; it makes no difference whether or not the main action giving rise to the claim for indemnity is itself brought under a contract to which the Hague-Visby Rules apply: *China Ocean Shipping Co, The Xingcheng (Owners) v The Andros (Owners)* [1987] 1 WLR 1213, [1987] 2 Lloyd's Rep 210, PC.

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## **(ii) Operational Mechanics of the Contract of Carriage**

### **A. THE LOADING**

#### **(A) READINESS OF SHIP**

##### **402. Readiness of ship and charterer's obligation to load.**

Where the ship in which a cargo is to be carried is employed under a voyage charterparty<sup>1</sup>, the following duties must be performed by the shipowner before he is entitled to require the charterer to load the cargo<sup>2</sup>:

- 128 (1) the ship must be at the place of loading specified in the charterparty, or, if the charterparty so provides, 'so near thereto as she can safely get'<sup>3</sup>;
- 129 (2) she must be ready to receive the goods on board<sup>4</sup>; and
- 130 (3) notice of readiness to load must have been given to the charterer<sup>5</sup>.

Moreover, if the charterparty provides for loading in regular turn<sup>6</sup>, the charterer's obligation to load the cargo does not become operative until the turn arrives<sup>7</sup>.

Where the terms on which the goods have been shipped are evidenced by a bill of lading, the details as to the place and time of loading will normally have been agreed by the shipper and the carrier when the contract of carriage was concluded, which will typically have happened prior to the issue of the bill of lading. The bill of lading will consequently not usually contain terms regarding these matters<sup>8</sup>.

1 As to voyage charterparties see PARA 208. As to time charterparties see PARA 209; whether the vessel needs to be ready to load by the time of its delivery to the charterer depends on whether the services to be provided by the owner include the carriage of goods by sea.

2 See eg *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499 at 517, 518, CA, per Kennedy LJ.

3 See PARA 406 et seq.

4 See PARA 413 et seq.

5 This duty is normally only contained in voyage charterparties, but may also appear in time charterparties: see PARA 416.

6 As to loading in regular turn see PARAS 295, 412.

7 *United States Shipping Board v Frank C Strick & Co Ltd* [1926] AC 545 at 557, 17 Asp MLC 40 at 45, HL, per Cave LC.

8 As to bills of lading see PARA 313 et seq.

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#### **403. Proceeding to port of loading.**

If the ship is not already lying in the port of loading at the time when the charterparty is signed, she must proceed there<sup>1</sup> so as to arrive in time to load for the contemplated voyage<sup>2</sup>. Where the port of loading is not specified in the charterparty but is left to be named by the charterer<sup>3</sup>, the shipowner's obligation to sail does not arise until the charterer has selected a port and given notice of it, even if the vicinity of the port is named in the charterparty<sup>4</sup>. The charterer must name<sup>5</sup> the port at which he desires the ship to load<sup>6</sup> within the time specified in the charterparty or, if no time is specified, within a reasonable time<sup>7</sup>.

1 Where a vessel is time-chartered for purposes other than the carriage of goods by sea, the place of delivery will not be a port or place of loading, but will be simply the agreed port or place where the owner agrees to put the vessel at the charterer's disposal.

2 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch, disapproving *Hurst v Usborne* (1856) 18 CB 144. See also *M'Andrew v Adams* (1834) 1 Bing NC 29. As to the effect of a statement of the position of the ship at the date of the contract see PARA 242.

3 See PARA 243.

4 *Rae v Hackett* (1844) 12 M & W 724.

5 As to what constitutes 'naming' see *Brown v Johnson* (1842) 10 M & W 331.

6 Cf the cases relating to the ordering of a port of discharge: see PARA 517.

7 *Woolley v Reddelien* (1843) 5 Man & G 316. See also *Whitwill v Scheer* (1838) 8 Ad & El 301; *Matthews v Lowther* (1850) 5 Exch 574; *Stewart v Rogerson* (1871) LR 6 CP 424; cf *Sieveking v Maass* (1856) 6 E & B 670. As to the charterer's liability where time lost by the ship awaiting orders is regained by dispatch at the port of loading see *Societa Ligure di Armamenti v Joint Danube and Black Sea Shipping Agencies of Braila* (1931) 47 TLR 296.

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#### **404. Effect of delay.**

Although it is the shipowner's duty to proceed to the port of loading with due diligence<sup>1</sup>, mere delay in starting<sup>2</sup>, or deviation on the way to the port of loading<sup>3</sup>, is not in itself a breach of duty entitling the charterer to refuse to supply a cargo<sup>4</sup>, but, in the absence of a clause exempting the shipowner from liability, he will be entitled to recover such damages as he may have sustained by reason of the shipowner's lack of diligence<sup>5</sup>. The position as regards the charterer's obligation to supply a cargo is not altered even if the charterparty, as is usually the case, contains an express term requiring the ship to proceed to the port of loading with all possible dispatch or all convenient speed<sup>6</sup>, as this term is not to be regarded as a condition precedent<sup>7</sup>, and the breach of it, therefore, only entitles the charterer to recover damages<sup>8</sup>. Where, however, the delay or deviation is so great as to frustrate the commercial object of the

adventure contemplated by the charterparty, there is a breach of a condition which goes to the root of the contract<sup>9</sup>. The charterer is then discharged from his obligation to supply a cargo<sup>10</sup> and, in addition, unless the frustrating event happened without fault or blame on the part of the shipowner<sup>11</sup>, or the shipowner is protected by an exception<sup>12</sup>, may recover damages<sup>13</sup>. The fact that the delay or deviation is occasioned by an excepted peril does not prevent the contract from being discharged, but, by reason of the exception, the shipowner may be exempted from liability for the consequences of his failure to perform the charterparty<sup>14</sup>.

1 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch; and see *M'Andrew v Adams* (1834) 1 Bing NC 29 (where the condition was held to be broken although the ship arrived before the day fixed for cancelling); and PARA 237, 245 note 1. As to the doctrine of frustration generally see PARA 237; and **CONTRACT** vol 9(1) (Reissue) PARA 897 et seq.

2 *Dimech v Corlett* (1858) 12 Moo PCC 199.

3 *Forest Oak Steam Shipping Co v Richard & Co* (1899) 5 Com Cas 100. As to deviation see also PARA 248 et seq.

4 *MacAndrew v Chapple* (1866) LR 1 CP 643; *Hudson v Hill* (1874) 2 Asp MLC 278.

5 *Clipsham v Vertue* (1843) 5 QB 265. See also *Transworld Oil Ltd v North Bay Shipping Corp'n, The Rio Claro* [1987] 2 Lloyd's Rep 173. If the charterparty is frustrated after a right of action for delay has arisen, only damages accrued before frustration are recoverable: *Associated Portland Cement Manufacturers (1900) Ltd v Houlder Bros & Co Ltd* (1917) 14 Asp MLC 170 (overdue steamer sinking before reaching loading port).

6 *Tarrabochia v Hickie* (1856) 1 H & N 183. See also PARA 244.

7 *Dimech v Corlett* (1858) 12 Moo PCC 199.

8 *MacAndrew v Chapple* (1866) LR 1 CP 643; *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch; *Hudson v Hill* (1874) 2 Asp MLC 278.

9 *Freeman v Taylor* (1831) 8 Bing 124; *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch (disapproving *Hurst v Osborne* (1856) 18 CB 144). Cf *Clipsham v Vertue* (1843) 5 QB 265; *Rankin v Potter* (1873) LR 6 HL 83 at 117, 2 Asp MLC 65 at 72, 73 per Blackburn J. As to the effect of frustration see PARAS 237, 244 et seq, 256.

10 *Tarrabochia v Hickie* (1856) 1 H & N 183; *Tully v Howling* (1877) 2 QBD 182, 3 Asp MLC 368, CA.

11 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL. A clause providing for a reference to arbitration of disputes arising under the charterparty survives the dissolution of the charterparty by frustration even if no dispute has arisen and the charterparty is wholly executory at the time of the frustration: *Kruse v Questier & Co Ltd* [1953] 1 QB 669, [1953] 1 All ER 954, [1953] 1 Lloyd's Rep 310 (following obiter dicta in *Heyman v Darwins Ltd* [1942] AC 356, [1942] 1 All ER 337, HL; not following *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, 17 Asp MLC 8, PC).

12 *Geipel v Smith* (1872) LR 7 QB 404, 1 Asp MLC 268; *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch. The exceptions in the charterparty apply to the voyage to the port of loading (*Hudson v Hill* (1874) 2 Asp MLC 278; and see *Bruce v Nicolopulo* (1855) 11 Exch 129; *Barker v M'Andrew* (1865) 18 CBNS 759; *Harrison v Garthorne* (1872) 1 Asp MLC 303), but the voyage must have begun (*Crow v Falk* (1846) 8 QB 467; *Valente v Gibbs* (1859) 6 CBNS 270; *Monroe Bros Ltd v Ryan* [1935] 2 KB 28, CA). As to exceptions see further PARA 265 et seq.

13 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch; cf PARA 244; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL.

14 *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch; *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360, DC; *Embiricos v Sydney Reid & Co* [1914] 3 KB 45, 12 Asp MLC 513; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL (it seems immaterial on the question of liability in a case of frustration whether the cause preventing the fulfilment of the charterparty has been expressly excepted or not, provided that it arose without fault or blame on either side). The shipowner cannot be required to do something which is wholly unreasonable in order to overcome an obstacle created by an excepted peril: *Phosphate Mining Co and Coronet Phosphate Co v Rankin, Gilmour & Co* (1916) 13 Asp MLC 418. See also *Alexander King Ltd v Howden Bros* (1915) 50 ILT 27 (cited in PARA 241 note 1).

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#### 405. Terms in the charterparty as to time.

The consequences of delay may be made more extensive by express terms in the charterparty, provided that it is clear from the language used that such is the intention of the parties<sup>1</sup>. Thus, there may be a term that the ship is to sail for the port of loading on or before a named date<sup>2</sup>. It is then made a condition of the contract that the ship is to sail<sup>3</sup> from the port in which she is lying by the given date; if she fails to do so, the charterer is entitled to refuse to supply a cargo<sup>4</sup>, and, in addition, unless the shipowner is excused by an exception, may recover damages for the breach of the condition<sup>5</sup>. It is immaterial that the ship has been prevented from sailing by an excepted peril<sup>6</sup>; although in this case the exception operates to exonerate the shipowner from an action for damages, it does not affect the condition precedent on which the charterer has contracted to take and load the ship<sup>7</sup>.

Similarly, a term which specifies the date by which the ship is to arrive at the port of loading<sup>8</sup>, or is to be ready to load<sup>9</sup>, is to be construed as a condition the breach of which discharges the charterer from his obligation to supply a cargo<sup>10</sup>, and may further entitle him to damages<sup>11</sup>. In this case, too, it is immaterial that the shipowner's failure to fulfil the condition is attributable to an excepted peril<sup>12</sup>, although in this case he is not liable in damages<sup>13</sup>.

A term specifying the day on or before which the ship is to arrive may be qualified by an exception of stress of weather or other unavoidable impediment, in which event the charterer is not excused from loading merely because the ship is delayed beyond the specified time if the shipowner has used ordinary diligence in the prosecution of the voyage to the port of loading<sup>14</sup>. The shipowner is not discharged from his duty to proceed to the port of loading by reason of the fact that it has already become impossible for the ship to arrive there by the due date<sup>15</sup>; nor can he call on the charterer to extend the time or otherwise to indicate his intention of accepting or refusing the ship<sup>16</sup>. If, however, by his conduct, the charterer leads the shipowner to believe that the ship will be loaded, and thus induces him to send the ship to the port of loading, he cannot afterwards repudiate the contract on the ground that the condition has been broken<sup>17</sup>.

1 *Bornmann v Tooke* (1808) 1 Camp 377; *Forest Oak Steam Shipping Co Ltd v Richard & Co* (1899) 5 Com Cas 100.

2 *Glaholm v Hays* (1841) 2 Man & G 257; *Sharp v Gibbs* (1857) 1 H & N 801; cf *Ollive v Booker* (1847) 1 Exch 416; *Behn v Burness* (1863) 3 B & S 751, Ex Ch.

3 As to what is meant by 'sailing' see *Van Baggen v Baines* (1854) 9 Exch 523.

4 *Shower v Cudmore* (1682) T Jo 216; *Glaholm v Hays* (1841) 2 Man & G 257.

5 *Valente v Gibbs* (1859) 6 CBNS 270 at 287 per Byles J.

6 *Croockewit v Fletcher* (1857) 1 H & N 893; and see PARA 246.

7 *Croockewit v Fletcher* (1857) 1 H & N 893.

8 *Corkling v Massey* (1873) LR 8 CP 395, 2 Asp MLC 18.

9 *Oliver v Fielden* (1849) 4 Exch 135; *Seeger v Duthie* (1860) 8 CBNS 45, Ex Ch; *Groves, Maclean & Co v Volkart Bros* (1884) Cab & El 309 (affd (1885) 1 TLR 454, CA); *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360; *Hick v Tweedy & Co* (1890) 6 Asp MLC 599; *Sanday & Co v Keighley, Maxted & Co* (1922) 15 Asp MLC 596, CA; *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164,

[1970] 3 All ER 125, [1970] 2 Lloyd's Rep 43, CA; *R Pagnan and Fratelli v NGJ Schouten NV, The Filipinas I* [1973] 1 Lloyd's Rep 349.

10 *Shadforth v Higgin* (1813) 3 Camp 385; but see *Deffell v Brocklebank* (1821) 3 Bli NS 561, HL (where the term was not treated as a condition). This condition does not excuse the shipowner from his obligation to proceed to the port of loading with reasonable dispatch, and he may be liable in damages for a breach of this obligation even if he arrives before the named date: *M'Andrew v Adams* (1834) 1 Bing NC 29.

11 *Corkling v Massey* (1873) LR 8 CP 395, 2 Asp MLC 18.

12 *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360.

13 *Harrison v Garthorne* (1872) 1 Asp MLC 303; *Donaldson Bros v Little & Co* (1882) 10 R 413.

14 *Granger v Dent* (1829) Mood & M 475; cf *John Potter & Co v Burrell & Son* [1897] 1 QB 97, 8 Asp MLC 200, CA (where the exact date of arrival was fixed in a subsequent letter).

15 *Shubrick v Salmond* (1765) 3 Burr 1637; cf *Wheeler v Bavidge* (1854) 9 Exch 668.

16 *Bucknall Bros v Tatem & Co* (1900) 9 Asp MLC 127 (where, however, the court refused an injunction restraining the shipowner from accepting other employment); *Moel Tryvan Ship Co Ltd v Andrew Weir & Co* [1910] 2 KB 844, 11 Asp MLC 469, CA (where there was a cancelling clause; it was held that the charterer was not bound to exercise his option under it before the ship arrived; and see PARA 252).

17 *Bentsen v Taylor, Sons & Co (2)* [1893] 2 QB 274, 7 Asp MLC 385, CA; *Panoutsos v Raymond Hadley Corp of New York* [1917] 1 KB 767, 14 Asp MLC 43 (affd [1917] 2 KB 473, CA).

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#### **406. Reaching the port of loading or 'so near thereto as the ship can safely get'.**

The ship must reach the port of loading specified in the charterparty or, if the charterparty so provides, 'so near thereto as she can safely get'<sup>1</sup>. The effect of the alternative provision is to excuse the shipowner from his duty to reach the port of loading if he is prevented by an obstruction involving an unreasonable delay which is not a normal incident of the voyage at the particular time in question<sup>2</sup>. Since, however, after loading, the ship has to leave the port with her cargo on board, the extent of the shipowner's duty is to be measured, when the obstruction is physical, by the capacity of the ship when loaded, and not merely by her ability to enter the port when empty<sup>3</sup>. Thus, where there is a bar obstructing access to the port of loading, the shipowner cannot be required to send his ship across the bar if, whatever the state of the water, she will be unable to recross it when loaded<sup>4</sup>; and, if she does enter and load as much cargo as can safely be carried across the bar<sup>5</sup>, he is entitled to call on the charterer to complete the loading at his own expense outside<sup>6</sup>. Where, however, the depth of water over the bar will, in the ordinary course of events, become sufficient within a reasonable time to enable the ship to cross and to recross it in safety as a laden ship, it is the shipowner's duty to wait for a reasonable time and to proceed to the actual port of loading when the water permits, and, if he fails to do so, he is liable in damages to the charterer for his breach of duty<sup>7</sup>. Similarly, where the port is tidal, the ship is bound to wait until the tide serves, including, if requisite, a spring tide<sup>8</sup>. It is immaterial that the term contains the qualification 'always afloat' if the port is accessible at certain states of the tide<sup>9</sup>. If, however, the term is further qualified by the words 'at all times of the tide', the shipowner cannot be compelled to send his ship into a port where she must necessarily take the ground when the tide is low<sup>10</sup>.

If the port or place of loading is not specified in the charterparty but is expressly left to be named by the charterer<sup>11</sup>, the effect is the same as if it had been specified in the charterparty<sup>12</sup>. In practice, it is usually provided that the charterer must name a 'safe port'<sup>13</sup>.

1 Cf throughout the cases cited as to arrival at the port of discharge: see PARA 515 et seq. The parties may substitute another port by agreement: *Jackson v Galloway* (1838) 5 Bing NC 71; cf *Plata (Owners) v Ford & Co* [1917] 2 KB 593, 14 Asp MLC 93 (where Bailhache J held that a ship which was chartered to the port of Le Havre but diverted to Cherbourg, by order of the French Admiralty, there to await her turn to proceed to and berth at Le Havre was not an 'arrived ship' on reaching Cherbourg, the shipowner's contention that she had arrived constructively being rejected).

2 *Parker v Winlow* (1857) 7 E & B 942 (delay in reaching place of destination from inability to cross mud bank except on spring tides). See also *Schilizzi v Derry* (1855) 4 E & B 873; *Geipel v Smith* (1872) LR 7 QB 404, 1 Asp MLC 268; *Nelson v Dahl* (1879) 12 ChD 568 at 592, 593, 4 Asp MLC 172 at 178, CA, per Brett LJ (affd sub nom *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL); *Castel and Latta v Trechman* (1884) Cab & El 276.

3 *Shield v Wilkins* (1850) 5 Exch 304.

4 *General Steam Navigation Co v Slipper* (1862) 11 CBNS 493; and see *Shield v Wilkins* (1850) 5 Exch 304. In this event the expenses of lightering the goods to the ship must be borne by the charterer: *Trindade v Levy* (1861) 2 F & F 441. There may, however, be a custom to load part of the cargo inside the bar and to complete the loading outside: see *Herring v Ward* (1839) 8 LJQB 218.

5 *General Steam Navigation Co v Slipper* (1862) 11 CBNS 493.

6 *Shield v Wilkins* (1850) 5 Exch 304. If, however, the ship receives a full cargo inside, the expenses of unloading for the purpose of recrossing the bar, and of reloading outside, fall on the shipowner and not on the charterer: *General Steam Navigation Co v Slipper* (1862) 11 CBNS 493 (where it was held that the goods, if received, must be carried to their destination).

7 *Schilizzi v Derry* (1855) 4 E & B 873 (where it was also held that the shipowner was not excused under an exception against 'dangers and accidents of the seas, rivers and navigation of what nature and kind soever during the voyage'); *Gifford & Co v Dishington & Co* (1871) 9 M 1045 (where the ship had crossed the bar for the purpose of loading, but refused to take on board the whole of the cargo). Cf *The Curfew* [1891] P 131, 7 Asp MLC 29, DC.

8 *Parker v Winlow* (1857) 7 E & B 942. If she has already entered, she cannot refuse to complete her loading on the ground that, the tides being neap, she will be detained, provided that she will be able to get out on a spring tide: *The Curfew* [1891] P 131, 7 Asp MLC 29, DC. See also *Gifford & Co v Dishington & Co* (1871) 9 M 1045. It may be the custom of the port to load a part of the cargo at a particular place and to complete the loading afloat: *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests Ltd* (1903) 9 Asp MLC 411.

9 *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486, 8 Asp MLC 402, HL; cf *The Curfew* [1891] P 131, 7 Asp MLC 29, DC; *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests Ltd* (1903) 9 Asp MLC 411.

10 *Horsley v Price* (1883) 11 QBD 244, 5 Asp MLC 106. Cf *Allen v Coltart* (1883) 11 QBD 782, 5 Asp MLC 104 (where the term was qualified by the words 'a dock, as ordered on arrival, if sufficient water').

11 See PARAS 243, 244, 403.

12 *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests Ltd* (1903) 9 Asp MLC 411. See also *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA; *Sanders v Jenkins* [1897] 1 QB 93. Once a port has been properly nominated, the charterer does not have the right, still less the obligation, to make a second nomination: *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1960] 1 QB 439 at 485, [1959] 3 All ER 434 at 450, [1959] 2 Lloyd's Rep 229 at 247 per McNair J (affd [1962] 1 QB 42, [1961] 2 All ER 577, [1961] 1 Lloyd's Rep 385, CA; [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL) (where the nominated port was strikebound, but the charterparty contained an exception clause in respect of strikes; McNair J was citing Devlin J in *Anglo-Danubian Transport Co Ltd v Ministry of Food* [1949] 2 All ER 1068 at 1069, 83 Ll L Rep 137 at 139); *Batis Maritime Corp v Petroleos del Mediterraneo SA, The Batis* [1990] 1 Lloyd's Rep 345 (vessel arrived at Hormuz, the nominated port, which was congested; charterers changed the nomination to Lavan Island in breach of the charter).

13 *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360. As to the meaning of 'safe port' see PARA 518. As to the master's duty when the port is not named within a reasonable time see *Sieveking v Maass* (1856) 6 E & B 670, Ex Ch. See also *Woolley v Reddelien* (1843) 5 Man & G 316; *Rae v Hackett* (1844) 12 M & W 724.

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#### 407. Meaning of 'arrived ship'.

Since, for the purpose of demurrage and damages for detention in a voyage charterparty<sup>1</sup>, time does not begin to run against the charterer until due notice of readiness to load is given after the arrival of the ship at her port of loading<sup>2</sup>, it is necessary to consider whether the ship must reach the particular berth which she is to occupy during the loading before she can be said to have 'arrived', or whether she is an 'arrived ship' when she has reached the port, so that any delay incurred afterwards in getting to the berth falls to be borne by the charterer<sup>3</sup>. The answer to this question depends on the terms of the charterparty<sup>4</sup> and the usage of the port<sup>5</sup>. The following categories of cases must be distinguished<sup>6</sup>:

- 131 (1) where the port or place of loading is to be named by the charterer<sup>7</sup>;
- 132 (2) where the destination is a port or 'so near thereto as the ship can safely get'<sup>8</sup>;
- 133 (3) where it is a specified area within a port<sup>9</sup>;
- 134 (4) where it is a still more limited or precise point such as a berth, quay or pier<sup>10</sup>;  
and
- 135 (5) where it is provided that the cargo is to be loaded 'in regular turn'<sup>11</sup>.

1 See PARA 292.

2 *Tapscott v Balfour* (1872) LR 8 CP 46, 1 Asp MLC 501; *Nelson v Dahl* (1879) 12 ChD 568 at 593, 4 Asp MLC 172 at 178, CA, per Brett LJ (affd sub nom *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL); *Pyman Bros v Dreyfus Bros & Co* (1889) 24 QBD 152, 6 Asp MLC 444; *Monsen v Macfarlane & Co* [1895] 2 QB 562, 8 Asp MLC 93, CA; *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA. The charterparty may provide that time is to be counted from some other event, eg when the ship is reported at the custom house (*Horsley Line Ltd v Roehling Bros* 1908 SC 866 (where she was reported before actually entering the harbour); *Macbeth v Wild & Co* (1900) 16 TLR 497 (where the ship was subsequently delayed by the tides for a week)) or when 24 hours have expired after the receipt of notice and no orders have been given (*Bryden v Niebuhr* (1884) Cab & El 241; *Hough v Athya & Son* (1879) 6 R 961); or from arrival at Havre Roads when Rouen was the port in question (*Steel, Young & Co v Rose, TP Richards Ltd* (1915) 139 LT Jo 28; *Larrinaga Steamship Co Ltd v Green & Co* [1916] 2 IR 126 (cited in PARA 526 note 2)).

3 *Nelson v Dahl* (1879) 12 ChD 568 at 581, 4 Asp MLC 172 at 174, CA, per Brett LJ; affd sub nom *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL.

4 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA.

5 *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC; *Modesto Pineiro & Co v Dupre & Co* (1902) 9 Asp MLC 297. The usage of the port does not apply where it is inconsistent with the charterparty: *Hick v Tweedy & Co* (1890) 6 Asp MLC 599.

6 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499 at 518, CA, per Kennedy LJ.

7 See PARAS 406, 408.

8 See PARAS 406, 408.

9 See PARA 409.

10 See PARA 410.

11 See PARA 412.

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#### 408. Arrival at port.

The voyage charterparty may provide simply that the ship is to arrive at the specified port, without any further particularity or qualification<sup>1</sup>. For these purposes, 'port' must not be applied in its geographical, fiscal or pilotage sense<sup>2</sup>; the ship has not necessarily arrived within the meaning of the charterparty because she is within the geographical or legal limits of the port<sup>3</sup>. The word must be construed in a commercial sense as meaning the area known and treated as the port by all persons engaged in the shipping of goods, whether as shippers, charterers or shipowners<sup>4</sup>. The ship is not, therefore, to be considered as having arrived until she has reached a usual place in the port at which loading vessels lie<sup>5</sup>. When she has reached this place, the ship has 'arrived' and the risk of delay in getting to her loading berth falls on the charterer<sup>6</sup>. It is not necessary for the purpose of the commencement of the lay days<sup>7</sup> that the ship should have reached the particular spot where loading is to take place<sup>8</sup>. Since, however, evidence of usage is admissible to explain the charterparty<sup>9</sup>, the charterer may succeed in proving that by the custom of the port the ship is not considered to have arrived until she has reached some particular place within the commercial port, such as a dock<sup>10</sup> or quay<sup>11</sup>, and, in such a case, until she has done so, time does not begin to run against him.

If the vessel cannot proceed immediately to a berth, she is an 'arrived ship' when she has reached a position within the port where she is at the immediate and effective disposition of the charterer. If she is at the place where waiting ships usually lie, she is in such a position unless there are some extraordinary circumstances, proof of which lies on the charterer. If the vessel is waiting at some other place in the port, it is for the shipowner to prove that she is as fully at the disposition of the charterer as she would be if she were in the vicinity of the berth for loading<sup>12</sup>.

Where the provision of a cargo is necessary to enable the ship to perform her obligation of becoming an 'arrived ship'<sup>13</sup>, the charterer is under an absolute obligation to provide a cargo in time to enable the ship to fulfil her obligation<sup>14</sup>.

The charterer is entitled to name the actual loading berth, and the ship must proceed to it before he can be called on to supply a cargo<sup>15</sup>; but, as the ship is already an 'arrived ship' within the meaning of the charterparty, time runs against him notwithstanding that the ship is delayed in reaching it<sup>16</sup>.

1 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499 at 520, CA, per Kennedy LJ.

2 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 490 at 519, CA, per Kennedy LJ, citing *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580 at 587, 5 Asp MLC 499 at 500, CA, per Brett MR. See also *Brown v Johnson* (1842) 10 M & W 331; *Kell v Anderson* (1842) 10 M & W 498; *President of India v Olympia Sauna Shipping Co SA, The Ypatia Halcoussi* [1984] 2 Lloyd's Rep 455 (three separate loading places between them over 60 miles apart could not constitute one single port).

3 *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, 5 Asp MLC 499, CA. See also *Brown v Johnson* (1842) 10 M & W 331; *Kell v Anderson* (1842) 10 M & W 498.

4 *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, 5 Asp MLC 499, CA; *Hall Bros Steamship Co Ltd v R and W Paul Ltd* (1914) 12 Asp MLC 543 (the commercial limits of the port of King's Lynn confined to the dock); *Larrinaga Steamship Co v Green & Co* [1916] 2 IR 126 (Queenstown (now Cobh) outside the commercial limits of the port of Cork); *EL Oldendorff & Co GmbH v Tradax Export SA, The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, [1973] 2 Lloyd's Rep 285, HL (where a vessel reaching the Bar anchorage at Liverpool, which was 17 miles away from the usual berth but was the usual waiting place, was held to be an 'arrived

ship'); *Venizelos ANE of Athens v Société Commerciale de Cereales et Financière SA of Zurich, The Prometheus* [1974] 1 All ER 597, [1974] 1 Lloyd's Rep 350 (where a vessel reaching the intersection anchorage at Buenos Aires, where vessels customarily waited their turn for admission to a berth, was held to be an 'arrived ship'); *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy* [1978] AC 1, [1977] 2 All ER 849, [1977] 2 Lloyd's Rep 301, HL (where a vessel was held not to be an 'arrived ship' when she anchored at the Weser Lightship anchorage 25 miles from the mouth of the River Weser and outside the legal, fiscal and administrative limits of the port). As to the effect of lack of a berthing certificate and a police permit see *Agrimpex Hungarian Trading Co for Agricultural Products v Sociedad Financiera de Bienes Raices SA* [1957] 3 All ER 626 at 636, 637, [1957] 1 WLR 1228 at 1241, 1242, [1957] 2 Lloyd's Rep 423 at 436 per Ashworth J; cf on appeal sub nom *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products* [1961] AC 135 at 173, 174, [1960] 2 All ER 578 at 588, 589, [1960] 1 Lloyd's Rep 623 at 641, 642, HL, per Lord Radcliffe. The same construction of 'port' has been applied to the International Convention relative to the Status of Enemy Merchant-Ships at the Outbreak of Hostilities (The Hague, 18 October 1907; TS 10 (1910); Cd 5031): *The Möwe* [1915] P 1, 13 Asp MLC 17; and *The Belgia* [1916] 2 AC 183, 13 Asp MLC 350, PC. As to the meaning of 'port' in relation to the law of prize see *The Roumanian* [1915] P 26, 13 Asp MLC 8; affd [1916] 1 AC 124, 13 Asp MLC 208, PC.

5 *Tapscott v Balfour* (1872) LR 8 CP 46, 1 Asp MLC 501; cf *United States Shipping Board v Frank C Strick & Co Ltd* [1926] AC 545 at 551, 17 Asp MLC 40 at 42, HL, per Cave LC.

6 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA; and see *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204 at 212, 213, 14 Asp MLC 84 at 87, CA, per Scrutton LJ.

7 As to the meaning of 'lay days' see PARA 284.

8 *Pyman Bros v Dreyfus Bros & Co* (1889) 24 QBD 152, 6 Asp MLC 444; *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA; *Van Nievelt Goudrian & Co Stoomvaart Maatschappij v CH Forslind & Son* (1925) 16 Asp MLC 521, CA.

9 See PARA 225.

10 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499 at 520, CA, per Kennedy LJ, citing *Norden Steamship Co v Dempsey* (1876) 1 CPD 654; *Brereton v Chapman* (1831) 7 Bing 559.

11 *Hick v Tweedy & Co* (1890) 6 Asp MLC 599 (where the usage was rejected as inconsistent with the charterparty); *Anglo-Hellenic Steamship Co Ltd v Louis Dreyfus & Co* (1913) 12 Asp MLC 291 (where the usage was not proved).

12 *EL Oldendorff & Co GmbH v Tradax Export SA, The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, [1973] 2 Lloyd's Rep 285, HL.

13 As to the meaning of 'arrived ship' see PARA 407.

14 *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products* [1961] AC 135, [1960] 2 All ER 578, [1960] 1 Lloyd's Rep 623, HL (where under a local regulation the ship was not allowed to enter the port without a certificate that cargo was ready to be loaded); *Sunbeam Shipping Co Ltd v President of India, The Atlantic Sunbeam* [1973] 1 Lloyd's Rep 482 (failure to obtain a document at Calcutta called a 'jetty challan'). See also *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70, [1957] 1 Lloyd's Rep 174; affd [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA (where the charterer was in breach of contract in failing to nominate a berth, and the local agent sent the ship to the buoys to await orders).

15 *The Felix* (1868) LR 2 A & E 273, as explained in *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA; *Nereide SpA di Navigazione v Bulk Oil International Ltd, The Laura Prima* [1982] 1 Lloyd's Rep 1, HL (where the charterparty stated that the vessel was to load 'at any safe place or wharf, or alongside vessels, reachable on her arrival, which shall be designated and procured by the charterer'). See also *Sociedad Carga Oceanica SA v Idolinoe Vetriebsgesellschaft mbH* [1964] 2 Lloyd's Rep 28; *Inca Compania Naviera SA and Commercial and Maritime Enterprises Evangelos P Nomikos SA v Mofinol Inc, The President Brand* [1967] 2 Lloyd's Rep 338; *Sametiet M/T Johs Stove v Istanbul Petrol Rafinerisi A/S, The Johs Stove* [1984] 1 Lloyd's Rep 38; *K/S Arnt J Moerland v Kuwait Petroleum Corp, The Fjordaas* [1988] 1 Lloyd's Rep 336; *Palm Shipping Inc v Kuwait Petroleum Corp, The Sea Queen* [1988] 1 Lloyd's Rep 500. The berth named must be a proper loading berth for the specified cargo: *Jennett v Meek* (1860) 3 LT 817; and see *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204 at 207, 14 Asp MLC 84 at 85, CA, per Swinfen Eady LJ.

16 Cf PARA 527.

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#### **409. Arrival in specified area.**

The charterparty may specify an area within a port, such as a basin, a dock or a certain distance or reach of shore on the sea coast or in a river<sup>1</sup>. In this event the ship is not an 'arrived ship' within the meaning of the charterparty until she is within the specified area<sup>2</sup>; but, once she is there, the shipowner's duty is fulfilled, and it is not necessary that the ship should actually reach her loading berth before time begins to run against the charterer<sup>3</sup>. Thus, where the specified place of loading is in dock, the ship's arrival at the dock gate is not sufficient<sup>4</sup>, except when she is prevented from entering the dock by an obstacle caused by the charterer or in consequence of the charterer's engagements<sup>5</sup>, or when, without any fault of the shipowner, she would have to wait an unreasonable time, having regard to the object of the charterparty and the interests of the parties, before she could gain admission<sup>6</sup>.

Except in these cases, she must enter the dock before the charterer's obligation to provide a cargo becomes operative<sup>7</sup>, but, unless there is a custom to the contrary, time begins to run against the charterer as soon as she has entered<sup>8</sup>. If, therefore, she is for some time unable to reach her actual loading berth, the delay falls on the charterer<sup>9</sup>. The same principle applies when the charterparty does not specify any particular dock, but provides merely that loading is to take place in a dock to be named by the charterer<sup>10</sup>.

1 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499 at 518, CA, per Kennedy LJ.

2 *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL; *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA. As to the meaning of 'arrived ship' see PARA 407.

3 *Tapscott v Balfour* (1872) LR 8 CP 46, 1 Asp MLC 501. The same principle applies where she is admitted into the dock by favour, even if she is not able to load at once: *Davies v McVeagh* (1879) 4 Ex D 265, 4 Asp MLC 149, CA.

4 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL.

5 *Ashcroft v Crow Orchard Colliery Co* (1874) LR 9 QB 540, 2 Asp MLC 397; but see *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n, 4 Asp MLC 118, CA. See also *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests Ltd* (1903) 9 Asp MLC 411 at 412 per Kennedy LJ.

6 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 54, 4 Asp MLC 392 at 397, HL, per Lord Blackburn.

7 *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL; and see *Brown v Johnson* (1842) 10 M & W 331. Cf *United States Shipping Board v Frank C Strick & Co Ltd* [1926] AC 545, 17 Asp MLC 40, HL.

8 *Tapscott v Balfour* (1872) LR 8 CP 46, 1 Asp MLC 501; *Davies v McVeagh* (1879) 4 Ex D 265, 4 Asp MLC 149, CA. See also *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC; *Anglo-Hellenic Steamship Co Ltd v Louis Dreyfus & Co* (1913) 12 Asp MLC 291.

9 *Monsen v Macfarlane & Co* [1895] 2 QB 562, 8 Asp MLC 93, CA.

10 *Tapscott v Balfour* (1872) LR 8 CP 46, 1 Asp MLC 501.

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#### **410. Arrival at berth.**

The charterparty may specify the precise spot at which the operation of loading is to take place, such as a particular quay, pier, wharf or spot, or, where the loading is to be performed by means of lighters and the ship is not to be in a shore berth, a particular mooring<sup>1</sup>. In this case the ship is not an 'arrived ship'<sup>2</sup>, and the charterer's obligation to provide a cargo does not become operative<sup>3</sup> until she has actually reached the precise spot specified in the charterparty<sup>4</sup>, except in so far as he may be under an implied obligation, referable to the known congestion at the port, to have a portion of the cargo ready for the purpose of satisfying the reasonable requirements of the dock authority and enabling the ship to gain admission<sup>5</sup>.

The same principle applies when the actual loading berth is to be named by the charterer<sup>6</sup>. In this case the charterer must name the berth within a reasonable time, otherwise he is liable for the consequences of his neglect or refusal to do so<sup>7</sup>. The berth named must be one to which, by terms of the charterparty, the charterer is entitled to direct the ship to proceed; if it is not such a berth, the charterer is responsible for any delay arising from the fact that he has named an improper berth<sup>8</sup>. The charterer is not bound to name a berth which is immediately available; a berth is not necessarily an improper berth because the ship will have to wait until the spring tide<sup>9</sup>, or because it is already engaged for other ships, not being the charterer's ships<sup>10</sup>, which will take precedence<sup>11</sup>. It must, however, be a berth which will be available within a reasonable time<sup>12</sup>.

1 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499 at 518, CA, per Kennedy LJ.

2 As to the meaning of 'arrived ship' see PARA 407.

3 The charterer's obligation is twofold: (1) an absolute obligation to provide the cargo at the port of loading; and (2) an obligation to do his part of the loading in the agreed time, ie the fixed lay days, or a reasonable time, as the case may be: *Vergottis v William Cory & Son Ltd* [1926] 2 KB 344 at 353, 17 Asp MLC 71 at 73 per Greer J, followed in *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70, [1957] 1 Lloyd's Rep 174 (affd on other grounds [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA).

4 *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL; *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA; *Cosmar Compania Naviera SA v Total Transport Corpn, The Isabelle* [1984] 1 Lloyd's Rep 366, CA.

5 *Hogarth v Cory Bros & Co* (1926) LR 53 Ind App 230, 17 Asp MLC 175, PC; and see *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products* [1961] AC 135, [1960] 2 All ER 578, [1960] 1 Lloyd's Rep 623, HL.

6 *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA, approved in *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA (where it was held that, where the charterparty provided for the naming of the port only, the charterer could not insist on the ship reaching the berth designated before she could be deemed an 'arrived ship'); *Modesto Pineiro & Co v Dupre & Co* (1902) 9 Asp MLC 297; *Stag Line Ltd v Board of Trade* [1950] 2 KB 194, [1950] 1 All ER 1105, 84 Ll L Rep 1, CA; cf *Dall'orso v Mason & Co* (1876) 3 R 419.

7 *Stewart v Rogerson* (1871) LR 6 CP 424. If the ship has already proceeded to another berth, the expenses of moving to the berth named by the charterer must be borne by the shipowner, provided that the charterer is not in default: *The Felix* (1868) LR 2 A & E 273.

8 *Harris v Jacobs* (1885) 15 QBD 247, 5 Asp MLC 531, CA; *Jaques & Co v Wilson* (1890) 7 TLR 119; cf *Jennett v Meek* (1860) 3 LT 817.

9 *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486, 8 Asp MLC 402, HL (where it was known to the owners, as well as the charterers, that the depth of water at neap tide was insufficient for a ship of the size of the chartered vessel to load always afloat). The charterparty may, however, provide for a ready berth to be named: *Harris v Jacobs* (1885) 15 QBD 247, 5 Asp MLC 531, CA.

10 *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests Ltd* (1903) 9 Asp MLC 411.

11 *Tapscott v Balfour* (1872) LR 8 CP 46, 1 Asp MLC 501; cf *Stephens, Mawson and Goss v Macleod & Co* (1891) 19 R 39. The charterer is, however, responsible for any obstacles caused by him or arising out of his

engagements: *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests Ltd* (1903) 9 Asp MLC 411 at 412 per Kennedy J.

12 *Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA; cf *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL.

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#### 411. Cases where prerequisites of 'arrival' not necessary.

Where a charterparty provides that laytime is, on the giving of notice of readiness, to commence 'whether the vessel is in port or not', the vessel must reach a usual waiting area for the port in question and the vessel must be at the immediate and effective disposition of the charterers<sup>1</sup>.

Where a charterparty provides that notice of readiness may be given 'berth or no berth', the ship's master is entitled to give notice of readiness on arrival at the customary anchorage and the notice takes effect whether or not a berth is then available for her<sup>2</sup>. However, such a term does not apply where a berth is available but is unreachable because of bad weather<sup>3</sup>. Thus, if a berth is available but unreachable because of bad weather, the ship's master is not entitled to give notice of readiness<sup>4</sup>.

The charterparty may provide that laytime is to run from an arbitrary point, such as the reporting of the ship at the custom house<sup>5</sup>.

1 *R Pagnan & Fratelli v Finagrain Compagnie Commerciale Agricole et Financière SA, The Adolf Leonhardt* [1986] 2 Lloyd's Rep 395.

2 *Marocaine de l'Industrie du Raffinage SA v Notos Maritime Corp, The Notos* [1987] 1 Lloyd's Rep 503, HL.

3 *Northfield Steamship Co v Compagnie l'Union des Gaz* [1912] 1 KB 434, CA (delay caused by regulations made by shore labourers); *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd, The Kyzikos* [1989] AC 1264, [1988] 3 All ER 745, [1989] 1 Lloyd's Rep 1, HL (since the vessel could not reach the berth available on her arrival in Houston because of fog, the master was not entitled to give notice of readiness to discharge immediately on arrival and the charterers were not liable for demurrage calculated by reference to that notice; nor did the 'whether in berth or not' clause modify or replace the provision that time lost in waiting for a berth was to count as discharging time). Where the charterparty gives a port as the destination for loading or discharge, a clause 'whether in berth or not' makes no difference to the effect of congestion on the running of time, time automatically running against the owner whether in berth or not: *Carga del Sur Compania Naviera SA v Ross T Smyth & Co Ltd, The Seafort* [1962] 2 Lloyd's Rep 147 (and see PARA 526); *EL Oldendorff & Co GmbH v Tradax Export SA, The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, [1973] 2 Lloyd's Rep 285, HL; *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy* [1978] AC 1, [1977] 2 All ER 849, [1977] 2 Lloyd's Rep 301, HL (cited in PARAS 408, 523). As to the arrival of a ship at the discharging port see PARA 515 et seq; and as to readiness to discharge see PARA 526.

4 See note 3.

5 *Horsley Line Ltd v Roechling Bros* 1908 SC 866 (where the ship was reported before she arrived in the harbour); *Compania Argentina de Navegacion de Ultramar v Tradax Export SA, The Puerto Rocca* [1978] 1 Lloyd's Rep 252.

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#### 412. Loading in regular turn.

If the charterparty provides that the cargo is to be loaded 'in regular turn'<sup>1</sup>, the lay days<sup>2</sup> do not commence until the ship's turn for loading arrives. It is not sufficient that the ship has arrived and is ready and that notice of readiness to load has been given to the charterer<sup>3</sup>. A further condition must have been fulfilled, namely the arrival of the ship's turn to occupy the loading berth<sup>4</sup>.

1 As to the meaning of 'in regular turn' see PARA 295.

2 As to the meaning of 'lay days' see PARA 284.

3 See PARAS 295, 402.

4 *United States Shipping Board v Frank C Strick & Co Ltd* [1926] AC 545, 17 Asp MLC 40, HL.

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#### 413. Readiness to load.

The ship must be ready to load, that is to say, the shipowner must be in a position to place the whole of the chartered space<sup>1</sup> at the charterer's disposal<sup>2</sup>. The charterer has no rights, however, with regard to the ship's loading gear, and, therefore, may not cancel the charterparty on the ground of the inadequacy of the loading gear unless the ship is in such a condition that the shipowner must necessarily be unable to comply with his obligation to load<sup>3</sup>. The duty must be performed within the time fixed by the charterparty, or within a reasonable time, as the case may be<sup>4</sup>; otherwise the charterer is entitled to recover damages, and may, in addition, refuse to load if the ship could not be made fit for the purpose for which she was chartered within a period of time consistent with the object of the adventure<sup>5</sup>.

A charterparty often contains an option entitling the charterer to cancel the contract if the ship is not ready to load within a specified time, and this option is not qualified by the excepted perils clause<sup>6</sup>. If, therefore, the ship has arrived at the port of loading with a cargo on board, the whole of that cargo must have been discharged before she can be said to be ready to load; it is not sufficient that part of the cargo has been discharged and that some of the holds are available for the receipt of the new cargo<sup>7</sup>. It is not, however, necessary, when she is otherwise ready to load, that she should be actually lying at her loading berth, provided that she is an 'arrived ship' within the meaning of the charterparty<sup>8</sup>.

Where the charterparty provides for ballast being supplied by the charterer before loading, on the master giving notice of readiness to receive it, the ship is not ready to load until the ballast has been supplied<sup>9</sup>; but in the absence of special term it is the shipowner's duty to provide ballast<sup>10</sup>.

A charterparty sometimes also provides that the vessel must be 'securely moored at the loading or discharging place'. This means that she must be all fast at the spot where the actual process of loading or discharging is to occur<sup>11</sup>.

1 See PARA 259. As to the effect of a declaration by the master of the quantity to be loaded, where the charterparty provides for a cargo within specified limits, see *Louis Dreyfus & Cie v Parnaso Compania Naviera SA* [1960] 2 QB 49, [1960] 1 All ER 759, [1960] 1 Lloyd's Rep 117, CA; and as to the measure of damages when

the ship is unable to carry the quantity of cargo specified see PARA 462. The ship must not load more bunker coals than are reasonably necessary for the seaworthiness of the ship on the chartered voyage: *Darling v Raeburn* [1907] 1 KB 846, 10 Asp MLC 429, CA; *London Traders Shipping Co Ltd v General Mercantile Shipping Co Ltd* (1914) 30 TLR 493, CA. Cf *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486, 8 Asp MLC 402, HL (where the ship could not remain at her berth owing to her bunker coal disturbing her trim). As to the meaning and effect of the phrase 'expected ready to load' by a given date see PARA 414.

2 *Groves, Maclean & Co v Volkart Bros* (1884) Cab & El 309 (affd (1885) 1 TLR 454, CA); *Bodewes Scheepswerion NV and Kuva NV v Highways Construction Ltd, The Jan Herman* [1966] 1 Lloyd's Rep 402; *Compania de Naviera Nedelka SA v Tradax International SA, The Tres Flores* [1974] QB 264, [1973] 3 All ER 967, [1973] 2 Lloyd's Rep 247, CA; *Compania Argentina de Navegacion de Ultramar v Tradax Export SA, The Puerto Rocca* [1978] 1 Lloyd's Rep 252; *Logs and Timber Products (Singapore) Pte Ltd v Keeley Granite (Pty) Ltd, The Freijo* [1978] 2 Lloyd's Rep 1, CA; *Gerani Compania Naviera SA v General Organisation for Supply Goods, The Demosthenes V* [1982] 1 Lloyd's Rep 275 (where the ship was held to be ready to load even though the vacuators necessary for her discharge had not yet been supplied by the owners). The ship need not be prepared to receive the particular cargo: *Vaughan v Campbell, Heatley & Co* (1885) 2 TLR 33, CA; *Grampian Steamship Co Ltd v Carver & Co* (1893) 9 TLR 210; *Sun Shipping Co v Watson and Youell Shipping Agency* (1926) 42 TLR 240 ('ready to load in all her holds'). The statement in the text was quoted with approval by Tucker LJ in *Noemijulia Steamship Co Ltd v Minister of Food* [1951] 1 KB 223, [1950] 2 All ER 699, 84 Ll L Rep 354, CA (where all the earlier authorities are reviewed).

3 *Noemijulia Steamship Co Ltd v Minister of Food* [1951] 1 KB 223, [1950] 2 All ER 699, 84 Ll L Rep 354, CA.

4 *Oliver v Fielden* (1849) 4 Exch 135.

5 See PARA 404 et seq; *Tully v Howling* (1877) 2 QBD 182, 3 Asp MLC 368, CA; cf *New York and Cuba Mail Steamship Co v Eriksen and Christensen* (1922) 27 Com Cas 330.

6 *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360; Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 370.

7 *Groves, Maclean & Co v Volkart Bros* (1884) Cab & El 309.

8 *Hick v Tweedy & Co* (1890) 6 Asp MLC 599. As to the meaning of 'arrived ship' see PARA 407. As to the meaning of 'readiness to discharge' see *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204, 14 Asp MLC 84, CA.

9 *Lyderhorn Sailing Ship Co Ltd v Duncan Fox & Co* [1909] 2 KB 929, 11 Asp MLC 291, CA; cf *Sanguinetti v Pacific Steam Navigation Co* (1876) 2 QBD 238, 3 Asp MLC 300, CA.

10 *Weir v Union Steamship Co Ltd* [1900] AC 525, 9 Asp MLC 111, HL; cf *Vaughan v Campbell, Heatley & Co* (1885) 2 TLR 33, CA. For this purpose, he may carry goods for his own profit, provided that they do not encroach on the space engaged by the charterer and are not deleterious to the cargo shipped by him: *Towse v Henderson* (1850) 4 Exch 890.

11 *Plakoura Maritime Corpn v Shell International Petroleum Co Ltd, The Plakoura* [1987] 2 Lloyd's Rep 258.

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#### **414. 'Expected ready to load'.**

The phrase 'expected ready to load' by a specified date does not import an absolute obligation that the vessel will be so ready on or about the date stated. It means that, in view of the facts known to the shipowner at the time of the making of charterparty, he honestly entertains the expectation that the ship will be so ready to load and that such expectation is based on reasonable grounds<sup>1</sup>. Whether or not such expectation is based on reasonable grounds is a question of degree<sup>2</sup>. Such an undertaking amounts to a condition of the charterparty, on breach of which the charterer may, if he so wishes, elect to be released forthwith from the performance of his further obligations under the charterparty on the basis of repudiation<sup>3</sup>. He

may validly do so without having to establish that, on the facts of the particular case, the breach has produced serious consequences which can be treated as going to the root of the contract<sup>4</sup>.

Combined with an implied term to proceed with reasonable dispatch, or an express term to the like effect, the phrase 'expected ready to load' produces an undertaking that, the ship proceeding with reasonable dispatch from wherever she is on such date, she was honestly expected in the normal course of events to arrive at the loading port or be there and ready to load at the estimated time<sup>5</sup>.

An 'estimated time of arrival' clause in a charterparty is analogous to an 'expected ready to load' clause<sup>6</sup>.

1 *Finnish Government (Ministry of Food) v H Ford & Co Ltd* (1921) 6 Ll L Rep 188; *Sanday & Co v Keighley, Maxted & Co* (1922) 10 Ll L Rep 738, CA; *Monroe Bros Ltd v Ryan* [1935] 2 KB 28, CA; *Jensen v Hollis Bros & Co Ltd* [1936] 1 All ER 140, 54 Ll L Rep 133; *Compagnie Algérienne de Meunerie v Katana Societa di Navigazione Marittima SpA, The Nizeti* [1960] 1 Lloyd's Rep 132, CA; *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, [1970] 2 Lloyd's Rep 43, CA; *R Pagnan & Fratelli v NGJ Schouten NV, The Filipinas I* [1973] 1 Lloyd's Rep 349 (where an arbitration award was remitted to an arbitrator for him to consider whether the statement that the vessel was expected ready to load was based on reasonable grounds). Many charterparties contain a cancelling clause which entitles the charterer to cancel the charterparty if the ship does not arrive at the port by a specified date: see PARA 252.

As to the meaning of 'reasonable grounds' see *Sanday & Co v Keighley, Maxted & Co* at 740 per Lord Sterndale MR; *Louis Dreyfus & Co v Lauro* (1938) 60 Ll L Rep 94 at 96 per Branson J (where the earlier authorities are reviewed); *Efploia Shipping Corpn Ltd v Canadian Transport Co Ltd, The Pantanassa* [1958] 2 Lloyd's Rep 449 at 457 per Diplock J; *R Pagnan & Fratelli v NGJ Schouten NV, The Filipinas I* at 358 per Kerr J. As to the meaning of the word 'about' in the phrase 'expected ready to load about' see *Monroe Bros Ltd v Ryan* [1935] 2 KB 28, CA; *Louis Dreyfus & Co v Lauro* (1938) 60 Ll L Rep 94.

2 *Sanday & Co v Keighley, Maxted & Co* (1922) 10 Ll L Rep 738, CA.

3 *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, [1970] 2 Lloyd's Rep 43, CA, applying *Finnish Government (Ministry of Food) v H Ford & Co Ltd* (1921) 6 Ll L Rep 188 and *Sanday & Co v Keighley, Maxted & Co* (1922) 10 Ll L Rep 738, CA; *R Pagnan & Fratelli v NGJ Schouten NV, The Filipinas I* [1973] 1 Lloyd's Rep 349; *Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd, The Mavro Vetranic* [1985] 1 Lloyd's Rep 580; *Geogas SA v Trammo Gas Ltd, The Balears* [1993] 1 Lloyd's Rep 215, CA. As to anticipatory breach of contract by repudiation see **CONTRACT** vol 9(1) (Reissue) PARA 997 et seq; and as to the effect of anticipatory breach and the remedies therefor see **CONTRACT** vol 9(1) (Reissue) PARA 1002 et seq.

4 See note 3.

5 *Monroe Bros Ltd v Ryan* [1935] 2 KB 28, CA; *Louis Dreyfus & Co v Lauro* (1938) 60 Ll L Rep 94; *Evera SA Commercial v North Shipping Co Ltd, The North Anglia* [1956] 2 Lloyd's Rep 367; *Geogas SA v Trammo Gas Ltd, The Balears* [1993] 1 Lloyd's Rep 215, CA.

6 *Mitsui OSK Lines Ltd v Garnac Grain Co Inc, The Myrtos* [1984] 2 Lloyd's Rep 449.

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#### 415. Pratique.

The shipowner does not perform his duty merely by providing a ship which is physically ready to load; he must also have obtained pratique<sup>1</sup> and have complied with any other requirements which may be imposed on him<sup>2</sup> by the law of the port of loading<sup>3</sup>. Where it is known to the shipowner that permission to load may be required from a third person, there is, however, no implied warranty that the shipowner will obtain such permission within a reasonable time, or

even that he will use reasonable diligence to obtain such permission; in such circumstances the express obligation contained in the words 'expected ready to load' is sufficient for business efficacy<sup>4</sup>.

1 *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360; *The Austin Friars* (1894) 7 Asp MLC 503; *Whites etc v The Winchester* (1886) 13 R 524; cf *Balley v De Arroyave* (1838) 7 Ad & El 919 (where the ship had not formally received pratique, but had received it in the only way in which she could have it at the particular port). 'Pratique' means permission for a disease-free ship to use a port; 'free pratique', in a public health context, means permission for a ship to disembark and commence operation (see the Public Health (Ships) Regulations 1979, SI 1979/1435, reg 2(1); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 939. The mere fact that pratique has not been obtained does not mean that the ship is not ready to load if in fact pratique can be obtained at any time and without the possibility of delaying the loading: *Shipping Developments Corp v V/O Sojuzneftexport, The Delian Spirit* [1972] 1 QB 103, [1971] 2 All ER 1060, [1971] 1 Lloyd's Rep 506, CA.

2 If the obligation is imposed on the charterer, the shipowner is not responsible: *Kirk v Gibbs* (1857) 1 H & N 810. As to the corresponding duty of the charterer to comply with the requirements of the port authority regarding the supply of cargo see *Vergottis v William Cory & Son* [1926] 2 KB 344, 17 Asp MLC 71.

3 *The Austin Friars* (1894) 7 Asp MLC 503; cf Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 510, 511. See also *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd, The Derby* [1985] 2 Lloyd's Rep 325, CA (no ITF blue card).

4 *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA* [1960] 2 QB 115, [1960] 2 All ER 55, [1960] 1 Lloyd's Rep 132, CA. As to the meaning and effect of the phrase 'expected ready to load' by a given date see PARA 414.

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#### **416. Notice of readiness and the charterer's duty to load.**

The shipowner must give the charterer notice, normally under an express term in the voyage charterparty<sup>1</sup>, that the ship has arrived and that she is ready to load her cargo at the place specified in the charterparty<sup>2</sup>. Until such notice has been received by the charterer, his obligation to provide a cargo does not arise<sup>3</sup>, and the charterparty may expressly postpone that obligation until the expiry of a specified period after the notice is received<sup>4</sup>.

An option to terminate the charterparty if the ship is not ready by a given date does not entitle the charterer to terminate merely because notice of readiness has not been given in time if the ship herself is ready<sup>5</sup>. Since, however, it is the charterer's duty to have the cargo ready for loading, time begins to run against him as soon as he has received such notice<sup>6</sup>.

1 Time charterparties do not typically contain a term requiring the owner to give notice of readiness; such a requirement is, however, sometimes implicit in a time charterparty: see eg New York Produce Exchange Form 'Time to count from 7am on the working day following that on which written notice of readiness has been given to the charterers or their agents before 4pm, but of required by charterers, they to have the privilege of using vessel at once, such time used to count as hire'.

2 *Stanton v Austin* (1872) LR 7 CP 651 at 655 per Bovill CJ; *Nelson v Dahl* (1879) 12 ChD 568 at 581, 4 Asp MLC 172 at 173, CA, per Brett LJ (affd sub nom *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL). Cf *Gerani Compania Naviera SA v General Organisation for Supply Goods, The Demosthenes V* [1982] 1 Lloyd's Rep 275; *NZ Michalos v Food Corp of India, The Apollon* [1983] 1 Lloyd's Rep 409; *President of India v Diamantis Pateras (Hellas) Marine Enterprises Ltd, The Nestor* [1987] 2 Lloyd's Rep 649; *Unifert International SARL v Panous Shipping Co Inc, The Virginia M* [1989] 1 Lloyd's Rep 603; *Transgrain Shipping BV v Global Transporte Oceanico SA, The Mexico I* [1990] 1 Lloyd's Rep 507, CA (all relating to notice of readiness to discharge). As to terms requiring written notice of readiness to load see PARA 294.

3 *Fairbridge v Pace* (1844) 1 Car & Kir 317 (where the ship had first to unload her outward cargo); *Stanton v Austin* (1872) LR 7 CP 651 (where the ship was chartered whilst lying at the port of loading).

4 *Gordon v Powis* (1892) 8 TLR 397 ('captains or owners to telegraph advising probable arrival, and at least eight clear days' notice shall be given previous to requiring cargo').

5 *Nordiska Lloyd Akt v C Brownlie & Co (Hull) Ltd* (1925) 22 Ll L Rep 79, CA.

6 See PARAS 294, 423.

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#### **417. Position of shipper other than charterer.**

Where goods are to be shipped by a shipper other than the charterer, the shipowner, except in so far as he may be bound to accept the goods if delivered to him for carriage<sup>1</sup>, owes no duties to the shipper until the contract under which the goods are to be carried is made. He is bound to carry the goods in accordance with the contract, when made; if, therefore, after making the contract, he is unable to receive them on board through lack of space, he is guilty of a breach of contract, the measure of damages being, presumably, any extra freight which may have to be paid<sup>2</sup>, and any expenses incurred in warehousing the goods until they can be sent on by another ship<sup>3</sup>.

1 See PARA 433 et seq.

2 Cf *Featherston v Wilkinson* (1873) LR 8 Exch 122, 2 Asp MLC 31.

3 Cf *Welch Perrin & Co v Anderson, Anderson & Co* (1891) 7 Asp MLC 177, CA; and PARAS 461-463. As to damages generally see **DAMAGES** vol 12(1) (Reissue) PARA 801 et seq.

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#### **418. Implied undertaking of seaworthiness during loading.**

There is one undertaking which, at common law<sup>1</sup>, is implied in the contract of carriage, whether contained in a charterparty<sup>2</sup>, bill of lading or otherwise<sup>3</sup>, namely that the ship on which goods are to be loaded must be seaworthy at the time when the loading begins<sup>4</sup>. If, therefore, she is not seaworthy, in the sense of being fit to receive her cargo<sup>5</sup>, she cannot be considered ready to load; the owner of the goods is justified in refusing to put them on board<sup>6</sup>, and may further maintain an action against the shipowner for breach of the undertaking<sup>7</sup>. If the breach of the undertaking is not discovered until after the goods have been loaded, their owner may demand their redelivery, and the shipowner will not only be bound to redeliver them but must also pay damages, the measure of damages being the expenses incurred in landing and warehousing the goods and the amount of any damage actually sustained by them<sup>8</sup>.

The breach of the undertaking does not usually become apparent until after the ship has sailed and redelivery has, therefore, become impossible, in which case the shipowner is liable for all

loss or damage sustained by the goods<sup>9</sup>; he must discharge any liabilities to third persons to which the goods may become subject in consequence of his breach of the undertaking, such as liens for salvage<sup>10</sup> or general average contributions<sup>11</sup>, but he is at the same time precluded from asserting against the owner of the goods any claim for general average contributions in his own right<sup>12</sup>. Where the ship is employed under a charterparty, the shipowner must indemnify the charterer against the claims of third persons whose goods have been carried in the ship and who, under the particular contract of carriage, have the right to hold the charterer responsible for breach of the undertaking<sup>13</sup>.

1 There is not to be implied in any contract for the carriage of goods by sea to which the Hague-Visby Rules apply, any absolute undertaking by the carrier of the goods to provide a seaworthy ship; instead the carrier is bound before and at the beginning of the voyage only to exercise due diligence to make the ship seaworthy: see PARAS 371, 376.

2 As to whether the undertaking is implied in a charterparty by demise see PARA 264 note 1.

3 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 86, 3 Asp MLC 516 at 519, HL, per Lord Blackburn. As to charterparties by demise see PARAS 210-212.

4 *Kopitoff v Wilson* (1876) 1 QBD 377 at 380, 3 Asp MLC 163 at 165; *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374; *Gibson v Small* (1853) 4 HL Cas 353 at 395. As to the meaning of 'efficient' in a time charterparty see *Hogarth v Miller, Bro & Co* [1891] AC 48, 7 Asp MLC 1, HL; and as to seaworthiness at the commencement of the voyage see PARA 464.

5 *McFadden v Blue Star Line* [1905] 1 KB 697, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55. Defects capable of repair without disturbing the due course of loading do not entitle the charterer to refuse to load even though there is an express warranty of seaworthiness which has already attached: see *New York and Cuba Mail Steamship Co v Eriksen and Christensen* (1922) 27 Com Cas 330.

6 *Stanton v Richardson* (1875) 3 Asp MLC 23, HL; *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 77, 3 Asp MLC 516 at 517, HL, per Lord Cairns LC.

7 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 77, 3 Asp MLC 516 at 517, HL, per Lord Cairns LC.

8 *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

9 *Kopitoff v Wilson* (1876) 1 QBD 377, 3 Asp MLC 163; *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374; *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL. See also *Bank of Australasia v Clan Line Steamers Ltd* [1916] 1 KB 39, 13 Asp MLC 99, CA (cited in PARA 320 note 20).

10 *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413.

11 Cf *Robinson v Price* (1877) 2 QBD 295, 3 Asp MLC 407, CA.

12 *Schloss v Heriot* (1863) 14 CBNS 59; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC. See further PARA 610.

13 Cf *Scott v Foley, Aikman & Co* (1899) 5 Com Cas 53.

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#### **419. Scope of undertaking of seaworthiness during loading.**

The undertaking of seaworthiness during loading, which must be distinguished from the wider undertaking which comes into operation at the time of sailing<sup>1</sup>, comprises the following requirements.

The ship must be seaworthy in the strict sense of the word, that is to say, she must be reasonably fit to encounter the ordinary perils which are likely to arise during the loading<sup>2</sup>. Therefore, unless she is in a condition in all respects to render her reasonably safe during her stay in port and while loading, the owner of the goods may refuse to put them on board<sup>3</sup>. It is not necessary that she should be seaworthy in the sense that she is fit to begin her voyage<sup>4</sup>, provided that she is capable of being made seaworthy in that sense within a reasonable time<sup>5</sup>.

The ship must be seaworthy in the sense that she is reasonably fit for the reception of the goods contracted to be carried, and for carrying them on the voyage<sup>6</sup>, that is to say she must be cargo-worthy or the owner of the goods may refuse to load her<sup>7</sup>. The fitness of the ship must be measured by the particular cargo which she is under contract to carry<sup>8</sup>; if she is not fit to carry that cargo, there is a breach of the undertaking notwithstanding that she may be fit to carry any other cargo that might have been put forward<sup>9</sup>. Similarly, where the contract cargo is composed of different kinds of goods, she must be fit to carry them all; it is not sufficient that she is fit to carry some of them, if she is unfit to carry others<sup>10</sup>. The fitness of the ship to receive a particular cargo must, however, be judged without reference to the shipowner's intentions in regard to subsequent shipments under separate contracts<sup>11</sup>, for the addition of a deleterious cargo is bad stowage, not unseaworthiness, unless the effect is to endanger the safety of the ship on sailing<sup>12</sup>. The owner of the goods is not entitled to refuse to load them merely because he believes that the ship is unfit to carry them; to justify his refusal he must prove that she is in fact unfit to do so<sup>13</sup>.

1 *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374; *McFadden v Blue Star Line* [1905] 1 KB 697 at 704, 10 Asp MLC 55 at 57 per Channell J; and see PARA 464. As to the effect of the ship being unseaworthy on starting her voyage to the port of loading see *Porter v Izat* (1836) 1 M & W 381.

2 *McFadden v Blue Star Line* [1905] 1 KB 697 at 704, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55 at 57 per Channell J.

3 *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374; *Gibson v Small* (1853) 4 HL Cas 353; *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 77, 3 Asp MLC 516 at 517, HL, per Lord Cairns LC.

4 *Annen v Woodman* (1810) 3 Taunt 299.

5 *Tully v Howling* (1877) 2 QBD 182, 3 Asp MLC 368, CA; cf *New York and Cuba Mail Steamship Co v Eriksen and Christensen* (1922) 27 Com Cas 330.

6 *McFadden v Blue Star Line* [1905] 1 KB 697, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55; *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774.

7 As a general rule this kind of unfitness is not likely to be discovered until after the ship has put to sea, and the remedy of the owner of the goods will, therefore, be damages: see PARA 472.

8 *Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, 8 Asp MLC 65, CA.

9 *Stanton v Richardson* (1875) 3 Asp MLC 23, HL. A ship chartered to carry grain in bulk may be unseaworthy if she has no shifting boards: *Rederi AB Unda v WW Burdon & Co* (1937) 57 Ll L Rep 95.

10 *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

11 *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, 16 Asp MLC 351, HL. Cf *The Thorsa* [1916] P 257, 13 Asp MLC 592, CA; and *Upperton v Union-Castle Mail Steamship Co Ltd* (1902) 9 Asp MLC 475, CA.

12 *Upperton v Union-Castle Mail Steamship Co Ltd* (1902) 9 Asp MLC 475, CA; *Ingram and Royle Ltd v Services Maritimes du Tréport* [1913] 1 KB 538, 12 Asp MLC 295 (revsd on the question of limitation of liability [1914] 1 KB 541, 12 Asp MLC 387, CA); *Kopitoff v Wilson* (1876) 1 QBD 377, 3 Asp MLC 163.

13 *Towse v Henderson* (1850) 4 Exch 890.

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#### **420. What constitutes breach of undertaking of seaworthiness during loading.**

The duty imposed on the shipowner by the requirement of seaworthiness during loading is absolute; if the ship is in fact unfit at the time when the undertaking comes into operation, it does not matter that her unfitness is due to some latent defect of which he did not know, and it is no excuse for the existence of such a defect that he has used his best endeavours to make the ship as good as she can be made<sup>1</sup>. If, for example, in the course of the voyage, owing to a foul bill of health the ship will inevitably be subjected to a process of fumigation harmful to the cargo, she is deemed unfit, at the port of loading, to receive that cargo<sup>2</sup>. The place provided by the shipowner for the stowage of the cargo during the voyage must be free from defects rendering it an unsafe place of stowage<sup>3</sup>. It is immaterial whether the defect is one of construction (as, for example, where bullion is placed in a bullion room which is not reasonably fit to resist thieves<sup>4</sup>), or whether it is one of a temporary nature (as, for example, where the cargo is placed in a hold which has not been properly cleansed<sup>5</sup>, or which already contains goods which, from their nature, are likely to have a deleterious effect on the cargo in question, and there is no space for this cargo in another part of the ship<sup>6</sup>).

The defect may be outside the place of stowage altogether<sup>7</sup>; thus, where, from the nature of the cargo, special machinery or plant<sup>8</sup> is required for the purpose of keeping it in a proper state throughout the voyage, such as pumps for drawing off the drainage from a cargo of wet sugar<sup>9</sup>, or refrigerating plant for preserving a cargo of frozen meat<sup>10</sup>, or fans for ventilating a cargo of live cattle<sup>11</sup>, the machinery or plant supplied by the shipowner must be reasonably fit for the purpose. There is a breach of the undertaking if they prove inadequate<sup>12</sup> or if, during the voyage, they break down or fail to act owing to some initial defect<sup>13</sup>.

1 *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413. After the goods have been shipped, they are in the custody of the shipowner as carrier, and he is liable for any accident as an insurer unless protected by an express or implied exception: see *McFadden v Blue Star Line* [1905] 1 KB 697 at 705, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55 at 57 per Channell J ('refrigerator bill', implied obligation to provide refrigerating machinery in proper working condition); and PARA 447 et seq. Cf the position when the Hague-Visby Rules apply: see PARAS 371, 376.

2 *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774 (lemons damaged by sulphur fumes); and see PARA 270 note 9.

3 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 86, 3 Asp MLC 516 at 519, HL, per Lord Blackburn; *The Europa* [1908] P 84, 11 Asp MLC 19, DC. A ship is not, however, unseaworthy merely because the cargo is stowed in a portion of a compartment less suitable for its carriage than another portion of the same compartment, this being a case of bad stowage: *Calcutta Steamship Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395. As to the distinction between unseaworthiness and bad stowage see *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, 16 Asp MLC 351, HL; and PARA 467.

4 *Queensland National Bank v Peninsular and Oriental Steam Navigation Co* [1898] 1 QB 567, 8 Asp MLC 338, CA; cf *Lund v Thames and Mersey Marine Insurance Co Ltd* (1901) 17 TLR 566 (where the vessel was so constructed as to render the refrigerating apparatus unsafe) and *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL (where a pipe was so placed as to be broken by the pressure of the cargo).

5 *Tattersall v National Steamship Co* (1884) 12 QBD 297, 5 Asp MLC 206; *Elderslie Steamship Co v Borthwick* [1905] AC 93, 10 Asp MLC 24, HL; cf *Ismay, Imrie & Co v Blake* (1892) 7 Asp MLC 189.

6 *The Thorsa* [1916] P 257, 13 Asp MLC 592, CA; *Upperton v Union-Castle Mail Steamship Co Ltd* (1902) 9 Asp MLC 475, CA; but see *Werner v Det Bergenske Dampskibsselskab* (1926) 17 Asp MLC 18; *Towse v Henderson* (1850) 4 Exch 890 (where the goods already on board were not in fact deleterious); cf *Freedom (Owners) v Simmonds, Hunt & Co, The Freedom* (1871) LR 3 PC 594, 1 Asp MLC 28. The shipowner may,

however, claim the protection of an appropriate exception where the loss or damage is caused by the subsequent shipment of other goods: *Norman v Binnington* (1890) 25 QBD 475, 6 Asp MLC 528, DC.

7 *McFadden v Blue Star Line* [1905] 1 KB 697, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55; *Rathbone Bros & Co v D MacIver, Sons & Co* [1903] 2 KB 378, 9 Asp MLC 467, CA; *The Schwan* [1909] AC 450, 11 Asp MLC 286, HL; *The Europa* [1908] P 84, 11 Asp MLC 19; *Radcliffe & Co v Compagnie Générale Transatlantique* (1918) 35 TLR 65, CA (unnamed ship in time of war).

8 It is the shipowner's duty to supply such machinery or plant: see the cases cited below and in PARAS 482-484. There is no breach of this duty where he omits to provide plant which he is, by statute, required to provide for some purpose not relating to the safe carriage of the goods: *Gorris v Scott* (1874) LR 9 Exch 125, 20 Asp MLC 282 (where the shipowner was under a statutory obligation to provide pens for sheep as a precaution against disease; it was held that he was not liable for the loss of sheep which had been washed overboard owing to the absence of the pens). As to the carrier's obligation under the Hague-Visby Rules see PARA 377.

9 *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

10 *The Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, CA; *Lund v Thames and Mersey Marine Insurance Co Ltd* (1901) 17 TLR 566; *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16, 10 Asp MLC 581, HL; cf *The Marathon* (1879) 4 Asp MLC 75.

11 Cf *Sleigh v Tyser* [1900] 2 QB 333, 9 Asp MLC 97.

12 *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

13 *Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, 8 Asp MLC 65, CA.

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#### 421. Effect of exceptions.

The shipowner is not protected against the consequences of a breach of the undertaking of seaworthiness during loading by the ordinary exceptions contained in the charterparty or bill of lading<sup>1</sup>. Those exceptions relate only to his liability as carrier<sup>2</sup>, and presuppose a due performance of the undertaking precedent to the loading<sup>3</sup>. An intention to exclude any such undertaking, and to protect the shipowner against his failure to perform it, must be indicated by an express term<sup>4</sup>, framed in clear and unambiguous language<sup>5</sup>. Under the ordinary forms of terms in use the shipowner is not relieved entirely from his duty to make the ship seaworthy<sup>6</sup>; it is usually provided either that he is not to be liable for unseaworthiness, provided that all reasonable means have been taken to provide against it<sup>7</sup>, or, in more stringent terms, that any latent defects in hull or machinery are not to be considered unseaworthiness, provided that they do not result from want of due diligence on the part of the shipowner or his employees<sup>8</sup>.

1 *The Europa* [1908] P 84, 11 Asp MLC 19, DC; *Bank of Australasia v Clan Line Steamers Ltd* [1916] 1 KB 39, 13 Asp MLC 99, CA. As to the position when the Hague-Visby Rules apply see PARA 372 et seq.

2 *Lyon v Mells* (1804) 5 East 428.

3 *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413; *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL (following *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL); *Tattersall v National Steamship Co* (1884) 12 QBD 297, 5 Asp MLC 206; and see *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 AC 250, 15 Asp MLC 566, HL; and PARA 309 note 1. Cf *Christie v Trott* (1853) 2 WR 15.

4 *The Laertes (Cargo ex)* (1887) 12 PD 187, 6 Asp MLC 174; *McFadden v Blue Star Line* [1905] 1 KB 697, 10 Asp MLC 55.

5 *Rathbone Bros & Co v D MacIver, Sons & Co* [1903] 2 KB 378, 9 Asp MLC 467, CA; *Elderslie Steamship Co v Borthwick* [1905] AC 93, 10 Asp MLC 24, CA; *Nelson Line (Liverpool) Ltd v James Nelson & Sons* [1908] AC 16, 10 Asp MLC 581, HL. 'Steamer to clean for charterer's inspection to the satisfaction of charterer's inspector' has been held not to cut down the 'warranty of seaworthiness' which in this case was express: *Petrofina SA of Brussels v Compagnia Italiana Trasporto Olii Minerali of Genoa* (1937) 53 TLR 650, CA.

6 Cf *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 89, 3 Asp MLC 516 at 520, HL, per Lord Blackburn; *Minister of Materials v Wold Steamship Co Ltd* [1952] 1 Lloyd's Rep 485 (ship not answerable for latent defect in machinery or hull not resulting from want of due diligence by the owners).

7 As to the scope of such an exception see *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16, 10 Asp MLC 581, HL; *Rathbone Bros & Co v D MacIver, Sons & Co* [1903] 2 KB 378, 9 Asp MLC 467, CA; *Werner v Det Bergenske Dampskibsselschaft* (1926) 24 Ll L Rep 75 (meaning of 'experienced or qualified officers' in a protective clause). See also *Cosmopolitan Shipping Co Inc v Hatton and Cookson Ltd (Liverpool)* (1929) 18 Asp MLC 130, CA.

8 *The Laertes (Cargo ex)* (1887) 12 PD 187, 6 Asp MLC 174; cf *Elderslie Steamship Co v Borthwick* [1905] AC 93, 10 Asp MLC 24, HL. As to the carrier's obligations where the Hague-Visby Rules apply see PARA 376 et seq.

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#### **422. Unseaworthiness subsequently arising.**

The shipowner has sufficiently performed his duty as regards the loading stage if the ship which he provides is seaworthy at the commencement of the loading; it is not an implied undertaking that she is to continue to be seaworthy during the loading<sup>1</sup>. If, therefore, before the completion of loading she becomes unseaworthy and damage results, the shipowner is not precluded thereby from relying on the exceptions<sup>2</sup>, as the first stage of the adventure<sup>3</sup>, to which the exceptions apply, has begun<sup>4</sup>.

1 *McFadden v Blue Star Line* [1905] 1 KB 697 at 703, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55 at 57 per Channell J. Loading is incomplete until everything has been done that is necessary to put the cargo in a condition in which it can be carried: *C Wilh Svenssons Travaruaktiebolag v Cliffe Steamship Co* [1932] 1 KB 490 at 495, 18 Asp MLC 284 at 286 per Wright J.

2 *The Southgate* [1893] P 329.

3 As to the necessity for the ship being seaworthy when she sets sail see PARA 464 et seq.

4 *Norman v Binnington* (1890) 25 QBD 475, 6 Asp MLC 528, DC.

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#### **(B) PROVISION OF A CARGO**

##### **423. When cargo must be ready.**

When the ship has arrived at the port or place of loading<sup>1</sup> and is ready to load and the charterer has been duly notified, it is the voyage-charterer's<sup>2</sup> duty to provide the stipulated cargo<sup>3</sup> within the time specified in the charterparty or, if no time is specified, within a reasonable time<sup>4</sup>.

From where this cargo is to be procured and how it is to be transported to the place of loading are matters which precede the whole operation of loading, and form no part of it, but belong to that which, in the absence of an express term, is exclusively the charterer's business<sup>5</sup>. They fall wholly outside the charterparty, and do not in any way concern the shipowner, since the charterparty contemplates that the charterer will have his cargo ready at the place of loading at the time when the ship is ready to receive it<sup>6</sup>. If, therefore, the cargo is not ready at the place of loading, so that the loading of the ship is prevented or delayed, the charterer is, generally speaking, guilty of a breach of contract, which, if the delay lasts for an unreasonable time<sup>7</sup>, discharges the shipowner from his obligation to receive the cargo, and in any event entitles him to damages<sup>8</sup>, whatever may be the cause to which the delay or impossibility is attributable<sup>9</sup>. To entitle a shipowner to rescind a charterparty for the charterer's delay in providing a cargo, where time is not made of the essence of the contract, the delay must be such as to frustrate the object of the charterparty<sup>10</sup>. The assessment of what period is sufficient for this purpose is a question of fact<sup>11</sup>.

1 As to the meaning of 'arrived ship' see PARA 407.

2 Absent express terms, a time-charterer owes no duty to an owner to load goods: the owner of a vessel under time-charter earns hire whether the charterer loads goods or not.

3 *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 619, 4 Asp MLC 302 at 306, 307, HL, per Lord Blackburn; *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470 at 475, 476, 5 Asp MLC 353 at 355, HL, per Lord Selborne LC; *Ardan Steamship Co Ltd v Andrew Weir & Co* [1905] AC 501, 10 Asp MLC 135, HL. See also the cases cited in notes 4-11; and in PARA 424.

4 *Dimech v Corlett* (1858) 12 Moo PCC 199; *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491. The charterer must also procure any permit that may be necessary for the shipment of the cargo: *Kirk v Gibbs* (1857) 1 H & N 810. As to what is a sufficient compliance with this requirement see *Johnson v Greaves* (1810) 2 Taunt 344; *Haines v Busk* (1814) 5 Taunt 521. Loading is not complete until the cargo is so placed that the ship can proceed in safety: *Argonaut Navigation Co v Ministry of Food, SS Argobec* [1949] 1 KB 572, [1949] 1 All ER 160, 82 Ll L Rep 223, CA (where bagging was necessary). It must be borne in mind that loading is a joint operation, and each party must do what is reasonable to enable the other to do his part: see PARAS 427-429.

5 *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470 at 475, 5 Asp MLC 353 at 355, HL, per Lord Selborne LC; and see PARA 425. The preparation of the cargo for shipment (eg by pressing bales of wool) is equally outside the charterparty: *Cockburn v Alexander* (1848) 6 CB 791.

6 *Kay v Field* (1882) 10 QBD 241 at 249, 4 Asp MLC 588 at 591, CA, per Lindley LJ.

7 *Matthews v Lowther* (1850) 5 Exch 574; *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491. In *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193 at 201, 14 Asp MLC 110 at 115, 116, CA, Scrutton LJ expressed the opinion that, to enable the shipowner to abandon the charterparty without the charterer's consent, there must either be such a failure to load as amounts to a repudiation or such a commercial frustration of the adventure by delay as puts an end to the contract.

8 *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL; *Fenwick v Schmalz* (1868) LR 3 CP 313. As to damages see also PARA 458 et seq. In *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products* [1961] AC 135, [1960] 2 All ER 578, sub nom *Agrimpex Hungarian Trading Co for Agricultural Products v Sociedad Financiera de Bienes Raices SA* [1960] 1 Lloyd's Rep 623, HL (distinguishing *Mackay v Dick* (1881) 6 App Cas 251, HL) the ship was prevented from getting into port because the cargo was not available for loading, although it was subsequently available and loaded; as the charterers' primary obligation to enable the ship to become an 'arrived ship' was not fulfilled, their liability for the delay sounded in damages, and not in payment of the agreed rate of demurrage from the date when the lay days began. See also *Sunbeam Shipping Co Ltd v President of India, The Atlantic Sunbeam* [1973] 1 Lloyd's Rep 482.

9 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; but see *Ardan Steamship Co v Andrew Weir & Co* [1905] AC 501, 10 Asp MLC 135, HL (in the absence of something to qualify it the undertaking of the charterer to furnish a cargo is absolute); *Barker v Hodgson* (1814) 3 M & S 267 (if performance becomes illegal by the law of this country, the contract is dissolved by frustration). As to when the charterer is excused see PARA 427 et seq.

10 *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 430, [1957] 2 All ER 70 at 80, [1957] 1 Lloyd's Rep 174 at 189 per Devlin J (affd on other grounds [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA), following *Clipsham v Vertue* (1843) 5 QB 265; *Tarrabochia v Hickie* (1856) 1 H & N 183; and *Stanton v Richardson* (1872) LR 7 CP 421, 1 Asp MLC 449 (affd (1874) LR 9 CP 390, Ex Ch; on appeal (1875) 3 Asp MLC 23, HL). See also *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, [1961] 2 Lloyd's Rep 478, CA.

11 *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 435, [1957] 2 All ER 70 at 83, [1957] 1 Lloyd's Rep 174 at 192; affd on other grounds [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA; and followed in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, [1961] 2 Lloyd's Rep 478, CA.

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#### 424. Charterer's duty to procure cargo.

In performing his duty, the voyage-charterer must first procure a cargo<sup>1</sup>. The cargo must correspond with the description of the cargo in the charterparty<sup>2</sup>, and must be of the specified quantity<sup>3</sup>. Generally, the charterer is responsible for a failure to procure a cargo in due time or at all<sup>4</sup>. Even the impossibility of procuring a cargo does not excuse him<sup>5</sup>. The specified cargo may not exist<sup>6</sup>; it may be impossible in the existing state of things to obtain it<sup>7</sup>; or its exportation may be restricted<sup>8</sup> or prohibited<sup>9</sup> by the government of the place from where it is to be procured. Nevertheless, in all these cases the charterer is responsible for his failure, whether total<sup>10</sup> or partial<sup>11</sup>, to procure the cargo, unless the whole transaction is vitiated by illegality<sup>12</sup>.

1 *Adams v Royal Mail Steam-Packet Co* (1858) 5 CBNS 492; *Elliott v Lord* (1883) 5 Asp MLC 63, PC; *Barker v Hodgson* (1814) 3 M & S 267 at 270 per Lord Ellenborough CJ. As to time-charterers see PARA 423 note 2.

2 *Lewis v Marshall* (1844) 7 Man & G 729; *Warren v Peabody* (1849) 8 CB 800; *Shaw, Savill & Co v Aitken, Lilburn & Co* (1883) Cab & El 195; and see PARA 257 et seq.

3 *Hunter v Fry* (1819) 2 B & Ald 421; *Morris v Levison* (1876) 1 CPD 155, 3 Asp MLC 171; cf *Gibbs v Grey, Grey v Gibbs* (1857) 2 H & N 22; *Aktieselskabet Reidar v Arcos Ltd* [1926] 2 KB 83 (affd [1927] 1 KB 352, 17 Asp MLC 144, CA) (charterers liable for dead freight although a full winter cargo loaded because, if loading had been completed within the lay days, a summer cargo might have been shipped); *Total Transport Corp v Amoco Trading Co, The Altus* [1985] 1 Lloyd's Rep 423 (charterer liable for dead freight and for damages for the loss of demurrage resulting from their failure to load the minimum cargo). See also PARA 259.

4 *Elliott v Lord* (1883) 5 Asp MLC 63, PC; *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA; *Jenkins v L Walford (London) Ltd* (1917) 87 LjKB 136; *China Offshore Oil (Singapore) International Pte Ltd v Giant Shipping Ltd, The Posidon* [2001] 1 All ER (Comm) 429, [2001] 1 Lloyd's Rep 697.

5 See the cases cited in notes 6-9; cf *Braemount Steamship Co Ltd v Andrew Weir & Co* (1910) 11 Asp MLC 345 at 347 per Bray J.

6 *Hills v Sughrue* (1846) 15 M & W 253 (where the contract placed the duty on the shipowner).

7 *Elliott v Lord* (1883) 5 Asp MLC 63, PC; *Adams v Royal Mail Steam-Packet Co* (1858) 5 CBNS 492; *Gardiner v Macfarlane, M'Crindell & Co, The Lismore* (1889) 16 R 658; *Arden Steamship Co Ltd v William Mathwin & Son* 1912 SC 211.

8 *Kirk v Gibbs* (1857) 1 H & N 810.

9 *Blight v Page* (1801) 3 Bos & P 295n; *Sjoerds v Luscombe* (1812) 16 East 201; *Barker v Hodgson* (1814) 3 M & S 267 (in consequence of an infectious disorder at the port of loading it was forbidden to send the cargo alongside the ship).

10 *Blight v Page* (1801) 3 Bos & P 295n.

11 *Elliott v Lord* (1883) 5 Asp MLC 63, PC; *Kirk v Gibbs* (1857) 1 H & N 810.

12 As to illegality see PARA 233. Where a contract provides for an act to be done in a foreign country, then, in the absence of very special circumstances, it is an implied term of the continuing validity of such a provision that the act to be done in the foreign country is not to be illegal by the law of that country: see *Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 at 304, 15 Asp MLC 33 at 43, CA, per Scrutton LJ; *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 KB 172, 16 Asp MLC 501, CA; *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301, [1957] 3 All ER 286, [1957] 2 Lloyd's Rep 289, HL.

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#### 425. Transporting goods to place of loading.

After procuring the cargo, the voyage-charterer must have it delivered to the place of shipment so that it may be ready for loading<sup>1</sup>. Transporting cargo to the place of shipment is not part of the loading<sup>2</sup>, and the charterer is usually responsible for all delays or accidents, however caused, in so transporting the cargo<sup>3</sup>. Where, however, it is the practice in a particular trade not to store the cargo at the place of loading, but to store it at a distance until required<sup>4</sup>, or to bring it direct from the place where it is procured to the ship<sup>5</sup>, being practically, according to known commercial usage, the only place from which the cargo can be brought to be loaded, the transportation of the cargo to the ship is then to be considered as part of the act of loading<sup>6</sup>, and the charterer's responsibility as regards the delivery is then qualified by any appropriate exceptions applicable to the loading<sup>7</sup>. It may, however, be that a reference in an exception to a specific cause of delay must be applied to something extraneous to the place and operation of loading because it is inappropriate to the actual loading, for example a mention of collieries or mines in a coal charterparty<sup>8</sup>.

The charterer may, however, be excused for a breach of his duty to provide a cargo in certain circumstances, or by exceptions in the charterparty covering the cause of the breach<sup>9</sup>.

1 *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL; and see PARA 423.

2 *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA; *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL. Hence the charterer may choose his own means of transportation; where, therefore, he is put to extra expense (eg for detention of railway trucks) by reason of the shipowner's failure to be ready, the shipowner must pay it, notwithstanding that it might have been avoided if the charterer had followed the ordinary course of business at the particular dock: *Welch Perrin & Co v Anderson, Anderson & Co* (1891) 7 Asp MLC 177, CA.

3 *Kearon v Pearson* (1861) 7 H & N 386; *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA; *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL; *Furness v Forwood Bros & Co* (1897) 8 Asp MLC 298; and see PARA 430.

4 *Hudson v Ede* (1868) LR 3 QB 412, Ex Ch, distinguished in *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL.

5 *Smith and Service v Rosario Nitrate Co* [1894] 1 QB 174, 7 Asp MLC 417, CA (following *Hudson v Ede* (1868) LR 3 QB 412, Ex Ch); *Furness v Forwood Bros & Co* (1897) 8 Asp MLC 298.

6 *Hudson v Ede* (1868) LR 3 QB 412, Ex Ch (where the charterer was held not liable for delay in shipping a cargo of grain due to ice in the Danube impeding its transportation by lighters from the place of storage to the ship, inasmuch as detention by ice was excepted and it was well known in the grain trade that grain to be shipped at the place in question was stored up river and brought down direct to the ship in lighters). Cf *Matheos*

(*Owners*) v *Louis Dreyfus & Co* [1925] AC 654, 16 Asp MLC 486, HL (where the operation of a similar exception was confined to specified limits).

7 *Allerton Sailing Ship Co Ltd v Falk* (1888) 6 Asp MLC 287, distinguishing *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL.

8 *Bunge y Born Lda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799 at 817, 16 Asp MLC 545 at 550, HL, per Lord Sumner.

9 See PARA 426 et seq.

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#### **426. Effect of breach of condition precedent by shipowner.**

Where the shipowner has already failed to perform a condition precedent to the loading<sup>1</sup>, the contract is discharged<sup>2</sup>, and the voyage-charterer may, therefore, refuse to provide a cargo<sup>3</sup>. He cannot, however, refuse to do so if he has waived the breach of condition<sup>4</sup>.

1 The failure to perform a term which is a condition precedent to some other obligation, but not to the loading, is not sufficient: *Storer v Gordon* (1814) 3 M & S 308.

2 If the shipowner is guilty of a breach of a term which is not a condition, the charterer is not excused: *Olhson v Drummond* (1785) 2 Chit 705; *Barker v Windle* (1856) 6 E & B 675, Ex Ch; *Clipsham v Vertue* (1843) 5 QB 265; *Fothergill v Walton* (1818) 8 Taunt 576; *MacAndrew v Chapple* (1866) LR 1 CP 643.

3 *Shubrick v Salmond* (1765) 3 Burr 1637; *Shadforth v Higgin* (1813) 3 Camp 385; *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Glaholm v Hays* (1841) 2 Man & G 257; *Ollive v Booker* (1847) 1 Exch 416; *Oliver v Fielden* (1849) 4 Exch 135; *Elliot v Von Glehn* (1849) 13 QB 632; *Croockewit v Fletcher* (1857) 1 H & N 893; *Smith v Dart & Son* (1884) 14 QBD 105, 5 Asp MLC 360; *Groves, Maclean & Co v Volkart Bros* (1884) Cab & El 309 (affd (1885) 1 TLR 454, CA); *Bentsen v Taylor, Sons & Co (2)* [1893] 2 QB 274, 7 Asp MLC 385, CA. Cf *Soames v Lonergan* (1824) 2 B & C 564; and see PARA 404.

4 *Bentsen v Taylor, Sons & Co (2)* [1893] 2 QB 274, 7 Asp MLC 385, CA; cf *Dimech v Corlett* (1858) 12 Moo PCC 199; *Olhson v Drummond* (1785) 2 Chit 705; *Panoutsos v Raymond Hodley Corp of New York* [1917] 2 KB 473, CA.

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#### **427. Effect of premature readiness of ship.**

Where the ship is ready to load before she could reasonably be expected to be ready, the voyage-charterer's duty to provide a cargo does not arise until the date at which in the ordinary course of events the ship would have been placed at his disposal, and he is not responsible for any delay occasioned by his failure to have the cargo ready sooner<sup>1</sup>. Thus, where the ship is to be loaded in turn<sup>2</sup>, and an unexpected opportunity to load her arises, owing to the fact that other ships having priority to her are not ready to load when their turn arrives, and is consequently lost, the charterer is not guilty of a breach of duty because he has failed to foresee what has happened and has no cargo in readiness<sup>3</sup>. If, however, there are facilities at the place of loading for storing cargo, and the contingency that the ship might be able to load

at an earlier date is one that might reasonably have been foreseen, considering the course of business at the place of loading, it is the charterer's duty to be prepared for such a contingency; and, if he has no cargo ready, he is responsible for the delay which ensues<sup>4</sup>.

1 *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL.

2 As to loading in turn see PARA 295.

3 *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL.

4 *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL; *Krog & Co v Burns and Lindemann, The Avis* (1903) 5 F 1189.

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#### **428. Effect of outbreak of war.**

Where the charterer is a British subject and the cargo is to be procured and loaded in a foreign country, the outbreak of war between the United Kingdom and that country discharges the charterer from the contract and, consequently, from his obligation to procure the cargo<sup>1</sup>. Similarly, if the charterer is a company controlled by alien enemies<sup>2</sup>, although registered in a neutral country, the continued existence of the charterparty is illegal as involving trading with the enemy<sup>3</sup>.

1 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch; *Esposito v Bowden* (1857) 7 E & B 763, Ex Ch. A term substituting a different port of loading in the event of war refers to a war between the United Kingdom and a foreign country, and not to a war between two foreign countries: *Avery v Bowden* (1856) 6 E & B 953 at 962, Ex Ch. As to frustration see PARA 237.

2 As to the meaning of 'alien enemy' see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARAS 574, 575.

3 *Clapham Steamship Co Ltd v Handels-en Transport-Maatschappij Vulcaan of Rotterdam* [1917] 2 KB 639, 14 Asp MLC 104. As to illegality see PARA 233; and as to trading with the enemy generally see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 576 et seq.

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#### **429. Effect of both parties being aware of circumstances likely to cause delay.**

Where the cargo is to be procured from a particular source of supply defined by the charterparty, such as a named colliery<sup>1</sup>, and both parties at the time of making the charterparty are aware of circumstances peculiar to the source of supply which may lead to delay in procuring a cargo or in transporting it to the place of loading, they must be taken to have assumed as the basis of their contract the possibility of more or less delay<sup>2</sup>. The charterer, therefore, assuming no time for loading has been fixed, is not responsible for any delay the cause of which was within the contemplation of the parties<sup>3</sup>. This is clearly the case where the cause of delay, such as the breakdown of machinery at the colliery, actually exists, to the

knowledge of both parties, at the time when the charterparty is made<sup>4</sup>. The principle equally applies if no time had been fixed for loading, where the cause of delay, although not actually operative at the date of the contract, was, according to the knowledge and experience of the parties, likely to operate at any time<sup>5</sup>. Thus, where the colliery designated is one of limited output, and by the custom of the port the ship cannot be loaded without a loading order from the colliery, the charterer is not responsible for any delay occasioned by the necessity of waiting for a loading order to be issued according to the colliery turn<sup>6</sup>, but the charterer must do what is reasonable with a view to getting the ship berthed as soon as practicable<sup>7</sup>. It may be that a similar principle applies where the contemplated cause of delay wholly prevents the charterer from procuring a cargo<sup>8</sup>, and, also perhaps, where the contract is not in general terms to provide a cargo but to load a specific cargo, if that cargo is destroyed without the charterer's fault before the time of loading arrives<sup>9</sup>.

1 *Jones Ltd v Green & Co* [1904] 2 KB 275, 9 Asp MLC 600, CA; *Harris and Taylor v Dreesman* (1854) as reported in 23 LJ Ex 210; cf *Hudson v Clementson* (1856) 18 CB 213.

2 *Jones Ltd v Green & Co* [1904] 2 KB 275 at 280, 9 Asp MLC 600 at 602, CA, per Vaughan Williams LJ; *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL; *Harris and Taylor v Dreesman* (1854) as reported in 23 LJ Ex 210.

3 *Harris and Taylor v Dreesman* (1854) as reported in 23 LJ Ex 210; cf *Hudson v Ede* (1868) LR 3 QB 412, Ex Ch.

4 *Harris and Taylor v Dreesman* (1854) as reported in 23 LJ Ex 210.

5 *Jones Ltd v Green & Co* [1904] 2 KB 275, 9 Asp MLC 600, CA.

6 *Jones Ltd v Green & Co* [1904] 2 KB 275, 9 Asp MLC 600, CA; cf *King v Hinde* (1883) 12 LR Ir 113.

7 *Little v Stevenson & Co* [1896] AC 108 at 119, 8 Asp MLC 162 at 163, HL, per Lord Herschell.

8 *Harris and Taylor v Dreesman* (1854) as reported in 23 LJ Ex 210 at 212, 213 per Parke B.

9 Cf *Smith v Myers* (1871) LR 7 QB 139, 1 Asp MLC 222, Ex Ch.

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#### **430. Exception in charterparty covering cause of delay or failure.**

Where the charterparty contains an exception which covers the cause of delay in loading or failure to load, as the case may be, the charterer is excused<sup>1</sup>. Unless the contrary intention is clearly expressed, the exceptions usually contained in a charterparty are to be understood as applying only to the actual loading<sup>2</sup>. They do not, therefore, protect the charterer against a failure to provide a cargo, which is an absolute and non-delegable duty<sup>3</sup>. Neither do such exceptions protect the charterer against the consequences of delay<sup>4</sup> or failure<sup>5</sup> in matters which precede the loading and form no part of it<sup>6</sup>. Thus, an express exception against frost does not cover delay in the transportation of the cargo to the place of loading, even if such delay is in fact caused by frost<sup>7</sup>. Where, however, it is clear that the transportation to the place of loading forms part of the act of loading<sup>8</sup>, an exception covering delay in loading will equally cover delay in the transportation<sup>9</sup>.

1 *Avery v Bowden* (1856) 6 E & B 953 at 962. As to the usual exceptions see PARA 299 et seq.

2 *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA. For propositions of law applicable to the construction of a common exceptions clause see *South African Dispatch Line v Panamanian Steamship Niki (Owners)* [1959] 1 QB 238, [1958] 3 All ER 590, [1958] 2 Lloyd's Rep 401 per Diplock J; affd [1960] 1 QB 518, [1960] 1 All ER 285, [1959] 2 Lloyd's Rep 663, CA; and see PARA 446.

3 *Triton Navigation Ltd v Vitol SA, The Nikmary* [2003] EWCA Civ 1715, [2004] 1 All ER (Comm) 698, [2004] 1 Lloyd's Rep 55.

4 *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA; *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL; *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA.

5 *Fenwick v Schmalz* (1868) LR 3 CP 313; cf *Adalands Akt v Whitaker* (1913) 18 Com Cas 229.

6 *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL; *Arden Steamship Co Ltd v William Mathwin & Son* 1912 SC 211. An exception of 'obstruction on the railways' was held to be limited in its application to railways in the port in *Bunge y Born Lda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799, 16 Asp MLC 545, HL. Cf *Bassa (Owners) v Royal Commission on Wheat Supplies* (1924) 16 Asp MLC 461 (after-effects of an excepted cause which had ceased to operate before the commencement of the lay days are not covered).

7 *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL; *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA; cf *Stephens v Harris* (1887) 57 LJQB 203, CA.

8 See PARA 425.

9 *Hudson v Ede* (1868) LR 3 QB 412, Ex Ch; *Allerton Sailing Ship Co v Falk* (1888) 6 Asp MLC 287 (distinguishing *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL); *Furness v Forwood Bros & Co* (1897) 8 Asp MLC 298; *Smith and Service v Rosario Nitrate Co* [1894] 1 QB 174, 7 Asp MLC 417, CA; *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA; *Matheos (Owners) v Louis Dreyfus & Co* [1925] AC 654, 16 Asp MLC 486, HL (an exception from the lay days of 'detention by frost or ice from Ibrail down to Sulina' relates to delay in shipping cargo by reason of frost or ice within the limits specified).

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### 431. Scope of exception.

The exception may be so framed as to apply to preliminary matters preceding the loading<sup>1</sup> and to include delay or failure in procuring the cargo<sup>2</sup> or in its transportation to the place of loading<sup>3</sup>. Unless, however, the cargo is to be procured from a particular source of supply specified or indicated<sup>4</sup> in the charterparty, the voyage-charterer cannot claim the protection of the exception merely on the ground that, by reason of the excepted peril, he has been prevented from procuring the cargo which he had intended to load or has been delayed in transporting it to the place of loading<sup>5</sup>.

To be excused for his failure to perform his duty, he must show that all available sources of supply or all practicable methods of transportation, as the case may be, were equally affected by the excepted peril<sup>6</sup>. In no case is he protected where it appears that the delay or failure might have been avoided if only he had taken reasonable steps for the purpose<sup>7</sup>, but the charterer is under no obligation to select a loading place advantageous to the ship<sup>8</sup>. If the charterer is entitled to load different kinds of cargo and is prevented by an excepted peril from loading cargo of the kind intended, the question whether he is excused from the necessity of loading a full and complete cargo in accordance with the contract will depend on the precise form of words used in the charterparty<sup>9</sup>. If his failure to load such a cargo is in the circumstances a breach of contract, the voyage-charterer is liable for dead freight<sup>10</sup>, but reasonable delay in changing over is covered by the exception<sup>11</sup>.

1 For the general principle when there is no express provision to this effect see PARA 430.

2 *Re Allison & Co and Richards* (1904) 20 TLR 584, CA; *Gordon Steamship Co Ltd v Moxey Savon & Co Ltd* (1913) 12 Asp MLC 339. See *Triton Navigation Ltd v Vitol SA*, *The Nikmary* [2003] EWCA Civ 1715, [2004] 1 All ER (Comm) 698 at 703, [2004] 1 Lloyd's Rep 55 at 60 per Mance LJ (clear and distinct words needed); and see PARA 430 text and note 3.

3 *Fenwick v Schmalz* (1868) LR 3 CP 313 (where the cause of delay was not covered); *Furness v Forwood Bros & Co* (1897) 8 Asp MLC 298; *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA.

4 This is usually the case when the charterparty provides for loading in accordance with a colliery guarantee: *Monsen v Macfarlane & Co* [1895] 2 QB 562, 8 Asp MLC 93, CA; *Shamrock Steamship Co v Storey & Co* (1899) 8 Asp MLC 590, CA; *Saxon Steamship Co v Union Steamship Co* (1900) 9 Asp MLC 114, HL; *Dobell & Co v Green & Co* [1900] 1 QB 526, 9 Asp MLC 53, CA (where it was held to be immaterial that the colliery guarantee was not tendered to the shipowner until after the excepted peril had come into operation); *Thorman v Dowgate Steamship Co Ltd* [1910] 1 KB 410, 11 Asp MLC 481; cf *Restitution Steamship Co v Sir John Pirie & Co* (1889) 7 Asp MLC 11n, CA.

5 *The Rookwood* (1894) 10 TLR 314, CA; cf *Gardiner v Macfarlane, M'Crindell & Co, The Lismore* (1893) 20 R 414. The obligation to provide cargo ready for loading is prima facie absolute and unaffected by clauses of exception as to lay days unless by express language or necessary implication: see *Bunge y Born Lda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799 at 816, 16 Asp MLC 545 at 550, HL, per Lord Sumner; cf *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1960] 1 QB 439 at 491, 492, [1959] 3 All ER 434 at 454, [1959] 2 Lloyd's Rep 229 at 251 per McNair J; affd [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL.

6 *Bruce v Nicolopulo* (1855) 11 Exch 129; *Stephens v Harris* (1887) 57 LJQB 203, CA; *Brown v Turner, Brightman & Co* [1912] AC 12, 12 Asp MLC 79, HL; cf *The Village Belle* (1874) 2 Asp MLC 228.

7 *Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA; *Budgett & Co v Binnington & Co* (1890) 25 QBD 320 at 327 per Vaughan Williams LJ (affd [1891] 1 QB 35, 6 Asp MLC 592, CA).

8 *Matheos (Owners) v Louis Dreyfus & Co* [1925] AC 654 at 664, 16 Asp MLC 486 at 489, HL, per Lord Sumner; cf *Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA.

9 *Brightman & Co v Bunge y Born Lda Sociedad* [1924] 2 KB 619, 16 Asp MLC 423, CA; affd on a different point sub nom *Bunge y Born Lda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799, 16 Asp MLC 545, HL; distinguished in *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1960] 1 QB 439 at 505, [1959] 3 All ER 434 at 463, [1959] 2 Lloyd's Rep 229 at 259 per McNair J (affd [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL); and see PARA 298 note 6. If the charterers are under a duty to load an alternative cargo, which they fail to do, the burden is on them, in an action against them claiming demurrage, to show that no time would have been saved had they tried to load an alternative cargo: *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1962] 1 QB 42 at 121, 122, [1961] 2 All ER 577 at 619, 620, [1961] 1 Lloyd's Rep 385 at 425, 426, CA.

10 As to the meaning of 'dead freight' see PARA 460.

11 *Brightman & Co v Bunge y Born Lda Sociedad* [1924] 2 KB 619 at 637, 16 Asp MLC 423 at 428, CA (where Atkin LJ said he thought that in such a case 'there is no such thing as an appropriation of cargo nor any question of final election of an option'); affd [1925] AC 799 at 814, 16 Asp MLC 545 at 549, HL. Cf PARA 446 note 3.

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### 432. Effect when ship on demurrage.

If, at the time when the excepted peril happens, the ship is already on demurrage<sup>1</sup>, even if the exception applies to delay or failure in procuring or transporting the cargo, it is not usually available, as, once the ship is on demurrage, the charterer is in default and time runs against him without a break<sup>2</sup>. It is not unusual, however, for the charterparty to contain an express

term suspending the liability for demurrage in certain events, and such a term may apply to matters arising before the actual loading<sup>3</sup>.

1 As to the meaning of 'demurrage' see PARA 287.

2 *Saxon Steamship Co v Union Steamship Co* (1900) 9 Asp MLC 114, HL; *Shamrock Steamship Co v Storey & Co* (1899) 8 Asp MLC 590, CA; and see *Tyne and Blyth Shipping Co v Leech, Harrison and Forwood* [1900] 2 QB 12 (where a deduction was allowed for time lost whilst the ship was absent under repairs). Cf *Compania Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, [1962] 2 Lloyd's Rep 175, HL (discharge prevented by strike). The general rule applies even though a vessel is not already on demurrage when the peril operates: *Ellis Shipping Corp v Voest Alpine Intertrading, The Lefthero* [1992] 2 Lloyd's Rep 109, CA.

3 *Lilly & Co v DM Stevenson & Co* (1895) 22 R 278; *Cero Navigation Corp v Jean Lion & Cie, The Solon* [2000] 1 All ER (Comm) 214, [2000] 1 Lloyd's Rep 292.

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## (C) DELIVERY AND STOWAGE OF CARGO

### 433. How far shipowner bound to accept cargo.

A shipowner who puts his ship up as a general ship<sup>1</sup>, or who runs a line of ships from ports to ports, habitually carrying all goods brought to him<sup>2</sup>, is a common carrier<sup>3</sup>. He is, therefore, bound, like any other common carrier, on payment of a reasonable charge, to accept for the purpose of carriage all goods brought to him, provided that they are goods which he holds himself out as carrying in the ordinary course of business, and that there is room in the ship for them<sup>4</sup>. He is liable at common law for all accidents which may happen to the goods carried, except when occasioned by act of God or the Queen's enemies, the inherent vice of the goods carried, or general average sacrifice<sup>5</sup>.

A shipowner who is not a common carrier is not bound to accept any goods unless he has entered into a contract to that effect<sup>6</sup>. Whether a shipowner who is not a common carrier of goods has the same liability as a common carrier for accidents which may happen to the goods or whether he owes only the obligations of a bailee for the exercise of reasonable care is uncertain<sup>7</sup>.

Thus, a shipowner whose ship has been chartered to carry goods on an outward voyage to a particular port is not bound to accept a cargo from the charterer for the return voyage, but may load goods for his own benefit, or bring the ship home in ballast at his pleasure<sup>8</sup>.

In certain circumstances the shipowner's refusal to accept cargo is excused<sup>9</sup>.

1 *Mors v Sluce* (1672) 1 Mod Rep 85; *Coggs v Bernard* (1703) 2 Ld Raym 909; 1 Smith LC (13th Edn) 175; *Barclay v Cuculla y Gana* (1784) 3 Doug KB 389; *Laveroni v Drury* (1852) 8 Exch 166.

2 *Nugent v Smith* (1875) 1 CPD 19 at 28, 3 Asp MLC 87 at 90 per Brett J; revsd without affecting this point (1876) 1 CPD 423, 3 Asp MLC 198, CA. It seems, however, that a person who lets out lighters to individual customers on application is not in the same position (*Liver Alkali Co v Johnson* (1874) LR 9 Exch 338 at 344, 2 Asp MLC 332 at 338, Ex Ch, per Brett J), although the majority of the court thought otherwise (*Nugent v Smith* at 433 and at 202 per Cockburn CJ). See also PARA 264.

3 See PARA 264.

4 See PARA 98; cf *Benett v Peninsular Steam-Boat Co* (1848) 6 CB 775 (where it was held that an action lay against common carriers of passengers for refusing to carry a passenger).

5 See PARA 4.

6 *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338 at 344, 2 Asp MLC 332 at 337, 338, Ex Ch, per Brett J; *Nugent v Smith* (1876) 1 CPD 423 at 433, 3 Asp MLC 198 at 202, CA, per Cockburn CJ.

7 See PARA 4.

8 *Cockburn v Wright* (1840) 6 Bing NC 223; *Cross v Pagliano* (1870) LR 6 Exch 9.

9 See PARAS 434-439. See for example *Sea Success Maritime Inc v African Maritime Carriers Ltd* [2005] EWHC 1542 (Comm), [2005] 2 Lloyd's Rep 692, where the charter declared 'Master has the right and must reject any cargo that are [sic] subject to clausing of the bs/l'.

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#### **434. Charterer's failure or refusal to load.**

Where the voyage-charterer fails to tender any goods within a reasonable time<sup>1</sup>, the shipowner is not bound to wait any longer<sup>2</sup>, and a tender of goods at a later date is inoperative<sup>3</sup>. He is not entitled to depart sooner unless the contract has already been repudiated by the charterer and he has accepted the repudiation as entitling him to treat the contract as at an end<sup>4</sup>. Thus, where there is a demurrage clause with a fixed number of days, the shipowner must wait for those days, unless the contract has been previously repudiated and he has accepted the repudiation; and, if, although demurrage is provided for, no days are fixed, the ship must nevertheless wait for a reasonable time<sup>5</sup> or until the contract is repudiated<sup>6</sup>.

Where the voyage-charterer definitely refuses to load, the shipowner may treat his refusal as a breach discharging the contract<sup>7</sup>. He may at once bring an action against the charterer for the breach, and is not bound to wait until the expiry of the period allowed for loading<sup>8</sup>. In this case a tender of goods after the repudiation has been accepted is inoperative<sup>9</sup>.

The shipowner may, however, decline to treat the voyage-charterer's refusal as a repudiation, in which case the contract is not discharged, but remains open and effective<sup>10</sup>; there is then no breach unless the charterer fails to load the cargo within the specified time or a reasonable time, if none is specified<sup>11</sup>. Until such time has expired, the voyage-charterer may withdraw his refusal and begin to load, or he may be released in the meantime from his obligation to load by the happening of an event which frustrates the adventure<sup>12</sup>.

1 *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491. It seems that, in the absence of a repudiation by the charterer, delay in providing a cargo does not justify the shipowner in rescinding the contract, if time has not been made the essence of the contract, unless the delay is such as to amount to a frustration of the commercial object of the adventure: see *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193 at 200-201, 14 Asp MLC 110 at 115, CA, per Scrutton LJ; cf *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70, [1957] 1 Lloyd's Rep 174 (affd on another ground [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA).

2 *Jamieson & Co v Laurie* (1796) 6 Bro Parl Cas 474, HL; *Matthews v Lowther* (1850) 5 Exch 574 (where a ship is under time-charter, the owner earns hire whether the charterer loads goods or not).

3 *Esposito v Bowden* (1857) 7 E & B 763, Ex Ch; *Danube and Black Sea Railway and Kustentje Harbour Co Ltd v Xenos* (1863) 13 CBNS 825.

4 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch.

5 See, however, *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 430, 434-435, [1957] 2 All ER 70 at 80, 83, [1957] 1 Lloyd's Rep 174 at 189, 192; and note 1.

6 *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491 per Bray J; *Dimech v Corlett* (1858) 12 Moo PCC 199; *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193, 14 Asp MLC 110, CA.

7 *Danube and Black Sea Rly and Kustenjje Harbour Co Ltd v Xenos* (1863) 13 CBNS 825; *Bradford v Williams* (1872) LR 7 Exch 259, 1 Asp MLC 313. A refusal is not justified by the operation of an excepted peril which prevents loading unless it is shown that, in all reasonable probability, the inability to load will endure for a time inconsistent with the object of the adventure: *Ropner & Co v Ronnebeck* (1914) 13 Asp MLC 47; *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, 17 Asp MLC 8, PC. The doctrine of frustration being founded on an implied term, its application is not dependent on an express exception of the cause which delays or prevents performance of the contract: *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL; and see PARAS 237, 245.

8 See **CONTRACT** vol 9(1) (Reissue) PARA 997 et seq.

9 *Danube and Black Sea Rly and Kustenjje Harbour Co Ltd v Xenos* (1863) 13 CBNS 825.

10 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch.

11 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch; cf *Dimech v Corlett* (1858) 12 Moo PCC 199.

12 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch; *Avery v Bowden* (1855) 25 LJQB 49 (affd (1856) 6 E & B 962, Ex Ch) (declaration of war making performance illegal). As to frustration see PARA 237.

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#### **435. Cargo not as described in contract.**

Where the goods tendered do not correspond with the description in the contract<sup>1</sup>, the shipowner may refuse them<sup>2</sup>. If the contract gives the charterer an option under which he may select the goods to be loaded, he may exercise that option as he thinks fit<sup>3</sup>; and, if the ship receives as large a quantity of the selected goods as she can take on board, the shipowner has no ground of complaint because a different selection would have enabled a larger cargo to be shipped<sup>4</sup>.

1 See PARA 257.

2 *Mackill v Wright Bros & Co* (1888) 14 App Cas 106, HL; *Lebeau v General Steam Navigation Co* (1872) LR 8 CP 88 at 97, 1 Asp MLC 435 at 438 per Grove J. If the shipowner carries a cargo which is not in accordance with the charterparty, he is not restricted to the chartered freight but may claim on an implied contract for the current rate of freight: *Steven v Bromley & Son* [1919] 2 KB 722, 14 Asp MLC 455, CA. Cf *The Olanda, Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Co Ltd* [1919] 2 KB 728n, HL; and see PARA 257.

3 See PARA 258.

4 *Moorson v Page* (1814) 4 Camp 103; *Irving v Clegg* (1834) 1 Bing NC 53; *Cockburn v Alexander* (1848) 6 CB 791; *Duckett v Satterfield* (1868) LR 3 CP 227; *Southampton Steam Colliery Co v Clarke* (1870) LR 6 Exch 53, Ex Ch; *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

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### **436. Dangerous goods.**

Where the goods tendered, although otherwise in accordance with the contract, are of a dangerous nature<sup>1</sup>, the shipowner may refuse to accept them<sup>2</sup> unless, with knowledge of their nature, he has expressly contracted to carry them<sup>3</sup>.

Where any dangerous goods<sup>4</sup> have been sent or carried, or attempted to be sent or carried, on board any ship, whether or not a United Kingdom ship, without being marked as required by safety regulations, without such notice having been given as is required by safety regulations, under a false description or with a false description of their sender or carrier,

any court having Admiralty jurisdiction may declare the goods, and any package or receptacle in which they are contained, to be forfeited<sup>5</sup>. United Kingdom ships wherever they may be, and other ships while they are within the United Kingdom or its territorial waters, which are carrying dangerous goods<sup>6</sup> in bulk or packaged form and marine pollutants<sup>7</sup> in packaged form must comply with the relevant regulations<sup>8</sup>.

Operators of ships departing from a port must inform the competent authority of that port about the nature, quantity and location of any dangerous or polluting goods aboard, its destination and intended route<sup>9</sup>.

1 As to dangerous goods generally see PARA 260. As to when goods are of a dangerous nature see PARA 384.

2 *Brass v Maitland* (1856) 6 E & B 470 at 484 per Lord Campbell CJ; *Farrant v Barnes* (1862) 11 CBNS 553 at 563 per Willes J; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94 at 107, 115, CA; *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, [1998] 1 All ER 495, HL.

3 *Brass v Maitland* (1856) 6 E & B 470 at 485 per Lord Campbell CJ; *Acatos v Burns* (1878) 3 Ex D 282 at 288, CA, per Bramwell LJ; and see *General Feeds Inc v Burnham Shipping Corpn, The Amphion* [1991] 2 Lloyd's Rep 101 (dangerous cargo of anti-oxidant treated bagged fishmeal); *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, [1998] 1 All ER 495, HL. As to the circumstances in which a carrier may discharge, destroy or render innocuous goods of an inflammable, explosive or dangerous nature where the Hague-Visby Rules apply see art IV r 6; and PARA 384.

4 As to the meaning of 'dangerous goods' for these purposes see the Merchant Shipping Act 1995 s 87(5); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 656.

5 See the Merchant Shipping Act 1995 s 87(1); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 656.

6 As to the meaning of 'dangerous goods' for these purposes see the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997/2367, reg 2(1); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657.

7 As to the meaning of 'marine pollutant' for these purposes see the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997/2367, reg 2(1); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657.

8 See the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997/2367; **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657; see also PARA 106.

9 See the Merchant Shipping (Reporting Requirements for Ships Carrying Dangerous or Polluting Goods) Regulations 1995, SI 1995/2498; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 659.

## **UPDATE**

### **436 Dangerous goods**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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#### **437. Improperly packed goods.**

Where the goods tendered are improperly or insufficiently packed, the shipowner may refuse to accept them<sup>1</sup>. He cannot, however, insist on the goods being packed in any other than the usual packages<sup>2</sup>.

1 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231. As to the shipper's and forwarder's statutory obligations in respect of packaged goods see the Merchant Shipping (Carriage of Cargoes) Regulations 1999, SI 1999/336, reg 6; PARA 452; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 662.

2 *Cuthbert v Cumming* (1855) 11 Exch 405.

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#### **438. Excessive amount of goods.**

Where under a contract for a full and complete cargo<sup>1</sup> more goods are tendered than the ship can reasonably stow, the shipowner may refuse the excess<sup>2</sup>. He must, however, fulfil the contract by loading the ship to her full capacity<sup>3</sup>. Where he has contracted to carry a specified quantity of goods<sup>4</sup>, he must find room for them; otherwise he will be liable in damages for failing to load them unless the contract is made subject to there being room in the ship<sup>5</sup>.

1 As to a 'full and complete cargo' see PARA 259.

2 *Mackill v Wright Bros & Co* (1888) 14 App Cas 106, HL; *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

3 *Furness v Tennant, Sons & Co* (1892) 7 Asp MLC 179, CA (failure to carry full and complete cargo due to shipowner's stowage). The charterer may be precluded from complaining if the shipowner's inability to carry a full cargo is due to the methods of loading adopted, of which the charterer was aware and to which he made no objection: *Hovill v Stephenson* (1830) 4 C & P 469.

4 See PARA 259. As to the effect of a statement as to the ship's capacity see *Pust v Dowie* (1864) 5 B & S 20, Ex Ch; *Ungherese di Armamento Marittimo Oriente SA v Tyser Line Ltd* (1902) 8 Com Cas 25; and see PARA 242.

5 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245.

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#### **439. Exception in contract providing excuse.**

Where the operation of loading, so far as it falls to be performed by the shipowner, is prevented or delayed by a cause excepted in the contract<sup>1</sup>, the shipowner is excused for the failure or delay<sup>2</sup>, provided that he has taken all reasonable precautions to ensure the due performance of the loading<sup>3</sup>; and, if, without the default of the shipowner, the parties are unable to load the ship, being prevented by vis major, no action lies for failure to have the ship ready to load within the time specified<sup>4</sup>.

1 See PARA 265 et seq; cf *Philpott v Swann* (1861) 11 CBNS 270.

2 *Geipel v Smith* (1872) LR 7 QB 404, 1 Asp MLC 268; cf *Atkinson v Ritchie* (1809) 10 East 530; *Hocquard v R, The Newport* (1858) 6 WR 310, PC.

3 See PARA 280.

4 *Cunningham v Dunn* (1878) 3 CPD 443, 3 Asp MLC 595, CA.

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#### **440. Place of delivery to ship.**

Apart from custom or special contract, it is the duty of the charterer or other shipper, at his own expense, to bring the goods to the side of the ship, within reach of her tackle<sup>1</sup>, and to deliver them there to the shipowner or to his employees authorised to take delivery on his behalf<sup>2</sup>.

If, therefore, the ship is lying at a wharf, the shipper must deliver the goods alongside; he is not entitled simply to deposit them on the wharf at some distance from the ship and to require the shipowner, at his own expense, to provide the necessary labour for removing them from the place of deposit to the ship<sup>3</sup>. If the ship is lying at anchor during the loading, so that the goods have to be taken out to her in lighters, it is the shipper's duty to provide the necessary lighters and to pay the expenses of lightering the goods<sup>4</sup>.

The shipowner or his employees may, however, consent to accept delivery of the goods before they are actually brought alongside, and in this event the necessary expenses of removal to the ship will be borne by the shipowner<sup>5</sup>. Thus, where the ship has to be loaded afloat, the charterparty may provide that the goods are to be taken from the shore to the ship at the shipowner's expense<sup>6</sup>, and there may be a custom of the port of loading to the same effect<sup>7</sup>. Any such custom is, however, excluded by an express provision of the charterparty that the goods are to be delivered alongside by the charterer<sup>8</sup>. An agreement on the part of the shipowner to bear the expenses of removal is not to be inferred from the mere fact that he has provided the necessary labour for the purpose on the shipper's refusal to do so<sup>9</sup>.

The charterparty may provide that the charterer has the right to require the vessel at the loading port to shift from a berth and back to the same one, or to another berth, on payment of all additional expenses incurred<sup>10</sup>.

- 1 *Holman & Sons v Dasnières* (1886) 2 TLR 607, CA. The lifting of the goods to the tackle must be done by the shipper's men: *Holman & Sons v Dasnières*. The principles governing delivery to the ship are the same as those governing delivery to the consignee at the port of discharge: cf PARA 532 et seq.
- 2 *Mackenzie v Rowe* (1810) 2 Camp 482; *Cobban v Downe* (1803) 5 Esp 41; *Glengarnock Iron and Steel Co Ltd v Cooper & Co* (1895) 22 R 672. However, in the absence of express provision, the charterer has an implied right to order the ship to any usual and proper loading berth (*The Felix* (1868) LR 2 A & E 273); and it may be that, without any express provision for shifting berths, the charterer can order the ship to move elsewhere to complete loading in accordance with the practice of the port or as safety or convenience may require (*Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486, 8 Asp MLC 402, HL; *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests Ltd* (1903) 9 Asp MLC 411; cf *Matheos (Owners) v Louis Dreyfus & Co* [1925] AC 654 at 663, 16 Asp MLC 486 at 489, HL).
- 3 *Fletcher v Gillespie* (1826) 3 Bing 635. Nor can he require the shipowner to prepare the cargo for shipment eg by pressing bales of wool: *Cockburn v Alexander* (1848) 6 CB 791 (where evidence of custom was rejected).
- 4 *Trindade v Levy* (1861) 2 F & F 441.
- 5 *British Columbia Saw-Mill Co v Nettleship* (1868) LR 3 CP 499; *Holman & Sons v Dasnières* (1886) 2 TLR 607, CA.
- 6 *Nottebohn v Richter* (1886) 18 QBD 63, CA; cf *Wiener & Co v Wilsons and Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413, CA.
- 7 *Scrutton v Childs* (1877) 3 Asp MLC 373, DC.
- 8 Cf *The Nifa* [1892] P 411, 7 Asp MLC 324, doubting the construction placed on the particular contract in *Scrutton v Childs* (1877) 3 Asp MLC 373, DC. See also *Palgrave, Brown & Son Ltd v Turid (Owners)* [1922] 1 AC 397, HL, sub nom *The Turid* 15 Asp MLC 538.
- 9 *Fletcher v Gillespie* (1826) 3 Bing 635.
- 10 *Cosmar Compania Naviera SA v Total Transport Corp'n, The Isabelle* [1982] 2 Lloyd's Rep 81; affd [1984] 1 Lloyd's Rep 366, CA.

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#### **441. Effect of delivery.**

On delivery the shipper's responsibility ceases, as he has fulfilled his contract<sup>1</sup>. If the goods put on board are destroyed through any cause, he cannot be compelled to replace them<sup>2</sup>; and, if it becomes necessary to unload the ship for some temporary purpose, the shipowner must bear the expenses of unloading and reloading<sup>3</sup>, unless the expenses can be treated as general average<sup>4</sup>.

The shipper is entitled to demand redelivery of the goods shipped if he is refused a bill of lading<sup>5</sup>, or is tendered a bill of lading subject to a charterparty of which he had no notice at the time of shipment<sup>6</sup>; but he is not usually entitled to redelivery unless he pays the freight which would have been earned by their carriage<sup>7</sup> and indemnifies the master against the consequences of any bill of lading signed by him<sup>8</sup>. In the case of the charterer, payment of freight is not a necessary condition precedent to redelivery if there is no obligation to put a cargo on board and the payment for the use of the ship is independent of the delivery of a cargo<sup>9</sup>.

1 *Strugnell v Friedrichsen* (1862) 12 CBNS 452 (where, the goods having been landed owing to a casualty to the ship and forwarded by another ship to their destination, it was held that the charterer could not be compelled to ship another cargo); cf *Smith v Wilson* (1807) 8 East 437.

- 2 *Jones v Holm* (1867) LR 2 Exch 335 (cited in PARA 447 note 1).
- 3 *General Steam Navigation Co v Slipper* (1862) 11 CBNS 493.
- 4 As to general average see PARA 605 et seq.
- 5 *Falk v Fletcher* (1865) 18 CBNS 403. See PARA 325.
- 6 *Peek v Larsen* (1871) LR 12 Eq 378, 1 Asp MLC 163; *Armstrong v Allan Bros* (1892) 7 Asp MLC 277 (on appeal 7 Asp MLC 293 at 294, CA (where the actual decision in the case was reversed)). If the shipowner alters the destination of the ship after shipment, he must give specific notice of the alteration to the shippers: *Peel v Price* (1815) 4 Camp 243 (where the shipper was held entitled to recover the excess premium charged on his insurance policies).
- 7 *Tindall v Taylor* (1854) 4 E & B 219.
- 8 *Davidson v Gwynne* (1810) 12 East 381; *Tindall v Taylor* (1854) 4 E & B 219.
- 9 *Thompson v Small* (1845) 1 CB 328; *Re Child, ex p Nyholm* (1873) 2 Asp MLC 165.

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#### **442. Risk during delivery.**

Until delivery the goods remain at the shipper's risk<sup>1</sup>. Accordingly, if lightering is necessary, the risks of the transit from shore to ship fall on him and not on the shipowner<sup>2</sup>. Where there is a voyage-charterparty, the duty of the charterer to provide a cargo in accordance with the contract is not wholly discharged until he has actually delivered to the ship the whole of the cargo contracted for<sup>3</sup>. It is immaterial that he has fulfilled the conditions precedent to the loading and has his cargo in readiness<sup>4</sup>. If, therefore, the actual operation of loading is delayed, interrupted or prevented through the intervention of any cause whatever<sup>5</sup>, the charterer is, unless he has some lawful excuse<sup>6</sup>, responsible in damages for any detention of the ship beyond the time allowed for loading<sup>7</sup> or for any loss arising from deficiency in the quantity delivered<sup>8</sup>. In addition, where the charterer is wholly unable to deliver the cargo to the ship within a reasonable time, the shipowner may be discharged from further performance of the contract<sup>9</sup>. The charterer is excused for failure or delay in loading in certain circumstances<sup>10</sup>.

1 Cf PARAS 448, 449. A charterparty may provide for cargo 'when signed for to be at ship's risk until shipped on board': *Dampskebselskabet Skjoldborg and CK Hansen v Charles Calder & Co* (1911) 12 Asp MLC 156.

2 *Nottebohn v Richter* (1886) 18 QBD 63 at 65, CA. As to the liability of the lighterman see PARA 264.

3 *Elliott v Lord* (1883) 5 Asp MLC 63, PC; *Christoffersen v Hansen* (1872) LR 7 QB 509, 1 Asp MLC 305 (where a cesser clause was held not to come into operation until after the loading had been completed). As to the effect of a cesser clause on the liability to load see PARA 304 et seq.

4 *Barker v Hodgson* (1814) 3 M & S 267.

5 This is so even if the charterer is not responsible for the delay: *Adams v Royal Mail Steam-Packet Co* (1858) 5 CBNS 492; *Barret v Dutton* (1815) 4 Camp 333; *Watson Bros v Mysore Manganese Co Ltd* (1910) 11 Asp MLC 364; *Abchurch Steamship Co v Stinnes* 1911 SC 1010.

6 If the lay days are fixed by the terms of the charterparty, the obligation to load or unload before they expire is prima facie absolute: *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL. If no fixed time is specified, a reasonable time is allowed: *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL.

7 *Lawson v Burness* (1862) 1 H & C 396; *The Village Belle* (1874) 2 Asp MLC 228; *Ashcroft v Crow Orchard Colliery Co* (1874) LR 9 QB 540, 2 Asp MLC 397; *Jones v Adamson* (1876) 1 Ex D 60, 3 Asp MLC 253, DC; *Elliott v Lord* (1883) 5 Asp MLC 63, PC; *Monsen v Macfarlane & Co* [1895] 2 QB 562, 8 Asp MLC 93, CA; *John Potter & Co v Burrell & Son* [1897] 1 QB 97, 8 Asp MLC 200, CA. See also *Jackson v Galloway* (1838) 5 Bing NC 71, Ex Ch (where a different port of loading was substituted by agreement). 'To load with customary steamship dispatch' means 'to load in a reasonable time, having regard to the existing circumstances for a charterer having a cargo ready': *Blech v Balleras* (1860) 3 E & E 203. Cf *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL. The words 'with customary berth dispatch' in a fixed laytime charterparty are not directed to the late arrival of the ship at the berth: *NV Reederij Amsterdam v President of India, The Amstelmolen* [1960] 2 Lloyd's Rep 82 at 94. Where a charterparty contains a demurrage clause which fixes the rate of compensation for detention without specifying the time for which it is intended to apply, damages at a higher rate are not recoverable for any period of the detention if the ship remains and loads: *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193, 14 Asp MLC 110, CA.

8 *Kirk v Gibbs* (1857) 1 H & N 810.

9 *Wilson and Coventry Ltd v Otto Thoresen's Linie* [1910] 2 KB 405, 11 Asp MLC 491; and see PARAS 433-434.

10 See PARAS 443-447.

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#### **443. Charterer excused by shipowner's default.**

Where the delay in loading or failure to load is attributable to the shipowner's wrongful act or default<sup>1</sup>, the voyage-charterer is not responsible<sup>2</sup>. He is then entitled to receive from the shipowner any damages sustained in consequence of the delay or failure<sup>3</sup>. Where, however, there are fixed lay days, it does not avail the charterer that the cause which prevents him from performing his part of the loading would also have made it impossible for the shipowner to do his share of the work<sup>4</sup>. Where the shipowner repudiates the charterparty altogether, the charterer is discharged from his obligation to load and need not ship his goods even if the shipowner subsequently offers to accept them<sup>5</sup>.

1 *Bradley v Goddard* (1863) 3 F & F 638; and see PARA 540 et seq.

2 *Seeger v Duthie* (1860) 8 CBNS 45 (delay from captain's reluctance to take on board acids and gunpowder and lucifer matches); *Harris v Best, Ryley & Co* (1892) 7 Asp MLC 272, CA; *Taylor v Clay* (1846) 9 QB 713; *Harris v Haywood Gas Coal Co* (1877) 14 SLR 605; *Benson v Blunt* (1841) 1 QB 870.

3 *Carali v Xenos* (1862) 2 F & F 740; cf *Welch, Perrin & Co v Anderson & Co* (1891) 7 Asp MLC 177, CA.

4 *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA.

5 *Danube and Black Sea Railway and Kustenjje Harbour Co Ltd v Xenos* (1863) 13 CBNS 825. As to refusal by the charterer cf PARAS 434, 459-460.

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#### **444. Charterer excused by vis major.**

Where there is no requirement to load the cargo within a given or calculable number of lay days<sup>1</sup>, and both parties are prevented from performing their respective parts in the joint operation of loading by reason of vis major or some cause for which neither party is responsible<sup>2</sup>, the charterer is not liable for the delay<sup>3</sup>.

1 As to the meaning of 'lay days' see PARA 284.

2 Eg an order made by the port authorities forbidding the shipment of the cargo.

3 *Cunningham v Dunn* (1878) 3 CPD 443, 3 Asp MLC 595, CA, following *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch. Cf *Little v Stevenson & Co* [1896] AC 108, 8 Asp MLC 162, HL; *Leidemann v Schultz* (1853) 14 CB 38; *King v Hinde* (1883) 12 LR 113; and *Hudson v Clementson* (1856) 18 CB 213.

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#### **445. Charterer excused on contract becoming unlawful.**

Where the performance of the contract has become unlawful, the voyage-charterer is released from his obligation to load<sup>1</sup>; but the fact that loading is prevented by a local law during a part, as distinct from the whole, of the laytime will not excuse the failure to load within the laytime<sup>2</sup>.

1 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch. As to illegality see PARA 233.

2 *Compania Crystal de Vapores of Panama v Herman and Mohatta (India) Ltd* [1958] 2 QB 196, [1958] 2 All ER 508, [1958] 1 Lloyd's Rep 616.

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#### **446. Charterer excused where cause is expressly excepted by contract.**

Where the delay or failure in loading is attributable to a cause expressly excepted by the contract, the charterer is not responsible<sup>1</sup>. The ordinary exceptions of the charterparty inserted for the protection of the charterer<sup>2</sup> do not apply, unless the charterer is ready with his cargo<sup>3</sup> and is in a position to commence the actual loading<sup>4</sup>. Thus, where the cargo is stored at a distance from the place of shipment and the charterer is prevented by an excepted peril from delivering the cargo, he is not excused unless it is clear, from a usage of the trade in question to supply cargoes direct to the ship from a particular source outside the limits of the place of shipment, that the loading process was intended to include the entire passage to the ship<sup>5</sup>. The phrase 'other causes beyond charterer's control' in a clause of exceptions as to lay days will usually be construed ejusdem generis with the enumeration of specified perils which precedes it, and has been held not to cover a shortage of labour due to a dismissal of men by the charterer's agent for his own purposes<sup>6</sup>. The clause may, however, be extended, and, when so extended, may, for example, exempt the charterer from demurrage<sup>7</sup> where the ship is unable to berth because other ships were occupying the berth<sup>8</sup>.

The charterer will not be liable for delay in loading or discharging after the adventure has been frustrated<sup>9</sup>.

1 *Adamson v Newcastle Steamship Freight Insurance Association* (1879) 4 QBD 462, 4 Asp MLC 150, DC; *Petersen v Dunn & Co* (1895) 43 WR 349; *Larsen v Sylvester & Co* [1908] AC 295, 11 Asp MLC 78, HL; *Crawford and Rowat v Wilson, Sons & Co* (1896) 1 Com Cas 277, CA. If the ship is already on demurrage, the exception does not apply unless specially made applicable: *Lilly & Co v DM Stevenson & Co* (1895) 22 R 278. A party cannot be required to do something commercially impracticable in order to overcome the effects of an excepted peril: *Phosphate Mining Co v Rankin, Gilmour & Co* (1916) 13 Asp MLC 418. If loading in the usual and customary mode at the berth selected by the charterer is shown to have been prevented by an excepted peril, the burden shifts to the shipowner to establish that loading could and should have proceeded by indicating the existence of a practicable alternative: *Matheos (Owners) v Louis Dreyfus & Co* [1925] AC 654 at 664, 666, 16 Asp MLC 486 at 490, HL.

2 See PARA 297 et seq.

3 In *South African Dispatch Line v Panamanian Steamship Niki (Owners)* [1959] 1 QB 238, [1958] 3 All ER 590, [1958] 2 Lloyd's Rep 401 (affd [1960] 1 QB 518, [1960] 1 All ER 285, [1959] 2 Lloyd's Rep 663, CA), in construing a clause by which delay from strikes was excepted, Diplock J laid down the following four propositions of law as applicable to it: (1) it is prima facie the duty of the charterer to have the cargo ready to load at the start of the lay days; (2) a clause providing for interruption of the lay days relates prima facie to perils which affect the actual operation of loading, not merely the provision of the cargo or its transport to the loading place; (3) where loading of a selection of different cargoes is permitted, the fact that the exceptions clause would excuse delay in loading one type does not excuse a failure to load another type which would not be so delayed; but (4) in such a case the exceptions clause would excuse such delay as is reasonably necessary for obtaining and making ready for loading another type of cargo.

4 *The Village Belle* (1874) 2 Asp MLC 228; *Kay v Field* (1882) 10 QBD 241, 4 Asp MLC 588, CA; *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, 5 Asp MLC 353, HL. Cf *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA. Where there is an exception from the lay days of 'time lost owing to work being impossible through rain', the charterer must show that cargo was ready awaiting shipment throughout the rainy period so that loading was actually impeded by the rain: *Burnett Steamship Co Ltd v Danube and Black Sea Shipping Agencies* [1933] 2 KB 438, 18 Asp MLC 443, CA.

5 See PARA 425.

6 *Re Richardsons and M Samuel & Co* [1898] 1 QB 261, 8 Asp MLC 330, CA (where, in consequence of an accident on the railway, which was covered by the exception, the charterer had discharged his own labourers and thus delayed the loading). See also *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, [1963] 1 Lloyd's Rep 12, HL (any other hindrance of whatsoever nature beyond the charterer's control).

7 As to the meaning of 'demurrage' see PARA 287.

8 *NV Reederij Amsterdam v President of India, The Amstelmolen* [1961] 2 Lloyd's Rep 1, CA; applied in *R Pagnan & Fratelli v Finagrain Cie Commerciale Agricole et Financiere SA, The Adolf Leonhardt* [1986] 2 Lloyd's Rep 395.

9 Eg by the destruction of the ship: *D/S, A/S Gulnes v Imperial Chemical Industries Ltd, The Gulnes* [1938] 1 All ER 24, 59 Ll L Rep 144. As to frustration see PARA 237.

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#### **447. Charterer's duty where part of goods destroyed.**

Where, during the loading, those goods which have already been put on board the ship are destroyed, the voyage-charterer is not discharged from his duty to complete the loading<sup>1</sup>, even if such destruction is due to an excepted peril<sup>2</sup>. Since, however, the delivery of the goods so

destroyed has discharged him pro tanto, he may not be required to load other goods to take their place<sup>3</sup>, nor, apparently, may he claim the right to do so<sup>4</sup>, the shipowner being entitled to fill the space left vacant by shipping goods for his own benefit<sup>5</sup>.

1 *Jones v Holm* (1867) LR 2 Exch 335 (after part of the cargo had been loaded, the ship caught fire; charterer held liable to load such further cargo as would, with the damaged cargo, amount to a full and complete cargo); cf *Strugnell v Friedrichsen* (1862) 12 CBNS 452 (cited in PARA 441 note 1).

2 *Aitken, Lilburn & Co v Ernsthausen & Co* [1894] 1 QB 773, 7 Asp MLC 462, CA; cf *Weir & Co v Girvin & Co* [1900] 1 QB 45, 9 Asp MLC 7, CA.

3 *Jones v Holm* (1867) LR 2 Exch 335.

4 This seems to follow from the fact that the shipowner is equally discharged pro tanto by his receipt of the original goods.

5 *Aitken, Lilburn & Co v Ernsthausen & Co* [1894] 1 QB 773, 7 Asp MLC 462, CA (where it was held that freight thus earned was not to be taken into account in measuring the damages on the charterer's refusal to complete the loading). As to the payment of advance freight see *Weir & Co v Girvin & Co* [1900] 1 QB 45, 9 Asp MLC 7, CA.

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#### **448. When goods are at shipowner's risk.**

The shipowner's responsibility attaches as soon as the goods are received by his employees<sup>1</sup>. Apart from special contract or usage<sup>2</sup>, it is his duty to have the goods put on board and duly stowed in the holds or other places provided for the purpose, and to pay the expenses of so doing, including the cost of transportation to the ship, where delivery is taken before they are brought alongside<sup>3</sup>. The goods are then at his risk, and, except in so far as he has some lawful excuse<sup>4</sup>, he is liable if they are lost or damaged after they have come into his hands<sup>5</sup>.

His liability being thus absolute, it is unnecessary, in a sense, to consider what are his duties in connection with the loading, as it is immaterial whether the loss or damage is attributable to his negligence in performing those duties or to an accidental cause beyond his control<sup>6</sup>. He may not, moreover, claim the benefit of any exception in the charterparty unless he has duly performed his duties in connection with the loading<sup>7</sup>, except in so far as he has been prevented from doing so by the cause specified in the exception<sup>8</sup>; nor may he hold the charterer responsible for the detention of the ship where the delay in loading the ship is attributable to his own default<sup>9</sup>.

1 *Cobban v Downe* (1803) 5 Esp 41; *Fragano v Long* (1825) 4 B & C 219; *British Columbia Saw-Mill Co v Nettleship* (1868) LR 3 CP 499; *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470 at 475, 5 Asp MLC 353 at 355, HL, per Lord Selborne LC.

2 See PARAS 440, 455. Where the charterparty provided that cargo was to be loaded and discharged free of expense to the steamer, it was held that the charterers had to bear the expense of stowage as well as that of putting the cargo on board: *A-G v Leopold Walford (London) Ltd* (1924) 18 Ll L Rep 314. See also *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57; *Transocean Liners Reederie GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848; *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] EWHC 483 (Comm), [2006] 2 Lloyd's Rep 66; and PARA 456.

3 *Holman & Sons v Dasnières* (1886) 2 TLR 607, CA.

4 The exceptions in the charterparty apply if delivery is taken alongside, even if the loss takes place before the goods are actually placed on board: *Pyman v Burt* (1884) Cab & El 207. Cf *The Carron Park* (1890) 15 PD 203, 6 Asp MLC 543 (where the goods were damaged before sailing); *The Southgate* [1893] P 329; but see *Dampskibsselskabet Skjoldborg and CK Hansen v Charles Calder & Co* (1911) 12 Asp MLC 156 (where, owing to the form of the contract, the goods were held to be at the shipowner's absolute risk until actually put on board). If the shipowner by his contract undertakes to accept the goods at a distance and to transport them to the ship, his liability during the transportation is, apart from any special term in the contract, apparently that of an ordinary bailee (*Nottebohm v Richter* (1886) 18 QBD 63 at 65, CA, per Lord Esher MR); but the transportation to the ship may be part of the voyage contracted for (*Wiener & Co v Wilsons and Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413, CA).

5 *British Columbia Saw-Mill Co v Nettleship* (1868) LR 3 CP 499; *Cobban v Downe* (1803) 5 Esp 41; *Fragano v Long* (1825) 4 B & C 219; *Morewood v Pollok* (1853) 1 E & B 743.

6 See PARAS 449, 453.

7 *The Oquendo* (1877) 3 Asp MLC 558.

8 *The Duero* (1869) LR 2 A & E 393; *Norman v Binnington* (1890) 25 QBD 475, 6 Asp MLC 528, DC; *The Carron Park* (1890) 15 PD 203, 6 Asp MLC 543.

9 *Harris v Best, Ryley & Co* (1892) 7 Asp MLC 272, CA; cf PARA 540 et seq.

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#### **449. Shipowner's common law duties as to loading and stowage.**

Except where he engages a stevedore for the purpose, it is the shipowner's duty to employ a master who is competent to supervise the operation of loading<sup>1</sup>; and, if the master is guilty of negligence in that respect, the shipowner is responsible<sup>2</sup>. Suitable equipment must be provided for the purpose of loading the goods on board and stowing the holds<sup>3</sup>, and sufficient persons must be employed to work the equipment and to stow the goods<sup>4</sup>. The goods must be stowed with due care and skill<sup>5</sup>. If they are negligently stowed, and are in consequence destroyed or damaged by a cause occasioned by such improper stowage, the shipowner is not protected by an exception which covers the immediate cause of the destruction or damage<sup>6</sup>.

Thus, where goods break away in a storm and are damaged, the shipowner cannot rely on an exception that he is not to be accountable for breakage if it is shown<sup>7</sup> that the loss was consequent on the negligent manner in which they were stowed<sup>8</sup>; where casks are strained through the pitching of the ship in heavy weather and allow their contents to escape, he is responsible if the casks were badly stowed, in spite of an exception in the contract against perils of the sea<sup>9</sup>, or even against leakage<sup>10</sup>, although he would have been protected by such an exception if he had not been in default<sup>11</sup>.

The same principle applies where goods of different kinds are stowed either in contact or in close proximity to each other, and the goods of one of the kinds are in consequence damaged by the proximity of goods of another kind<sup>12</sup>. Thus, if barrels containing liquids are stowed along with goods which are liable to heat, and, in consequence of such goods heating, the barrels are caused to become leaky so that their contents escape and are lost, the shipowner is guilty of negligence if the heating and consequent leakage ought reasonably to have been foreseen by him<sup>13</sup>, as it was his duty to guard against the consequences by stowing the two parcels of goods in places where they could not affect each other<sup>14</sup>, and, being guilty of negligence in the performance of this duty, he may not claim the protection of an express exception against leakage<sup>15</sup>. If, however, he was ignorant of the consequences which might ensue from the

proximity of the two parcels, and could not reasonably be expected to foresee them, he is not guilty of negligence and may, therefore, rely on the exception<sup>16</sup>.

1 *Anglo-African Co v Lamzed* (1866) LR 1 CP 226 (where the charterer failed to appoint a stevedore as required by the charterparty and the master accordingly supervised the loading); *Swainston v Garrick* (1833) 2 LJ Ex 255.

2 *Sandeman v Scurr* (1866) LR 2 QB 86. The master is himself responsible to the shipper: *Goff v Clinkard* (1750) 1 Wils 282n; *Blaikie v Stembridge* (1860) 6 CBNS 894 at 911, Ex Ch. He is also responsible to the shipowner where, but only where, he is personally guilty of negligence: *Blaikie v Stembridge*; *Swainston v Garrick* (1833) 2 LJ Ex 255. Where, however, the stevedore is the charterer's employee, the master is not responsible, either to the shipper or to the shipowner, for the stevedore's negligence: *Blaikie v Stembridge*; *Swainston v Garrick*; and see PARA 457.

3 *Hang Fung Shipping and Trading Co Ltd v Mullion & Co Ltd* [1966] 1 Lloyd's Rep 511 (where the shipowner did not make the necessary gear available, and the charterers were held to be entitled to claim reimbursement of the expenses which they had incurred in hiring additional labour).

4 A sufficient number of persons must also be employed to protect the goods on board against theft: see *Morse v Slue* (1672) 1 Vent 190, 238; *Rich v Kneeland* (1613) Cro Jac 330; Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 503. As to the effect of an exception against theft see PARA 276; and as to the meaning and effect of a clause in a charterparty providing that cargo is to be loaded and discharged free of expense to the ship see *A-G v Leopold Walford (London) Ltd* (1924) 18 Ll L Rep 314 (cited in PARA 448 note 2). An obligation imposed on charterers to provide stevedores to load the cargo at a fixed cost to the ship does not include a liability in respect of winchmen employed on work outside the normal functions of stevedores: *National Steamship Co Ltd v SA Comercial de Exportacion e Importacion (Louis Dreyfus & Co Ltd)* (1932) 44 Ll L Rep 99, HL. See also *Ohlson Steamship Co v Ronaasen & Son* (1933) 47 Ll L Rep 26 ('the cargo to be loaded and discharged in tiers of lengths as customary in the firewood trade').

5 *Swainston v Garrick* (1833) 2 LJ Ex 255; *Gillespie v Thompson* (1856) 6 E & B 477n; *Anglo-African Co v Lamzed* (1866) LR 1 CP 226; *Furness v Tennant, Sons & Co* (1892) 66 LT 635, 7 Asp MLC 179, CA; cf *Zipsy v Hill* (1858) 1 F & F 570. As to the meaning of 'seaworthy trim' see *Britain Steamship Co Ltd v Louis Dreyfus & Co* (1935) 51 Ll L Rep 196, followed in *JC Carras & Sons (Shipbrokers) Ltd v President of India, The Argobeam* [1970] 1 Lloyd's Rep 282. As to dunnage see PARA 450; as to broken stowage see PARA 451; and as to the statutory provisions relating to the loading, stowage and securing of cargoes see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657 et seq.

6 An express exception against negligence will, however, protect him if framed in terms wide enough to cover negligent stowage: *The Duero* (1869) LR 2 A & E 393; and see PARA 453.

7 The burden of proof is on the shipper: *Muddle v Stride* (1840) 9 C & P 380; *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; *Czech v General Steam Navigation Co* (1867) LR 3 CP 14; *The Prosperino Palasso* (1873) 2 Asp MLC 158; *The Ida* (1875) 2 Asp MLC 551, PC; *Moes, Molière and Tromp v Leith and Amsterdam Shipping Co* (1867) 5 M 988 (followed in *Horsley v Baxter Bros & Co* (1893) 20 R 333); but see *The Alexandra* (1866) 14 LT 742.

8 *Phillips v Clark* (1857) 2 CBNS 156; *Wibau Maschinenfabric Hartman SA v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494.

9 *The Catharine Chalmers* (1874) 32 LT 847; *The Ville de l'Orient* (1860) 2 LT 62.

10 *Phillips v Clark* (1857) 2 CBNS 156.

11 *The Catharine Chalmers* (1874) 32 LT 847; *Phillips v Clark* (1857) 2 CBNS 156; *The Modena, Chiesman & Co v Modena (Owners)* (1911) 16 Com Cas 292, DC.

12 *Mackill v Wright Bros & Co* (1888) 14 App Cas 106, HL; *Hayn v Culliford* (1879) 4 CPD 182, 4 Asp MLC 128, CA; *The Figlia Maggiore* (1868) LR 2 A & E 106. Cf *Freedom (Owners) v Simmonds, Hunt & Co, The Freedom* (1871) LR 3 PC 594; *Werner v Det Bergenske Dampskibsselskab* (1926) 24 Ll L Rep 75 (deterioration of eggs stowed above rotting potatoes). An express provision in a charterparty that the shipowner is to be responsible for proper stowage is not an absolute warranty: *Union Castle Mail Steamship Co Ltd v Borderdale Shipping Co Ltd* [1919] 1 KB 612, 14 Asp MLC 435.

13 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231.

14 *The Alexandra* (1866) 14 LT 742.

15 *The Alexandra* (1866) 14 LT 742; *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231.

16 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; cf *Union Castle Mail Steamship Co Ltd v Borderdale Shipping Co Ltd* [1919] 1 KB 612, 14 Asp MLC 435.

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#### **450. Dunnage.**

The shipowner must, in addition to stowing the goods with due care and skill<sup>1</sup>, provide any dunnage which may be required for the purpose of protecting the goods during the voyage<sup>2</sup>. Dunnage consists of pieces of wood placed against the sides and bottom of the hold to preserve the cargo from the effects of leakage<sup>3</sup>. Other articles may be used, such as mats<sup>4</sup> and, probably, cargo<sup>5</sup>.

1 See PARA 449.

2 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 504; *The Cressington* [1891] P 152, 7 Asp MLC 27, DC (insufficient dunnage); *Harlow & Jones Ltd v PJ Walker Shipping & Transport Ltd* [1986] 2 Lloyd's Rep 141 (additional dunnage required for stowage of cargo; defendants liable for extra cost of dunnage); see also *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57 (allegation of insufficient dunnage by shippers under special term allocating duty of stowage to charterer). As to the duty of providing broken stowage see PARAS 259, 451. It seems that a guarantee as to dead weight cargo capacity expressed in general terms without reference to cargo of a particular kind is limited, in the absence of special circumstances, to abstract lifting capacity so that no deduction need be made by the shipowner for space occupied by dunnage: see *Re Thomson & Co and Brocklebank Ltd* [1918] 1 KB 655, 14 Asp MLC 253.

3 '... whether a specific article be dunnage or not must depend upon the view of a trained mercantile man experienced in these matters as to the nature and function of the object': *Wye Shipping Co Ltd v Compagnie du Chemin de Fer Paris-Orleans* (1922) 10 Ll L Rep 85 at 87 per McCordie J.

4 *Hogarth v Walker* [1900] 2 QB 283, 9 Asp MLC 84, CA. As to 'shifting boards' see *Wye Shipping Co Ltd v Compagnie du Chemin de Fer Paris-Orleans* [1922] 1 KB 617, 10 Ll L Rep 85; *Rederi A/B Unda v WW Burdon and Co Ltd* (1937) 57 Ll L Rep 95; *Skagerak Akt v Saremine SA* (1939) 64 Ll L Rep 153.

5 See *The Marathon* (1879) 4 Asp MLC 75; *The Visurgis* [1999] 1 Lloyd's Rep 218.

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#### **451. Broken stowage.**

If the cargo as shipped is a full and complete cargo<sup>1</sup>, it is immaterial that there is a large space left which might have been filled if a different method of packing had been adopted, or that more cargo could have been carried if the goods tendered had been more compressed<sup>2</sup>. The contract may, however, provide that goods are to be shipped for broken stowage<sup>3</sup>, in which case the charterer is bound to fill any space which may be left after the specified cargo has been shipped<sup>4</sup>; but, if only a portion of the ship's cargo space is chartered, the shipowner is entitled to carry goods for his own profit in the remaining space<sup>5</sup>.

- 1 As to the meaning of 'full and complete cargo' see PARA 259.
- 2 *Cuthbert v Cumming* (1855) 11 Exch 405, Ex Ch; *Furness v Tennant Sons & Co* (1892) 7 Asp MLC 179, CA; *SS Isis Co Ltd v Bahr* [1900] AC 340, 9 Asp MLC 109, HL; *Angfartygs AB Haldan v Price and Pierce Ltd* [1939] 3 All ER 672, 64 Ll L Rep 290, CA (where the charterer was held to be entitled to ship bundled timber by trade custom, although more could have been shipped if unbundled).
- 3 Where the charterer has an option as to what kind of cargo he will supply, the term as to broken stowage may apply to one kind of cargo and not to another: *Duckett v Satterfield* (1868) LR 3 CP 227; *Angfartygs A/B Haldan v Price and Pierce Ltd* [1939] 3 All ER 672, 64 Ll L Rep 290, CA.
- 4 *Cole v Meek* (1864) 15 CBNS 795.
- 5 *Caffin v Aldridge* [1895] 2 QB 648, 8 Asp MLC 233, CA.

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#### **452. Statutory duties as to loading and stowage.**

The duties of shippers in relation to the loading and stowage of cargo are set out in regulations made under the Merchant Shipping Act 1995<sup>1</sup>. The regulations apply to sea-going United Kingdom ships wherever they may be and sea-going non-United Kingdom ships while they are within the United Kingdom waters when loaded or intended to be loaded with any cargo<sup>2</sup>, and apply to the carriage of all cargoes subject to the requirement of a further statutory regime<sup>3</sup> in respect of the carriage of dangerous goods and marine pollutants<sup>4</sup>.

- 1 See the Merchant Shipping (Carriage of Cargoes) Regulations 1999, SI 1999/336 (made under the Merchant Shipping Act 1995 s 86(4)); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 592 et seq.
- 2 See the Merchant Shipping (Carriage of Cargoes) Regulations 1999, SI 1999/336, reg 3(1); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 660. For these purposes 'cargo' means any cargo which, owing to its particular hazard to ships or persons on board, may require special precautions, with the exception of liquids in bulk, gases in bulk and dangerous goods: see reg 2(1); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 660.
- 3 See the requirements of the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997/2367 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657).
- 4 See the Merchant Shipping (Carriage of Cargoes) Regulations 1999, SI 1999/336, reg 3(2); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 660.

#### **UPDATE**

#### **452 Statutory duties as to loading and stowage**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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#### **453. Liability for bad stowage where there is no exception clause; special form of exception.**

If there is no exception in the contract applicable to the cause of loss, no question of negligent stowage arises. However good the mode of stowage may have been, the shipowner is responsible, since the goods are at his risk, inherent vice always excepted<sup>1</sup>.

Thus, the ordinary exceptions against, for example, heating or leakage apply only to the actual goods which heat or leak; they do not cover the loss which other goods sustain in consequence of such heating or leakage<sup>2</sup>. For this purpose, a special form of exception is required. Sometimes the contract expressly provides that the shipowner is not to be responsible for negligent or improper stowage<sup>3</sup>, or an exception of negligence may be framed in terms sufficiently wide to cover it<sup>4</sup>; but the ordinary negligence clause excepting damage 'from any act or default of the pilot, master or mariners in the navigation or management of the ship' does not extend to other agents or employees, so that the shipowner remains responsible for the improper stowage of stevedores whom he employs<sup>5</sup>.

1 *Gillespie v Thompson* (1856) 6 E & B 477n; *Alston v Herring* (1856) 11 Exch 822; *Hayn v Culliford* (1879) 4 CPD 182, 4 Asp MLC 128, CA (where there was negligent stowage). As to inherent vice see PARA 273.

2 *Thrift v Youle & Co* (1877) 2 CPD 432, 3 Asp MLC 357, DC; *The Nepoter* (1869) LR 2 A & E 375; and see PARA 279.

3 *Bond, Connolly & Co and Woodall & Co v Federal Steam Navigation Co Ltd* (1906) 22 TLR 685, CA; *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57; *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] EWHC 483 (Comm), [2006] 2 Lloyd's Rep 66.

4 *The Duero* (1869) LR 2 A & E 393; *Baerselman v Bailey* [1895] 2 QB 301, 8 Asp MLC 4, CA; *Norman v Binnington* (1890) 25 QBD 475, 6 Asp MLC 528, DC. Cf *Good v London Steam-Ship Owners' Mutual Protecting Association* (1871) LR 6 CP 563 per Willes J; and *Bruce, Marriott & Co v Houlder Line Ltd* [1917] 1 KB 72, 13 Asp MLC 550, CA. For a clause making the certificate of a surveyor conclusive as to proper stowage see *Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd* [1938] 1 KB 459, [1937] 4 All ER 304, 59 Ll L Rep 23 (where Goddard J held (not following the dictum of Bailhache J in *Walters v Joseph Rank Ltd* (1923) 39 TLR 255) that such a clause was invalidated by the Harter Act 1893 (see PARA 280 note 6)).

5 *Hayn v Culliford* (1879) 4 CPD 182, 4 Asp MLC 128, CA (where a further clause stating that the master, officers and crew in the transmission of the goods should be considered the servants of the shipper, owner or consignee was held not to affect the shipowner's responsibility for negligent stowage); *The Ferro* [1893] P 38, 7 Asp MLC 309; cf *R F Brown and Co Ltd v T & J Harrison, Hourani v T & J Harrison* (1927) 17 Asp MLC 294, CA. As to the personal liability of stevedores see PARA 457; and as to what is covered by 'navigation or management of the ship' see PARAS 280, 388.

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#### **454. Place of stowage.**

The goods to be shipped must be stowed in the proper places provided for the purpose<sup>1</sup>. The shipper has no right to claim the use of any other part of the ship<sup>2</sup>, nor may the shipowner insist on stowing them elsewhere<sup>3</sup>. If he does so, apart from agreement, he is responsible for

any loss or damage sustained by the goods, and may not rely on any exception of the contract to exempt him from responsibility<sup>4</sup>.

1 *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, 6 Asp MLC 92, HL; *Steamship Calcutta Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, 11 Asp MLC 395. As to the statutory provisions relating to the stowage and securing of goods see PARA 449.

2 *Mitcheson v Nicol* (1852) 7 Exch 929; *Neill v Ridley* (1854) 9 Exch 677; *Wills & Co v Burrell & Son* (1894) 21 R 527.

3 Cf *Jardine, Matheson & Co v Clyde Shipping Co* [1910] 1 KB 627, 11 Asp MLC 384.

4 *The Oquendo* (1877) 3 Asp MLC 558; *Newall v Royal Exchange Shipping Co* (1885) 33 WR 868, CA (affd sub nom *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, 6 Asp MLC 92, HL).

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#### 455. Deck cargo.

The deck is not a proper place of stowage<sup>1</sup>; and the shipowner is not entitled to stow goods on deck<sup>2</sup>, except:

- 136 (1) where a usage of trade has sanctioned the practice<sup>3</sup>; but it is not sufficient that it is usual, unless the shipper expressly provides to the contrary, to carry the particular goods on deck<sup>4</sup>; or
- 137 (2) where the master has the shipper's consent to stow the goods on deck; there may have been an express term of the contract to this effect<sup>5</sup>; and it seems that the shipper's consent may be implied from his conduct, as, for example, where he sees the goods stowed on deck and makes no objection<sup>6</sup>, or from the nature of the goods being such that they cannot be stowed below deck<sup>7</sup>.

There are specific statutory requirements which must be complied with when cargo is carried on deck<sup>8</sup>. For the purposes of the Hague-Visby Rules, 'goods' does not include cargo which by the contract of carriage is stated as being carried on deck and is so carried<sup>9</sup>.

1 *Gould v Oliver* (1840) 2 Man & G 208; *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, 6 Asp MLC 92, HL; and see *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd, The Fantasy* [1992] 1 Lloyd's Rep 235, CA (cargo loaded in containers for carriage on deck; charterers liable for bad stowage of the deck cargo prior to the voyage). See also PARA 467.

2 The shipowner may carry goods on deck for his own benefit: *Neill v Ridley* (1854) 9 Exch 677. As to general average and goods carried on deck see PARA 611.

3 *Gould v Oliver* (1840) 2 Man & G 208; cf *Da Costa v Edmunds* (1815) 4 Camp 142, discussed in *Milward v Hibbert* (1842) 3 QB 120.

4 *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, 6 Asp MLC 92, HL.

5 *Burton v English* (1883) 12 QBD 218, 5 Asp MLC 187, CA; *Wright v Marwood* (1881) 7 QBD 62, 4 Asp MLC 451, CA; *Johnson v Chapman* (1865) 19 CBNS 563. Where the contract of affreightment gives the shipowner an option to stow the goods on deck, there is no implied obligation on his part to inform the shipper that he proposes to exercise the option, nor is the option confined to such goods as are usually stowed on deck: *Armour & Co Ltd v Leopold Walford (London) Ltd* [1921] 3 KB 473, 15 Asp MLC 415.

6 *Gould v Oliver* (1840) 2 Man & G 208; *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, 6 Asp MLC 92, HL (where, in the special circumstances of the case, it was held that the goods were so placed at the shipowner's risk).

7 *Milward v Hibbert* (1842) 3 QB 120 at 136 per Lord Denman LJ.

8 See the Merchant Shipping (Carriage of Cargoes) Regulations 1999, SI 1999/336, reg 6; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 662.

9 See PARA 372 note 2.

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#### 456. When shipowner is not liable for stowage.

If the contract provides that the charterer is himself to load the goods and to be responsible for their proper stowage, the shipowner is clearly not liable for bad stowage<sup>1</sup>. He is also not liable where the charterer or his agent<sup>2</sup> is present during the operation of loading and, with full knowledge of what is being done, does not object either to the methods<sup>3</sup> or places<sup>4</sup> of stowage, or to the manner in which the loading is carried out<sup>5</sup>.

1 Whether or not the responsibility for stowage has effectively been transferred by special contractual agreement from owner to charterer is clearly a matter of construction and it is sometimes difficult to mark the precise dividing line between the cases: in the following cases it has been held that the responsibility for stowage was transferred to the charterer: *Compania Sud American Vapores v Hamburg* [2006] EWHC 483 (Comm), [2006] 2 All ER (Comm) 1, [2006] 2 Lloyd's Rep 66; *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57; *Transocean Liners Reederie GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848; *CHZ 'Rolimpex' v Eftavrysses Compania Naviera SA, The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586; *Canadian Transport Co Ltd v Court Line Ltd* [1940] AC 934, [1940] 3 All ER 112, 19 Asp MLC 374, HL; *Ceylon Government v Chandris* [1965] 3 All ER 48, [1965] 2 Lloyd's Rep 204; *Brys and Gylsen Ltd v J & J Drysdale & Co Ltd* (1920) 4 Ll L Rep 24; *The Catharine Chalmers* (1874) 2 Asp MLC 598 (vessel to be 'stowed by charterer's stevedore at the expense and risk of the vessel'; owners held not to be liable for bad stowage; *sed quaere*). On the other hand, it was found in the following cases that responsibility for stowage had *not* been reallocated to the charterer: *CV Scheepvaartonderneming Flintermar v Sea Malta Co Ltd* [2005] EWCA Civ 17, [2005] 1 Lloyd's Rep 409, [2005] 1 All ER (Comm) 497; *Alexandros Shipping Co of Piraeus v MSC Mediterranean Shipping Co SA of Geneva, The Alexandros P* [1986] 1 Lloyd's Rep 421; *MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd, The Argonaut* [1985] 2 Lloyd's Rep 216; *AB Marintrans v Comet Shipping Co Ltd, the Shinjitsu Maru No 5* [1985] 1 Lloyd's Rep 568; *Ballantyne v Paton* 1912 SC 246; *Andersen v Crundall & Co* (1898) 14 TLR 256; *Harris v Best, Ryley & Co* (1892) 7 Asp MLC 272, CA; *Union Castle Mail Steamship Co Ltd v Borderdale Shipping Co Ltd* [1919] 1 KB 612, 14 Asp MLC 435; *Sack v Ford* (1862) 13 CBNS 90; *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231.

2 A lighterman employed to transport the goods to the ship is not the charterer's agent for this purpose: *The Figlia Maggiore* (1868) LR 2 A & E 106.

3 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; *Ismail v Polish Ocean Lines* [1976] QB 893, [1976] 1 All ER 902, [1976] 1 Lloyd's Rep 489, CA (representation by charterer's agent that dunnage was unnecessary); cf *Major v White* (1835) 7 C & P 41.

4 See PARA 454. Where the charterparty provides that the shipowner is to be responsible for the proper stowage and delivery of the cargo, it seems that he is liable for damage caused by stowing part of the cargo in such a position as to damage the rest if his employees knew, or ought to have known, of the danger, even if the charterer's agent assented to the method of stowage adopted. This provision is not, however, an absolute warranty of safe stowage; its effect is only to render the shipowner liable for negligence in the stowage: *Union Castle Mail Steamship Co Ltd v Borderdale Shipping Co Ltd* [1919] 1 KB 612, 14 Asp MLC 435.

5 The same principle applies where, owing to the method adopted, the ship is unable to carry the full quantity contracted for: *Hovill v Stephenson* (1830) 4 C & P 469. A mere permission to load in a particular

manner does not relieve the shipowner from the consequences of negligent stowage: *Hutchinson v Guion* (1858) 5 CBNS 149; and see *Union Castle Mail Steamship Co Ltd v Borderdale Shipping Co Ltd* [1919] 1 KB 612, 14 Asp MLC 435.

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#### **457. Employment of stevedore.**

Where the actual work of loading the goods is delegated to a stevedore, he is usually to be regarded as the employee of the shipowner, who, as being the person primarily responsible for the loading, is liable to the shipper<sup>1</sup>, in the absence of an exception covering the stevedore's negligence<sup>2</sup>, for the manner in which the stevedore performs his work<sup>3</sup>, and also to the stevedore for his charges<sup>4</sup>.

The shipowner's liability is not taken away by a provision in the charterparty that the stevedore is to be appointed by the charterer, as the shipowner's duty to load the cargo remains, notwithstanding the charterer's failure to appoint any stevedore<sup>5</sup>, and the mere fact that the charterer is to appoint the stevedore is not inconsistent with the existence of the relationship of employer and employee between the shipowner and the stevedore when appointed<sup>6</sup>. As regards a shipper other than the charterer, this is clearly the case<sup>7</sup>. Even as regards the charterer himself the position appears to be the same<sup>8</sup>. He is not liable to pay demurrage or damages for detention if the loading is delayed beyond the proper time through the negligence or default of a stevedore, even where the stevedore is nominated by him, on the ground that the stevedore is, nevertheless, the shipowner's employee<sup>9</sup>; and it seems, therefore, that the charterer is entitled, on the same ground, to hold the shipowner responsible if the goods are improperly stowed by the stevedore acting as the shipowner's employee<sup>10</sup>.

The charterparty may, however, provide not merely that the stevedore is to be appointed by the charterer but also that he is to be employed and paid by him<sup>11</sup>. The stevedore is then to be regarded as the employee of the charterer, who is, therefore, not entitled to hold the shipowner responsible for improper stowage<sup>12</sup>. On the contrary, he is himself responsible to the shipowner for any loss or damage which the shipowner may suffer in consequence of improper stowage, unless the charterparty contains a term exempting him from responsibility in such circumstances<sup>13</sup>; and he is also responsible to the owners of any goods shipped which may be damaged by reason of the improper stowage<sup>14</sup>. Where, however, stevedores are employed by the charterers but the contract provides that the charterers are to load, stow and discharge at their own expense under the supervision and responsibility of the master, the primary liability for any damage caused by the stevedores falls on the shipowner, in the absence of any actual intervention by the charterers, as distinct from stevedores employed by them<sup>15</sup>.

The stevedore is personally liable to the holder of the bill of lading if he negligently damages the goods, and, not being a party to the bill of lading, is not usually entitled to rely on the exceptions in it<sup>16</sup>.

1 Where third persons are injured by the negligence of the stevedore's employees, the stevedore (*Burns v Poulson* (1873) LR 8 CP 563), and not the shipowner (*Murray v Currie* (1870) LR 6 CP 24), is usually responsible. At common law a stevedore is only liable for negligence. In *British-American Tobacco Co Ltd v Jones* (1925) 134 LT 405, DC, it was held that the Mersey Dock Acts Consolidation Act 1858 s 36 (requiring the master porters who perform the work of discharging ships at Liverpool to execute bonds conditioned for paying the owners of goods 'the amount of any loss or damage or injury which such goods may sustain') had not the effect of rendering the master porters liable for damage which was not due to negligence. There is no implied term in the contract between stevedore and shipowner that the stowage plan must be accurate and the cargo properly stowed: *Lampson Bros Ltd v Lilley & Co* (1936) 54 Ll L Rep 331. The shipowner has been held to be under no

duty to the stevedores to anticipate possible negligence on their part, by taking steps to guard against it: see *Compania Mexicana de Petroleo El Aguila v Essex Transport and Trading Co Ltd* (1929) 33 Ll L Rep 202, CA. As to the common duty of care owed by an occupier of premises, including a vessel, to his visitors see **NEGLIGENCE** vol 78 (2010) PARA 29 et seq.

2 *Baerselman v Bailey* [1895] 2 QB 301, 8 Asp MLC 4, CA. If the stevedore is negligent, the shipowner is not protected by an exception against 'any act, neglect or default of the pilot, master or mariners in the navigation or management of the ship': *The Ferro* [1893] P 38, 7 Asp MLC 309.

3 *Swainston v Garrick* (1833) 2 Lj Ex 255.

4 *Eastman v Harry* (1876) 3 Asp MLC 117, CA. Since prima facie the stowage of cargo is the shipowner's responsibility, it is within the authority of a ship's agent to arrange and pay for the work of stowage: *Blandy Bros & Co Lda v Nello Simoni Ltd* [1963] 2 Lloyd's Rep 393, CA.

5 *Anglo-African Co v Lamzed* (1866) LR 1 CP 226.

6 *Steinman & Co v Angier Line* [1891] 1 QB 619, 7 Asp MLC 46, CA; *Andersen v Crundall & Co* (1898) 14 TLR 256. Cf *Eastman v Harry* (1876) 3 Asp MLC 117, CA. It may be appropriate to imply a term to the effect that the charterers would appoint reasonably competent stevedores: see *Macieo Shipping Ltd v Clipper Shipping Lines Ltd, The Clipper Sao Luis* [2000] 1 All ER (Comm) 920, [2000] 1 Lloyd's Rep 645. See also note 10.

7 *Sandeman v Scurr* (1866) LR 2 QB 86; *The St Cloud* (1863) 8 LT 54; *Swainston v Garrick* (1833) 2 Lj Ex 255; *Eastman v Harry* (1876) 3 Asp MLC 117, CA; *The Ferro* [1893] P 38, 7 Asp MLC 309. The shipper may, however, by his conduct, preclude himself from holding the shipowner responsible: *Major v White* (1835) 7 C & P 41.

8 See note 10.

9 *Harris v Best, Ryley & Co* (1892) 7 Asp MLC 272, CA.

10 *Sack v Ford* (1862) 13 CBNS 90 (where the charterparty expressly provided that the charterer was not to be responsible to the shipowner for bad stowage, and it was held that the shipowner was, therefore, liable to the charterer for the stevedore's negligence); *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231 at 234 per Dr Lushington; *Harris v Best, Ryley & Co* (1892) 7 Asp MLC 272, CA, per Lord Esher MR; *Andersen v Crundall & Co* (1898) 14 TLR 256; but see *Murray v Currie* (1870) LR 6 CP 24 per Willes J. In *Blaikie v Stembridge* (1860) 6 CBNS 894 at 911, Ex Ch, the action was brought against the master, and it was held that he was not responsible, as the stevedore was not his employee, but the view was expressed that the stevedore might be the shipowner's employee even if he was appointed by the charterer. In *The Catharine Chalmers* (1874) 2 Asp MLC 598, the court professed to follow *Blaikie v Stembridge* and held the shipowner not to be responsible, although the charterparty expressly provided that the stowage was to be at the shipowner's risk. This decision may, however, be incorrect: cf *The Ferro* [1893] P 38, 7 Asp MLC 309.

11 Where the charterparty ('Centrocon') provided that the charterers had the option to appoint a stevedore 'to be paid by the master at the current rate', and it appeared that the exporters of grain at the loading port, including the charterers, had their own stevedoring department and had agreed a rate for stevedoring among themselves which was higher than the rate charged by independent stevedores who were usually employed when ships were loaded 'on the berth' and not under charter, it was held that the former rate was not necessarily 'the current rate' and that this expression meant the rate which the shipowner would have had to pay if he had been free to go into the market and appoint a stevedore: *Britain Steamship Co Ltd v Bunge & Co Ltd* (1929) 35 Ll L Rep 88, 282. If the charterparty provides that the charterers are to provide stevedores to load the cargo at a given rate and by trade union rules the ship's winches must be worked by shore winchmen and not (as is usually done) by the ship's crew, the cost of such winchmen must be borne by the shipowner: *SA Comercial de Exportacion y Importacion (Louis Dreyfus y Compania) Lda v National Steamship Co Ltd* (1932) 38 Com Cas 88, HL. In *Ben Line Steamers Ltd v Compagnie Optorg of Saigon* (1937) 57 Ll L Rep 194, CA, the charterparty provided that the charterers' agents should nominate the stevedore 'provided rates are not higher than captain can get the work done by other good stevedores', and the rate charged by the stevedore nominated by the charterers was higher than that charged by a stevedore with whom the shipowners had a contract, the latter rate being, however, conditional on the owners giving the stevedore the stevedoring work of all their ships and not being applicable 'when steamers are bound by charterparty to employ charterers' stevedore'. It was held that the captain was not bound to employ the stevedore nominated by the charterers.

12 *Harris v Best, Ryley & Co* (1892) 7 Asp MLC 272, CA, per Lord Esher MR; cf *Royal Mail Steamship Co v Macintyre Bros & Co* (1911) 16 Com Cas 231 (theft). If, however, the charterer is afterwards reimbursed the stevedore's expenses by the shipowner, the stevedore is to be deemed, at least as regards shippers other than the charterer, to be the shipowner's employee: *Sandeman v Scurr* (1866) LR 2 QB 86.

13 *Harris v Best, Ryley & Co* (1892) 7 Asp MLC 272, CA. See *Brys and Gylsen Ltd v Drysdale & Co* (1920) 4 Ll L Rep 24 (where the charterers were held liable for dead freight owing to the stevedore's failure to load a full cargo). As to exceptions protecting the charterer see PARA 297 et seq.

14 *Swainston v Garrick* (1833) 2 LJ Ex 255.

15 *AB Marintrans v Comet Shipping Co Ltd, The Shinjitsu Maru No 5* [1985] 1 Lloyd's Rep 568; *MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd, The Argonaut* [1985] 2 Lloyd's Rep 216. See also *Filikos Shipping Corp of Monrovia v Shipmair BV, The Filikos* [1983] 1 Lloyd's Rep 9, CA; *Alexandros Shipping Co of Piraeus v MSC Mediterranean Shipping Co SA of Geneva, The Alexandros P* [1986] 1 Lloyd's Rep 421.

16 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, sub nom *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep 365, HL. See also PARA 354 note 6. If the shipowner acts as an agent for the stevedore, the stevedore can enforce the terms of a bill of lading against a shipper if: (1) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it; (2) the bill of lading makes it clear that, in addition to contracting for these provisions on his own behalf, the shipowner is also contracting as an agent for the stevedore that those provisions should apply to the stevedore; (3) the shipowner has authority to do that; and (4) any difficulties about consideration moving from the stevedore would be overcome: *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, sub nom *The Eurymedon* [1974] 1 Lloyd's Rep 534, PC.

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## (D) MEASURE OF DAMAGES

### 458. Failure to provide cargo.

The charterparty may contain a provision for the payment of a specified sum as liquidated damages where, without lawful excuse, the voyage-charterer fails to provide the specified cargo<sup>1</sup>. In the absence of any such provision, or where the sum specified is to be regarded as a penalty<sup>2</sup>, the damages are unliquidated<sup>3</sup>, and the measure of damages<sup>4</sup> is the estimated amount of freight which would have been earned if the charterer had provided the cargo<sup>5</sup>, less an allowance for the expenses which would have been incurred in earning it<sup>6</sup>. A further allowance must be made if the ship has been able to find other employment in respect of any profit arising out of such employment<sup>7</sup>; if that profit is greater than the profit which would have been earned under the charterparty, the damages will be nominal only<sup>8</sup>.

1 *Heugh v Escombe* (1861) 4 LT 517; *Puller v Staniforth* (1809) 11 East 232; *Bell v Puller* (1810) 2 Taunt 285; cf *Sparrow v Paris* (1862) 7 H & N 594; and see PARA 307.

2 *Winter v Trimmer* (1762) 1 Wm BI 395; *Harrison v Wright* (1811) 13 East 343; cf *Rayner v Rederiaktiebolaget Condor* [1895] 2 QB 289, 8 Asp MLC 43; and see PARA 307. See also **DAMAGES** vol 12(1) (Reissue) PARA 1065 et seq.

3 Where the specified sum is payable in a particular event, which does not happen, the damages are unliquidated: *Staniforth v Lyall* (1830) 7 Bing 169. See also **DAMAGES** vol 12(1) (Reissue) PARA 808.

4 As to the measure of damages generally see PARA 773 et seq; **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 22; **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq.

5 *Westland v Robinson* (prior to 1690) cited in 2 Vern at 212; Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 678. Where the charterparty provides for the loading of different classes of goods at the charterer's option at varying rates of freight, the average freight is to be taken calculated on the usual quantity carried on such voyages: *Thomas v Clark and Todd* (1818) 2 Stark 450; applied in *Capper v Forster* (1837) 3 Bing NC 938. In *Steven v Bromley & Son* [1919] 2 KB 722, 14 Asp MLC 455, CA, part of the cargo loaded consisted of general goods, whereas the charterparty called for a cargo of steel billets. The current rate of freight for general goods was higher than the rate of freight agreed in the charterparty for the cargo of steel

billets. It was held (distinguishing *The Olanda, Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Co Ltd* (1917) [1919] 2 KB 728n, HL) that the tender and acceptance of the general goods implied an agreement by the charterers to pay for it at the current rate of freight for general goods and to pay for the rest of the cargo, which consisted of steel billets as required by the charterparty, at the rate provided in it. In *Andrew Weir & Co v Dobell & Co* [1916] 1 KB 722, 13 Asp MLC 496, the plaintiffs had chartered a ship for a certain period at 21s per ton. They sub-chartered her to the defendants for the same period at 28s 6d per ton. In breach of the sub-charter the defendants failed to load a cargo. The plaintiffs cancelled that contract, as they were entitled to do under the head charterparty, and sued the defendants for the difference between 28s 6d and 21s the market rate of freight. It was held that, in cancelling the head charterparty, the plaintiffs were acting in fulfilment of their duty to minimise damages and were in the same position as if they had entered into another sub-charterparty at 21s, and the measure of damages was, therefore, the difference between 28s 6d and 21s.

In *Anglo-Celtic Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* (1932) 43 Ll L Rep 295, a ship was chartered for a voyage, hire to be paid on a time basis. The shipowners claimed damages for failing to perform the voyage, and it was held (applying *Jardine, Matheson & Co v Clyde Shipping Co* [1910] 1 KB 627, 11 Asp MLC 384) that: (1) in calculating the time for which hire would have been payable if the charterers had fulfilled their contract, it must be assumed that they would have loaded a normal (ie a full) cargo which would have occupied the usual time in loading and discharging; but (2) it must be assumed that the charterers would have used all the lay days so that the shipowners would have had to incur expenses (such as wharfage dues) which they had to bear under the charterparty for the whole of these days; and (3) it must be assumed that the charterers would have exercised any options conferred on them by the charterparty, eg as to discharging ports, in the way least favourable to the shipowners: *Kaye Steam Navigation Co Ltd v W and R Barnett Ltd* (1932) 48 TLR 440, 43 Ll L Rep 166.

6 *Smith v M'Guire* (1858) 3 H & N 554. It is no defence that the ship was afterwards lost on her voyage, so that, if the goods had been loaded, no freight would have been earned: *Stephenson v Price* (1784) 3 Doug KB 353.

7 *Smith v M'Guire* (1858) 3 H & N 554; *Puller v Staniforth* (1809) 11 East 232. No allowance is to be made where the contract expressly fixes a sum to be paid as liquidated damages: *Bell v Puller* (1810) 2 Taunt 285.

8 *Staniforth v Lyall* (1830) 7 Bing 169.

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#### **459. Duty to seek other employment for the ship.**

How far the shipowner is bound to seek other employment or to accept it, if offered by the charterer or by a third person, is a question not free from doubt<sup>1</sup>. Since a refusal on the part of the charterer to provide a cargo is not a final breach unless the shipowner elects to treat it as such, and the shipowner is, therefore, entitled to treat the charterparty, even after the refusal, as subsisting throughout the whole of the period allowed for loading<sup>2</sup>, the charterer has no cause of complaint if, during such period, the shipowner declines to accept other employment from him, as, by accepting it, the shipowner might be deemed to have exonerated and discharged the charterer from his original undertaking<sup>3</sup>; nor is the shipowner, during the period allowed for loading, bound to seek or to accept employment elsewhere, since, by his acceptance of such employment, he clearly indicates an intention to treat the charterparty as discharged<sup>4</sup>. Where, therefore, the shipowner obtains employment for the ship after the expiry of the period allowed for loading, at a rate of freight lower than that offered or obtainable previously, the allowance to be made is to be calculated with reference to the freight actually earned, and not the freight which would or might have been earned if he had elected to treat the charterparty as discharged by the charterer's refusal to load<sup>5</sup>.

Whether after the expiry of the period allowed for loading the shipowner is bound to find some employment for the ship, if possible, and whether the charterer is entitled to an allowance for the freight which might have been earned but for the shipowner's default in refusing other

employment or in taking no steps to seek it, are questions to which different answers have been given<sup>6</sup>. It is probable, on the principle that, in assessing the damages for a breach of contract, regard must be had not only to what the injured party has done but also to what he had the means of doing, and as a prudent man ought in reason to have done, to minimise his loss<sup>7</sup>, that the shipowner is bound to do what is reasonable and to avail himself of any opportunity of employment that may present itself<sup>8</sup>. In addition, the charterer must pay any demurrage which may have accrued due before his refusal to load<sup>9</sup>.

1 See note 6.

2 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch.

3 *Harries v Edmonds* (1845) 1 Car & Kir 686; *Hudson v Hill* (1874) 2 Asp MLC 278; but see *Wilson v Hicks* (1857) 26 LJ Ex 242 (where the question was left to the jury whether the master had acted unreasonably in refusing the employment offered).

4 *Avery v Bowden* (1856) 6 E & B 953 at 962.

5 *Harries v Edmonds* (1845) 1 Car & Kir 686.

6 It was suggested that he was not bound to seek employment in *Smith v M'Guire* (1858) 3 H & N 554 at 567 per Martin B; and that he was bound to do so in *Harries v Edmonds* (1845) 1 Car & Kir 686; *Wilson v Hicks* (1857) 26 LJ Ex 242 (where the lay days had not expired); *Bradford v Williams* (1872) LR 7 Exch 259 at 262, 1 Asp MLC 313 at 317 per Bramwell B; *Gabarron v Kreeft*, *Kreeft v Thompson* (1875) LR 10 Exch 274, 3 Asp MLC 36. In *Thompson v Inglis* (1813) 3 Camp 428 it was held that the shipowner was not bound to wait after the day fixed in the charterparty for sailing, although the charterer offered him a cargo if the ship would wait, but, as the day fixed was the day when the convoy passed the port of loading, the risk of capture would have been increased if she had waited, and the course proposed was, therefore, not reasonable.

7 *Frost v Knight* (1872) LR 7 Exch 111 at 115, Ex Ch, per Cockburn CJ. See generally **DAMAGES** vol 12(1) (Reissue) PARA 1041.

8 *Bradford v Williams* (1872) LR 7 Exch 259, 1 Asp MLC 313. Cf Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 867, 868. Recent authorities emphasise the duty of the shipowner to take all reasonable steps to mitigate his damages. What steps are reasonable is a question of fact, depending on the circumstances of each case. For example, the shipowner is not entitled as a matter of law to refuse to consider an offer by a charterer who has repudiated the charterparty to load on terms other than those specified in it: *Taubate (Owners) v Barnett* (1924) 157 LT Jo 451. See also *Payzu Ltd v Saunders* [1919] 2 KB 581, CA; and **DAMAGES** vol 12(1) (Reissue) PARAS 1041-1043.

9 *Saxon Steamship Co v Union Steamship Co* (1900) 9 Asp MLC 114, HL (where it was held that demurrage was payable also after the date of refusal until the shipowner, acting with reasonable dispatch, obtained other employment for the ship).

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#### **460. Failure to ship proper cargo; dead freight.**

If, without lawful excuse, the charterer ships a quantity of goods less than that required by the charterparty<sup>1</sup>, or if the goods shipped are not in accordance with the charterparty<sup>2</sup>, the measure of damages is the difference between the freight actually earned, including any profit earned by carrying the goods of third persons<sup>3</sup>, and the freight which would have been earned if the charterer had fulfilled his obligation<sup>4</sup>. Such damages are usually known as 'dead freight'<sup>5</sup>.

1 *Heathfield Steamship Co Ltd v Rodenacher* (1896) 2 Com Cas 53, CA; Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 672; cf ---- *v Noell* (1661) 1 Keb 100.

2 *Young v Canning Jarrah Timber Co Ltd* (1899) 4 Com Cas 96.

3 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 672, 673. The shipowner has a right to fill up the ship with other goods if, in so doing, he is acting reasonably: *Wallems Rederij A/S v WH Muller & Co, Batavia* [1927] 2 KB 99, 17 Asp MLC 226. See also PARA 459 note 8.

4 *Young v Canning Jarrah Timber Co Ltd* (1899) 4 Com Cas 96; *Aitken, Lilburn & Co v Ernsthausen & Co* [1894] 1 QB 773, 7 Asp MLC 462, CA (where, however, the charterer was held not to be entitled to be credited with the freight earned by shipping goods on the shipowner's account to replace goods destroyed after shipment, but only with the freight earned by shipping goods after the charterer's failure to complete the loading). If, on the charterer being unable to complete the loading, the master fills up the ship with goods on the shipowner's account, the charterer cannot afterwards claim them, or the profit to be made out of them, even if they are of the same kind as the specified cargo: *Lidgett v Williams* (1845) 4 Hare 456 at 468.

5 'Dead freight' means the damage caused by the failure to furnish a full cargo in accordance with the contract, not merely that caused by the ship not being in fact fully loaded: *Angfartygs AB Halfdan v Price and Pierce Ltd* [1939] 1 All ER 322, 63 Ll L Rep 35; affd [1939] 3 All ER 672, 64 Ll L Rep 290, CA; *Total Transport Corp v Amoco Trading Co, The Altus* [1985] 1 Lloyd's Rep 423. It includes unliquidated damages (*McLean and Hope v Fleming* (1871) LR 2 Sc & Div 128, 1 Asp MLC 160, HL, approved in *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL), and is not confined to liquidated damages, as was held in *Pearson v Göschen* (1864) 17 CBNS 352 and *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115, Ex Ch. As to the lien for dead freight see PARA 306. If the charterer fails to complete loading within the lay days, and in consequence he is unable to load a full cargo, eg because it is no longer permissible to load the ship down to her summer load line, he must pay damages in the nature of dead freight as well as the agreed demurrage, the latter being merely agreed damages for the detention of the ship: *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352, 17 Asp MLC 144, CA. As to this case, from which it will be seen that it does not appear to be clear that this result would follow if the charterparty provided for 'demurrage days' as well as for demurrage, see PARA 289 note 4. It is uncertain whether, if the cargo is covered with ice and snow, the shipowner is entitled to dead freight on the ground that the ice and snow prevent him from loading to capacity: *Akties Steam v Arcos Ltd* (1933) 47 Ll L Rep 159, 18 Asp MLC 409, CA. By a custom of the London freight market, a forwarding agent who books shipping space incurs a personal liability to the ship's agent, and can, therefore, recover from the shipper any dead freight which he may have to pay if the cargo is not shipped: *Anglo Overseas Transport Co Ltd v Titan Industrial Corp (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152 (cited in PARA 216 note 19). For a case where the charterers were held to be entitled to set off the amount of overpayment of dead freight against the shipowners' increased claim for demurrage see *Bedford Steamship Co Ltd v Navico AG, The Ionian Skipper* [1977] 2 Lloyd's Rep 273.

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#### **461. Failure to supply ship for the charterer's goods.**

Where, without lawful excuse, the shipowner fails to load the specified goods, two factors have to be taken into consideration in measuring the damages<sup>1</sup>, namely the value of the ship to the charterer and the value of the goods to the charterer.

So far as the value of the ship to the charterer is concerned, the measure of damages is the estimated amount of bill of lading freight which the charterer would have been able to obtain from shippers at the port of loading if the ship had been available at the proper time, less the amount of the chartered freight<sup>2</sup>. If he is compelled to charter another ship in order to carry out his engagements, and, in consequence of a rise in freight, has to pay a larger amount of freight, the measure of damages is the difference between the amount of freight actually paid and the chartered freight<sup>3</sup>.

So far as the value of the goods to the charterer is concerned, if, owing to the shipowner's default, the charterer is compelled to pay a higher price to obtain a cargo than he would have

had to pay if the ship had been available at the proper time, then, in addition to any increased freight, he may recover the increase in the price of the cargo<sup>4</sup>.

If no ship is available at the port of loading, so that the charterer is unable to carry his goods to the port of discharge, the damages must be measured, not by the freight, but by the market price of the goods at the port of discharge at the time when they should have arrived, less the price payable at the port of loading, with the freight and insurance, at the time when the loading should have taken place<sup>5</sup>. If, however, the goods are afterwards brought in by another ship, their market price at the port of discharge at the time of arrival must be substituted for the price at the port of loading<sup>6</sup>.

1 Where the contract provides for the payment of liquidated damages, the charterer need not prove actual damage (*Sparrow v Paris* (1862) 7 H & N 594; cf *Sharp v Gibbs* (1857) 1 H & N 801), but the sum specified is not payable unless the shipowner is guilty of the particular default contemplated by the term in the contract (*Valente v Gibbs* (1859) 6 CBNS 270; *Seeger v Duthie* (1860) 8 CBNS 45). Cf **DAMAGES** vol 12(1) (Reissue) PARA 1072.

2 See *Hadley v Baxendale* (1854) 9 Exch 341; *Watson Steamship Co Ltd v Merryweather & Co* (1913) 12 Asp MLC 353; cf *The Argentino* (1888) 13 PD 191 at 201, 6 Asp MLC 348 at 352, CA, per Bowen LJ (affd sub nom *Gracie (Owners) v Argentino (Owners)*, *The Argentino* (1889) 14 App Cas 519, 6 Asp MLC 433, HL); *The Okehampton* [1913] P 173, 12 Asp MLC 428, CA.

3 *Featherston v Wilkinson* (1873) LR 8 Exch 122, 2 Asp MLC 31; *Thomas Nelson & Sons v Dundee East Coast Shipping Co Ltd* 1907 SC 927. If the intention of both the shipowner and the charterer is that their agreement is not to be performed in respect of the supply of a vessel, the measure of damages is the cost to the charterer of hiring substitute tonnage; but, if the breach amounts to mere delay, the measure of damages is the difference in the value to the charterer of the ship delivered punctually and the ship delivered late: *Yamashita Shinnihom Steamship Co Ltd v Elios SpA*, *The Lily Prima* [1976] 2 Lloyd's Rep 487, CA.

4 *Featherston v Wilkinson* (1873) LR 8 Exch 122, 2 Asp MLC 31; cf *Welch, Perrin & Co v Anderson, Anderson & Co* (1891) 7 Asp MLC 177, CA.

5 *Ströms Bruks Akt Bolag v Hutchison* [1905] AC 515, 10 Asp MLC 138, HL; applied in *Phosphate Mining Co v Rankin, Gilmour & Co* (1916) 13 Asp MLC 418; *Nissho Co Ltd v NG Livanos* (1941) 69 Ll L Rep 125. In *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, 13 Asp MLC 580, HL, the charterers had a cargo available, but, if it had been shipped, it would have been prevented from reaching its destination owing to the closing of the Dardanelles; it was held that this prevention would have been a risk against which charterers would have insured and the measure of damages was the difference between the price which charterers would have had to pay their sellers and the value which the cargo would have had at its port of destination, less the cost of insurance. Cf *Smith, Edwards & Co v Tregarthen* (1887) 6 Asp MLC 137; *Featherston v Wilkinson* (1873) LR 8 Exch 122, 2 Asp MLC 31. As to notice of a special contract see *Prior v Wilson* (1860) 1 LT 549.

6 *Smith, Edwards & Co v Tregarthen* (1887) 6 Asp MLC 137.

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## 462. Partial failure.

The principles which apply to the shipowner's failure to supply a ship for the charterer's goods<sup>1</sup> are also to be applied in measuring the damages where the shipowner loads part of the goods but fails to load them all<sup>2</sup>. The shipowner is nevertheless entitled to recover freight on the quantity actually carried, and the charterer must counterclaim in respect of any right to damages for his failure to load<sup>3</sup>.

1 See PARA 461.

2 *Smith, Edwards & Co v Tregarthen* (1887) 6 Asp MLC 137. As to the measure of damages under a lump sum charterparty where the lump sum is expressed to be based on the shipowner's guarantee of a specified capacity see *SA Ungherese di Armamento Marittimo Oriente v Tyser Line Ltd* (1902) 8 Com Cas 25.

3 *Ritchie v Atkinson* (1808) 10 East 295; and see PARA 596.

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### **463. Loss of profit.**

The charterer is not usually entitled to recover loss of profit<sup>1</sup>. Any extra profit which he has actually made must, however, be taken into account<sup>2</sup>.

1 *Scaramanga Manoussin & Co v English & Co* (1895) 1 Com Cas 99; cf *Walton v Fothergill* (1835) 7 C & P 392; and see PARA 563.

2 See PARA 565. Cf *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673, HL.

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## **B. THE VOYAGE**

### **(A) SEAWORTHINESS OF THE SHIP**

#### **464. Seaworthiness at commencement of voyage.**

During the loading<sup>1</sup> there is an implied undertaking of fitness to receive the cargo and to encounter the ordinary perils of the loading stage; that stage comes to an end immediately the loading is complete, and the ship must then be seaworthy for the next stage, whether that stage is the voyage, or an intermediate stage of lying waiting with the cargo on board<sup>2</sup>.

Subject to contrary contractual stipulation<sup>3</sup>, at the beginning<sup>4</sup> of the voyage<sup>5</sup> the ship must be seaworthy, that is to say, she must be reasonably fit to encounter the ordinary perils which might be expected on the voyage<sup>6</sup>. This implied undertaking of fitness for the voyage attaches at the time when the ship sets sail with her cargo<sup>7</sup>.

A ship may be unseaworthy before or at the time of sailing by reason of bad stowage endangering her safety<sup>8</sup>.

In any contract for the carriage of goods by sea to which the Hague-Visby Rules apply, by virtue of the Carriage of Goods by Sea Act 1971, there is not, however, to be implied any absolute undertaking by the carrier of the goods to provide a seaworthy ship; instead the carrier is bound before and at the beginning of the voyage only to exercise due diligence to make the ship seaworthy<sup>9</sup>.

1 As to loading see PARA 402 et seq.

2 *McFadden v Blue Star Line* [1905] 1 KB 697, 10 Asp MLC 55; cf *AE Reed & Co Ltd v Page, Son and East Ltd* [1927] 1 KB 743, 17 Asp MLC 231, CA.

3 See PARA 470.

4 See PARA 471. As to when the voyage is said to begin see PARA 476.

5 *Lyon v Mells* (1804) 5 East 428; *Kopitoff v Wilson* (1876) 1 QBD 377, 3 Asp MLC 163; *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; *The Marathon* (1879) 4 Asp MLC 75; *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL.

6 *Kopitoff v Wilson* (1876) 1 QBD 377, 3 Asp MLC 163. See also *The Princess Victoria* [1953] 2 Lloyd's Rep 619; *Actis Co Ltd v Sanko Steamship Co Ltd, The Aquacharm* [1982] 1 All ER 390, [1982] 1 WLR 119, [1982] 1 Lloyd's Rep 7, CA (vessel exceeded her permitted draught); *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210 (vessel unseaworthy by reason of corrosion at commencement of the voyage); *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd, The Derby* [1985] 2 Lloyd's Rep 325, CA (meaning of 'in every way fitted for the service'); *Athenian Tankers Management SA v Pyrena Shipping Inc, The Arianna* [1987] 2 Lloyd's Rep 376 (charterers refused to take delivery of vessel; defect in vessel held to have no real commercial significance); *Kuo International Oil Ltd v Daisy Shipping Co Ltd, The Yamatogawa* [1990] 2 Lloyd's Rep 39 (unseaworthiness at commencement of voyage admitted); *The Antigoni* [1991] 1 Lloyd's Rep 209, CA (major engine breakdown); *Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1994] 2 Lloyd's Rep 506, CA (explosion on vessel); *The Toledo* [1995] 1 Lloyd's Rep 40 (failure of shell plating on port side of vessel); *The Subro Valour* [1995] 1 Lloyd's Rep 509 (fire on board damaging vessel); *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd, The Apostolis* [1996] 1 Lloyd's Rep 475 (fire on board damaging vessel); *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc, The Kriti Rex* [1996] 2 Lloyd's Rep 171 (failure in main engine). Cf **INSURANCE** vol 25 (2003 Reissue) PARAS 248, 249. For a statutory definition of 'seaworthy' see the Marine Insurance Act 1906 s 39(4); and **INSURANCE** vol 25 (2003 Reissue) PARA 245. See also PARAS 371, 376.

7 See PARA 471.

8 *Kopitoff v Wilson* (1876) 1 QBD 377, 3 Asp MLC 163; *Ingram and Royle Ltd v Services Maritimes Du Tréport* [1913] 1 KB 538, 12 Asp MLC 295; and see PARA 418 et seq.

9 See PARAS 371, 376.

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#### **465. Fitness to encounter perils.**

To render the ship seaworthy for the purpose of the voyage she must, at the time of sailing, be in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage at the particular season in question<sup>1</sup>. Where the Hague-Visby Rules are incorporated into the charterparty, before and at the beginning of the voyage, the carrier is bound to exercise due diligence to make the ship seaworthy<sup>2</sup>. She must, therefore, be tight, staunch and strong, and furnished with all tackle and equipment necessary for the intended voyage<sup>3</sup>. Thus, there is a clear breach of this undertaking if, at the time of sailing, she is in a leaky state<sup>4</sup>, or insufficiently ballasted<sup>5</sup>, or if her boilers are defective<sup>6</sup>, or if her ground tackle is inefficient<sup>7</sup>.

Moreover, the undertaking is broken, although the ship may be in a state of fitness at the moment of sailing, if by reason of a latent defect or internal weakness existing at that time she will be rendered unfit in the future for the due completion of her voyage<sup>8</sup>. For example, she may not have been supplied with a sufficiency of fuel<sup>9</sup>, provisions<sup>10</sup> or medicines<sup>11</sup> for the voyage under ordinary conditions<sup>12</sup>; her boilers may be filled with muddy water, which will ultimately, by depositing the mud and thus clogging the steam pipes, render the boilers useless<sup>13</sup>; her portholes may be open or insecurely fastened, so that, although there may be no

immediate danger, a change of weather will enable the sea to gain access to the cargo by entering the open portholes or bursting the fastenings<sup>14</sup>. Such a defect does not, however, necessarily amount to unseaworthiness<sup>15</sup>. A defect of a temporary nature<sup>16</sup> or trivial character which in the ordinary course of the voyage could and would be remedied by the crew, such as a cabin porthole left open at the time of sailing<sup>17</sup>, cannot reasonably be said to render the ship unfit to encounter the perils of the voyage<sup>18</sup>. She is, therefore, seaworthy in spite of the defect, and it is immaterial that the defect is not put right; there is then negligence on the part of the crew, but not unseaworthiness of the ship<sup>19</sup>.

However, although the defect is temporary or trivial, if it is invisible and inaccessible, the ship cannot be considered seaworthy<sup>20</sup>. Between these extreme cases it is a question of fact, having regard to all the circumstances, whether the ship, when she sailed, was fit to encounter the ordinary perils reasonably to be expected on the voyage<sup>21</sup>.

1 *Dixon v Sadler* (1839) 5 M & W 405 at 414 per Parke B (affd sub nom *Sadler v Dixon* (1841) 8 M & W 895, Ex Ch); approved in *Hedley v Pinkney & Sons Steamship Co* [1894] AC 222 at 227, 7 Asp MLC 483 at 485, HL, per Lord Herschell LC. See also *Burges v Wickham* (1863) 3 B & S 669 at 689 per Blackburn J; *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL. For a case of special contract see *Robertson v Amazon Tug and Lighterage Co Ltd* (1881) 7 QBD 598, 4 Asp MLC 496, CA.

2 The words 'before and at the beginning of the voyage' mean the period from at least the beginning of the loading until the ship starts on her voyage, that is to say the obligation extends over the whole period and is not broken up, as is the common law obligation, by any doctrine of stages: see PARA 376.

3 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 488; *Itoh & Co Ltd v Atlantska Plovidba, The Gundulic* [1981] 2 Lloyd's Rep 418 (seawater entering through defective hatch covers). Where the shipowner did not make the necessary gear available, the charterers were held to be entitled to claim reimbursement of the expenses which they had incurred in hiring additional labour: *Hang Fung Shipping and Trading Co Ltd v Mullion & Co Ltd* [1966] 1 Lloyd's Rep 511.

4 *Lyon v Mells* (1804) 5 East 428.

5 *Leuw v Dudgeon* (1867) LR 3 CP 17n.

6 *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234.

7 *Wilkie v Geddes* (1815) 3 Dow 57, HL.

8 *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374; and see PARA 470.

9 *Thin v Richards & Co* [1892] 2 QB 141, 7 Asp MLC 165, CA; *The Vortigern* [1899] P 140, 8 Asp MLC 523, CA; *Mclver & Co Ltd v Tate Steamers Ltd* [1903] 1 KB 362, 9 Asp MLC 362, CA; *Northumbrian Shipping Co Ltd v E Timm & Son Ltd* [1939] AC 397, [1939] 2 All ER 648, 19 Asp MLC 290, HL. See, however, *Walford de Baedemaeker & Co v Galindez Bros* (1897) 2 Com Cas 137 (where insufficient coal was held not to amount to unseaworthiness); *Cunningham v Frontier Steamship Co* [1906] 2 IR 12 (Ir CA) (where there was a list owing to faulty stowage). Cf *The Undaunted* (1886) 11 PD 46, 5 Asp MLC 580; *Lindsay v Klein, The Tatjana* [1911] AC 194, 11 Asp MLC 562, HL. See also *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726, 18 Asp MLC 243, HL (where bunker coal was liable to spontaneous combustion). An unexplained fire in the bunkers affords presumptive evidence of unseaworthiness: see *Fiumana Società di Navigazione v Bunge & Co Ltd* [1930] 2 KB 47 at 63, 18 Asp MLC 147 at 151 per Wright J.

10 *The Wilhelm* (1866) 14 LT 636.

11 *Woolf v Claggett* (1800) 3 Esp 257.

12 As to voyages by stages see PARA 469.

13 *Seville Sulphur and Copper Co v Colvils, Lowden & Co* (1888) 15 R 616. The decision that the ship was in fact unseaworthy was, however, not followed in *Cunningham v Colvils, Lowden & Co* (1888) 16 R 295.

14 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; cf *Upperton v Union-Castle Mail Steamship Co Ltd* (1902) 9 Asp MLC 475, CA. It is immaterial that the porthole was properly opened in the first instance: *Mendl & Co v Ropner & Co* [1913] 1 KB 27, 12 Asp MLC 268.

15 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL. In *Tate v Crosby, Magee & Co* (1898) unreported, defective stowage of deck cargo was held to render the ship unseaworthy.

16 *The Pentland* (1897) 13 TLR 430; *Hedley v Pinkney & Sons Steamship Co* [1894] AC 222, 7 Asp MLC 483, HL.

17 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL, approved in *Hedley v Pinkney & Sons Steamship Co* [1894] AC 222 at 228, 7 Asp MLC 483 at 485, HL, per Lord Herschell LC, applied in *The Stranna* [1938] P 69, [1938] 1 All ER 458, 60 Ll L Rep 51, CA (where temporary instability during loading was held not to be unseaworthiness).

18 See *Leonard v Leyland & Co* (1902) 18 TLR 727 (hook and davit).

19 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 91, 3 Asp MLC 516 at 520, HL, per Lord Blackburn; *Gilroy, Sons & Co v Price & Co* [1893] AC 56 at 64, 7 Asp MLC 314 at 315, HL, per Lord Herschell LC; *Hedley v Pinkney & Sons Steamship Co* [1894] AC 222, 7 Asp MLC 483, HL; *The Diamond* [1906] P 282, 10 Asp MLC 286 (where a stove, which was negligently overheated, caused the cargo to catch fire, and it was held that the ship was not unseaworthy, as the stove was quite safe if properly used); cf *The Subro Valour* [1995] 1 Lloyd's Rep 509 (fire on board vessel; ship held not to be seaworthy at the beginning of the voyage).

20 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL (followed in *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL); cf *The Schwan* [1909] AC 450, 11 Asp MLC 286, HL (where water escaped through a cock which the engineer did not know to be capable of opening three ways and which was not properly turned off).

21 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; *President of India v West Coast Steamship Co, The Portland Trader* [1964] 2 Lloyd's Rep 443, US App Ct (where it was held that the employment of radar and loran in the navigation of tramp vessels was not so essential that their absence would give rise to a finding of unseaworthiness); and see *American Smelting and Refining Co v SS Irish Spruce and Irish Shipping Ltd, The Irish Spruce* [1976] 1 Lloyd's Rep 63 (SDNY).

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#### **466. The crew and the ship's documents.**

The ship is unseaworthy if she sails without a crew which is competent<sup>1</sup> and sufficient<sup>2</sup> for the voyage, regard being had to its length and the circumstances in which it is undertaken<sup>3</sup>. The master must be in a fit state of health to command the ship when the voyage starts<sup>4</sup>, and he must be conversant with any special precautions enjoined by the builders for her safety<sup>5</sup>. If there is no mate on board capable of performing the master's duties, should the master be disabled by accident or illness, the ship may be unseaworthy<sup>6</sup>. Further, it seems that a pilot must be taken on board when the ship sails from a port where there is an establishment of pilots and the nature of the navigation or the law or usage of the place requires one<sup>7</sup>.

The ship must also have on board all papers and documents necessary for the protection of the ship and cargo<sup>8</sup> and for the due performance of the voyage, such as her bill of health<sup>9</sup> and manifest<sup>10</sup>. The absence of a document, such as a certificate of stowage given at the port of loading, which is not a necessary document, or a foreign measurement certificate which is not shown to be a usual document<sup>11</sup>, or a certificate that the terms of employment of the crew fulfil the requirements of the International Transport Workers Federation<sup>12</sup>, does not, however, render her unseaworthy<sup>13</sup>.

1 *Shore v Bentall* (circa 1828) 7 B & C 798n; *Tait v Levi* (1811) 14 East 481. See also *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 138, 139, [1958] 1 All ER 725 at 730, 731, [1958] 1 Lloyd's Rep 73 at 80, 81, HL; *Alfred C Toepfer Schiffahrtsgesellschaft mbH v Tossa Marine Co Ltd, The Derby* [1985] 2 Lloyd's Rep 325, CA (no ITF Blue Card). The first two cases cited above, as well as certain other cases

cited here, are cases of marine insurance. Although the implied undertakings in a policy of marine insurance and in a contract of affreightment are not identical, these cases are nevertheless authorities on the question of seaworthiness, because that term has the same meaning whether used in reference to a policy or to a contract of affreightment: see *Firemen's Fund Insurance Co v Western Australian Insurance Co Ltd and Atlantic Insurance Co Ltd* (1927) 28 Ll L Rep 243 at 251 per Bateson J. As to the implied warranties in a policy of marine insurance see **INSURANCE** vol 25 (2003 Reissue) PARA 245 et seq. In *The Roberta* (1938) 60 Ll L Rep 84, the owner was held liable to the charterers in third party proceedings for damage to a cargo caused through the incompetence of the ship's engineer. As to the statutory requirements relating to manning see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 490 et seq.

2 *Clifford v Hunter* (1827) Mood & M 103; *Tait v Levi* (1811) 14 East 481; *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 34, [1961] 2 All ER 257 at 261, [1961] 1 Lloyd's Rep 159 at 168-171 (affd [1962] 2 QB 26, [1962] 1 All ER 474, [1961] 2 Lloyd's Rep 478, CA). A particular kind of crew (eg a pilot) may be required for different stages of the voyage: *Hollingworth v Brodrick* (1837) 7 Ad & El 40 at 47 per Patteson J. See, however, the comment on this case in **INSURANCE** vol 25 (2003 Reissue) PARA 252; *Bouillon v Lupton* (1863) 15 CBNS 113.

3 Where the Hague-Visby Rules are incorporated into the charterparty, the owner must exercise due diligence to properly man, equip and supply the ship: see art III r 1(b); and PARAS 98, 277, 371, 377.

4 *Rio Tinto Co Ltd v Seed Shipping Co* (1926) 24 Ll L Rep 316 at 320.

5 *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100, 17 Ll L Rep 120, HL; see also *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd, The Eurasian Dream* [2002] EWHC 118 (Comm), [2002] 1 Lloyd's Rep 719.

6 *Clifford v Hunter* (1827) Mood & M 103; *Tait v Levi* (1811) 14 East 481.

7 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 491; cf *Law v Hollingsworth* (1797) 7 Term Rep 160, not overruled as to this point in *Dixon v Sadler* (1839) 5 M & W 405 (affd sub nom *Sadler v Dixon* (1841) 8 M & W 895, Ex Ch); *Hollingworth v Brodrick* (1837) 7 Ad & El 40 at 44 per Patteson J; *Phillips v Headlam* (1831) 2 B & Ad 380. As to compulsory pilotage see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 570-572, 578-579.

8 As to the necessary certificates and clearances for cargo ships see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 623 et seq (health and safety requirements); **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 657 et seq (carriage of cargoes); **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 672 et seq (load line certificates); and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 999 et seq (clearances).

9 *Levy v Costerton* (1816) 4 Camp 389.

10 *Dutton v Powles* (1862) 8 Jur NS 970, Ex Ch.

11 *Chellew Navigation Co Ltd v AR Appelquist Kolimport AG* (1933) 45 Ll L Rep 190 at 193.

12 *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd, The Derby* [1985] 2 Lloyd's Rep 325, CA.

13 *Wilson v Rankin* (1865) LR 1 QB 162, Ex Ch; *Apex (Trinidad) Oilfields Ltd v Lunham and Moore Shipping Ltd* [1962] 2 Lloyd's Rep 203, Can Ex Ct (where the absence of a large scale chart of the waters in which the vessel ran aground did not render her unseaworthy).

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#### 467. Stowage of cargo.

A ship seaworthy in herself may be rendered unseaworthy by reason of her cargo<sup>1</sup>. It is essential that she should be fit to encounter the perils of the voyage as a laden ship<sup>2</sup>. A ship cannot, therefore, be regarded as seaworthy if she is overloaded at the time of her departure<sup>3</sup>, or, more accurately, at the commencement of the stage of the adventure next after the

loading<sup>4</sup>, or if she carries on deck goods which, having due regard to the safety of the ship, ought not to be carried there<sup>5</sup>.

Similarly, the ship may be rendered unseaworthy by the method of stowage adopted<sup>6</sup>. A defect which might otherwise be put right, such as an insecurely fastened porthole, may be concealed and rendered inaccessible by the cargo being piled against it<sup>7</sup>; or goods of a bulky nature, such as armour plates, may be improperly stowed, so that, owing to the movement of the ship in a heavy sea, they move and break through the side of the ship, thus causing her to sink with the rest of her cargo<sup>8</sup>. Bad stowage consisting in the exposure of one parcel to risk of damage from proximity to another does not in itself amount to unseaworthiness where the condition or equipment of the ship herself is not affected<sup>9</sup>. It is, however, material to inquire whether the parcel which suffered the damage or the parcel which produced it was stowed first<sup>10</sup>, for, if the ship is reasonably fit to load and carry the first parcel, the undertaking of seaworthiness in regard to that parcel is not broken by the unfitness of the ship to load and carry the additional parcel, whereas the undertaking in regard to the additional parcel will be broken unless it might have been stowed in safety in another part of the ship<sup>11</sup>.

1 *City of Lincoln (Master and Owners) v Smith* [1904] AC 250, 9 Asp MLC 586, PC; *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997, [1940] 3 All ER 405, 19 Asp MLC 382, HL.

2 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 77, 3 Asp MLC 516 at 517, HL, per Lord Cairns LC; *Gilroy, Sons & Co v Price & Co* [1893] AC 56 at 63, 7 Asp MLC 314 at 315, HL, per Lord Herschell LC.

3 *Biccard v Shepherd* (1861) 14 Moo PCC 471.

4 *AE Reed & Co Ltd v Page, Son and East Ltd* [1927] 1 KB 743, 17 Asp MLC 231, CA. The voyage may not start from the spot where the particular cargo is loaded if the ship completes her loading elsewhere: *Thompson and Norris Manufacturing Co Ltd v PH Ardley & Co* (1929) 35 Ll L Rep 248.

5 *Daniels v Harris* (1874) LR 10 CP 1, 2 Asp MLC 413. As to deck cargo see PARA 455.

6 *Kopitoff v Wilson* (1876) 1 QBD 377, 3 Asp MLC 163; *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; *Firemen's Fund Insurance Co v Western Australian Insurance Co Ltd and Atlantic Insurance Co Ltd* (1927) 28 Ll L Rep 243 (sulphuric acid in drums stowed inadequately with wood dunnage). But see *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 Lloyd's Rep 57, and the other cases cited at PARAS 456 note 1, 371, 383.

7 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; cf *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL.

8 *Kopitoff v Wilson* (1876) 1 QBD 377, 3 Asp MLC 163.

9 *The Thorsa* [1916] P 257, 13 Asp MLC 592, CA (chocolate tainted by cheese); *Actis Co v Sanko Steamship Co, The Aquacharm* [1982] 1 All ER 390, [1982] 1 WLR 119, [1982] 1 Lloyd's Rep 7, CA.

10 See note 9.

11 *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, 16 Asp MLC 351, HL (casks of palm oil stove in by bags of palm kernels stowed above with no 'tween deck).

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#### **468. Fitness to carry cargo.**

Seaworthiness involves fitness to carry cargo of any description which the shipper had a right to offer<sup>1</sup>. It is not enough that at the beginning of the loading the ship was fit to receive the

cargo<sup>2</sup>; it is necessary that at the time of sailing she should be fit to carry the cargo on the agreed voyage<sup>3</sup>. Fitness to carry cargo includes legal as well as physical fitness<sup>4</sup> and fitness arising from an express or implied obligation to be properly equipped to carry particular goods<sup>5</sup>. Moreover, the ship must be free from defects which, although not endangering the safety of the ship herself, yet endanger the safety of the cargo by allowing the sea to have access to the cargo<sup>6</sup> or otherwise<sup>7</sup>.

1 *Stanton v Richardson* (1875) 3 Asp MLC 23, HL; cf *Parker v Potts* (1815) 3 Dow 23 at 32, HL, per Lord Eldon LC.

2 See PARA 419. Where the Hague-Visby Rules are incorporated into the charterparty, the owner must exercise due diligence to 'make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation': see art III r 1(c); and PARAS 98, 371, 377.

3 *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374; *Empresa Cubana Importada de Alimentos 'Alimport' v Iasmos Shipping Co SA, The Good Friend* [1984] 2 Lloyd's Rep 586.

4 See *Golden Fleece Maritime Inc v St Shipping and Transport Inc, The Elli and The Frixos* [2008] EWCA Civ 584, [2008] 2 Lloyd's Rep 119, [2008] All ER (D) 321 (May) (ship chartered for the carrying of fuel oil required by law to be double-hulled; single-hulled ship therefore unfit to carry cargo).

5 See, in the context of a bill of lading, *Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, 8 Asp MLC 65, CA (where there is an express or implied obligation to provide a ship equipped with refrigerating machinery for a cargo of frozen meat, the machinery must be fit at the time of shipment to carry the frozen cargo on the agreed voyage made under ordinary conditions).

6 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL (followed in *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL); *The Rona* (1884) 5 Asp MLC 259.

7 *Kay v Wheeler* (1867) LR 2 CP 302, Ex Ch; *Laveroni v Drury* (1852) 8 Exch 166.

## UPDATE

### 468 Fitness to carry cargo

NOTE 4--*Golden Fleece*, cited, reported at [2009] 1 All ER (Comm) 908.

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### 469. Voyage in stages.

Where the voyage is divided into stages, either naturally<sup>1</sup> or by agreement between the parties or by reason of the necessity of the case<sup>2</sup>, the undertaking as to seaworthiness is sufficiently fulfilled if the ship, on entering on any particular stage of the voyage, is seaworthy for that stage; she need not necessarily be fit, at that time, to perform the whole voyage<sup>3</sup>. Thus, if her course lies partly by canal or river and partly by sea, the ship is considered seaworthy if, on leaving the inland port, she is fit to encounter the usual perils of navigating the river, and it is not necessary that she should then be fit to put to sea<sup>4</sup>. On leaving the river, she must, however, be fit for the voyage across the sea, otherwise there is a breach of the undertaking as to seaworthiness when she puts to sea<sup>5</sup>.

Whenever the voyage is composed of separate stages having distinct conditions of navigation or requiring a different complement of crew or different equipment, it is enough that the ship at

the beginning of each stage is in a state of preparation which fits her to perform it<sup>6</sup>. On this principle, a ship which is bound for a distant port is not unseaworthy because she has not on board a sufficient supply of fuel to take her to her destination, provided that the voyage is divided into stages for fuelling purposes by reason of the necessity of the case<sup>7</sup>, or from the usage of navigation<sup>8</sup> or by agreement between the parties<sup>9</sup>. At the beginning of each stage the ship must have on board sufficient fuel to take her to her next fuelling port<sup>10</sup>, having regard to the ordinary incidents of navigation on the voyage at the time of year in question<sup>11</sup>.

It has been suggested that a compulsory pilotage district may form a separate stage of the navigation so that the undertaking as to seaworthiness may be broken if the ship has no pilot on board<sup>12</sup>.

In any contract for the carriage of goods by sea to which the Hague-Visby Rules apply, by virtue of the Carriage of Goods by Sea Act 1971, both before and at the beginning of the voyage, the carrier is bound to exercise due diligence to make the ship seaworthy, the words 'before and at the beginning of the voyage' meaning the period from at least the beginning of the loading until the ship starts on her voyage, that is to say the obligation extends over the whole period and is not broken up, as is the common law obligation, by any doctrine of stages<sup>13</sup>.

1 Eg where the voyage is partly by river and partly by sea. As to the doctrine of stages see **INSURANCE** vol 25 (2003 Reissue) PARA 251.

2 Such an agreement may be implied where it is usual to call at various ports on the way: Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 522; *The Vortigern* [1899] P 140, 8 Asp MLC 523, CA.

3 *The Vortigern* [1899] P 140, 8 Asp MLC 523, CA; *Mclver & Co Ltd v Tate Steamers Ltd* [1903] 1 KB 362, 9 Asp MLC 362, CA; cf *Buchanan & Co v Faber* (1899) 4 Com Cas 223. The employment of lighters to discharge the cargo is not to be regarded as a separate stage so as to make it a condition that the lighters are to be seaworthy: *Lane v Nixon* (1866) LR 1 CP 412; cf *Thomas Wilson Sons & Co Ltd v Galileo (Cargo ex), The Galileo* [1915] AC 199, 12 Asp MLC 534, HL.

4 *Bouillon v Lupton* (1863) 15 CBNS 113; *Cunningham v Colvils, Lowden & Co* (1888) 16 R 295; cf *Dixon v Sadler* (1839) 5 M & W 405 at 414 per Parke B; *Hogarth v Miller, Bro & Co* [1891] AC 48, 7 Asp MLC 1, HL (time charter).

5 *Bouillon v Lupton* (1863) 15 CBNS 113; *Seville Sulphur and Copper Co v Colvils, Lowden & Co* (1888) 15 R 616.

6 *Bouillon v Lupton* (1863) 15 CBNS 113; *Biccard v Shepherd* (1861) 14 Moo PCC 471; *Thompson v Hopper* (1856) 6 E & B 172 at 181 per Erle J; *AE Reed & Co Ltd v Page, Son and East Ltd* [1927] 1 KB 743, 17 Asp MLC 231, CA.

7 *The Vortigern* [1899] P 140, 8 Asp MLC 523, CA; *Mclver & Co Ltd v Tate Steamers Ltd* [1903] 1 KB 362, 9 Asp MLC 362, CA.

8 *Bouillon v Lupton* (1863) 15 CBNS 113 at 137.

9 *Yrazu v Astral Shipping Co* (1904) 20 TLR 153.

10 *Thin v Richards & Co* [1892] 2 QB 141, 7 Asp MLC 165, CA (followed in *The Vortigern* [1899] P 140, 8 Asp MLC 523, CA); *Greenock Steamship Co v Maritime Insurance Co* [1903] 2 KB 657, 9 Asp MLC 463, CA; cf *Northumbrian Shipping Co Ltd v E Timm & Son Ltd* [1939] AC 397, [1939] 2 All ER 648, 19 Asp MLC 290, HL. The availability of bunkering facilities at some intermediate port cannot be taken into account; the stage of the voyage must be determined before sailing, and the fact that it was negligence on the part of the master not to elect to call at such intermediate port will not make the ship seaworthy for that stage: *Northumbrian Shipping Co Ltd v E Timm & Son Ltd*. It is immaterial that the charterer has contracted to supply the coal required if the master has negligently omitted to take on board an adequate supply: *Mclver & Co Ltd v Tate Steamers Ltd* [1903] 1 KB 362, 9 Asp MLC 362, CA.

11 *Walford de Baedemaeker & Co v Galindez Bros* (1897) 2 Com Cas 137; *Mclver & Co Ltd v Tate Steamers Ltd* [1903] 1 KB 362, 9 Asp MLC 362, CA.

12 See *Law v Hollingsworth* (1797) 7 Term Rep 160, as explained in *Hollingsworth v Brodrick* (1837) 7 Ad & El 40 at 44 per Patteson J. See, however PARA 466 note 2. As to compulsory pilotage see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 570-572, 578-579.

13 See PARAS 371, 376.

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#### **470. Extent of duty.**

At common law the shipowner's duty to provide a seaworthy ship is absolute unless he has contracted out of it<sup>1</sup>. He warrants the fitness of his ship when she sails, and not merely that he will honestly and in good faith endeavour to make her fit<sup>2</sup>. He is, therefore, responsible for any latent defect<sup>3</sup> the existence of which renders the ship unseaworthy<sup>4</sup>. It is immaterial that he has done his best to provide an efficient ship and that the defect could not have been detected by any reasonable means before it actually showed itself<sup>5</sup>. Nevertheless, his duty does not extend to providing a perfect ship and one that can never, without the happening of some extraordinary peril, break down<sup>6</sup>.

There is no positive or fixed standard of seaworthiness<sup>7</sup>. It is a term relative to the nature of the adventure, and must be construed not literally but relatively to the circumstances<sup>8</sup>; for example it encompasses legal fitness to carry the cargo in question as much as it does physical fitness<sup>9</sup>. All that is necessary is that the ship should possess that degree of fitness to encounter the perils of the voyage which it would be usual and prudent and a matter of course to require at the commencement of the voyage<sup>10</sup>; and, if it appears that a prudent owner would never have sent the ship to sea without remedying the defect if he had known of its existence, a ship that puts to sea with the defects unremedied must be regarded as unseaworthy<sup>11</sup>. It follows, therefore, that the standard of seaworthiness rises as progress is made in shipbuilding<sup>12</sup>, and the shipowner does not fulfil his duty unless the ship is reasonably equipped with modern improvements<sup>13</sup>. Nevertheless, as seaworthiness is merely a relative term<sup>14</sup>, the character of the particular ship as known to the parties must be taken into consideration<sup>15</sup>. If she is reasonably efficient for the voyage, the shipowner has fulfilled his duty to supply a seaworthy ship; and on the loss of the ship he is not rendered responsible merely by proof that a stouter ship would have survived the peril<sup>16</sup>.

In any contract for the carriage of goods by sea to which the Hague-Visby Rules apply there is not, however, to be implied any absolute undertaking by the carrier of the goods to provide a seaworthy ship; instead the carrier is bound before and at the beginning of the voyage only to exercise due diligence to make the ship seaworthy<sup>17</sup>.

1 *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16, 10 Asp MLC 581, HL. See also *Wiener & Co v Wilsons and Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413, CA; *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284.

2 *Kopitoff v Wilson* (1876) 1 QBD 377 at 379, 3 Asp MLC 163 at 164 per Blackburn J; cf *GE Dobell & Co v SS Rossmore Co Ltd* [1895] 2 QB 408, 8 Asp MLC 33, CA.

3 As to the meaning of 'latent defect' see *The Dimitrios Rallias* (1922) 13 Ll L Rep 363, CA.

4 *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413; *London Rangoon Trading Co Ltd v Ellerman Lines Ltd* (1923) 14 Ll L Rep 497; cf *The Laertes (Cargo ex)* (1887) 12 PD 187, 6 Asp MLC 174 (where unseaworthiness arising from a latent defect was covered by an exception).

5 *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413.

6 *Readhead v Midland Rly Co* (1867) LR 2 QB 412 at 440 per Blackburn J, approving *Burges v Wickham* (1863) 3 B & S 669 (insurance).

7 *Knill v Hooper* (1857) 2 H & N 277.

8 *Burges v Wickham* (1863) 3 B & S 669 (where a river steamer undertook a sea voyage).

9 See *Golden Fleece Maritime Inc v St Shipping and Transport Inc, The Elli and The Frixos* [2008] EWCA Civ 584, [2008] 2 Lloyd's Rep 119, [2008] All ER (D) 321 (May) (ship chartered for the carrying of fuel oil required by law to be double-hulled; single-hulled ship therefore unfit to carry cargo).

10 *Burges v Wickham* (1863) 3 B & S 669 at 693 per Blackburn J.

11 *Gibson v Small* (1853) 4 HL Cas 353 at 384 per Erle J (adopted in *Burges v Wickham* (1863) 3 B & S 669 at 692 per Blackburn J); *McFadden v Blue Star Line* [1905] 1 KB 697 at 706, 10 Asp MLC 55 at 60 per Channell J.

12 *Burges v Wickham* (1863) 3 B & S 669.

13 *Mount Park Steamship Co v Grey* (1910) Shipping Gazette, 12 March, HL. As to a failure to take a statutory precaution not connected with the carriage of goods see PARA 420 note 8.

14 *Knill v Hooper* (1857) 2 H & N 277.

15 *Burges v Wickham* (1863) 3 B & S 669; *Compania Cantabrica di Navigacion v Anglo-American Oil Co Ltd* (1923) 16 Ll L Rep 235 (where a chartered vessel was held seaworthy inasmuch as she was as fit for the carriage of spirit as a vessel of her type, having vertical cylindrical tanks, could be).

16 *Amies v Stevens* (1718) 1 Stra 127, followed in *Blower v Great Western Rly Co* (1872) LR 7 CP 655.

17 See PARAS 371, 376.

## UPDATE

### 470 Extent of duty

NOTE 9--*Golden Fleece*, cited, reported at [2009] 1 All ER (Comm) 908.

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### 471. Time when seaworthiness necessary.

The time at which the undertaking of seaworthiness must be fulfilled is at the commencement of the voyage<sup>1</sup>, that is to say when the ship leaves her moorings without the intention of returning to them<sup>2</sup>. If she is seaworthy at that time, the fact that she subsequently becomes unseaworthy is no breach of the undertaking, as it is no part of the contract that she is to continue to be seaworthy<sup>3</sup>. If, however, she is unseaworthy at the time of her departure, the shipowner cannot escape the consequence of the breach of the undertaking by subsequent repair, and it is immaterial that the ship may have been made thoroughly seaworthy before the loss or damage takes place<sup>4</sup>.

1 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 76, 3 Asp MLC 516 at 517, HL, per Lord Cairns LC and at 90 and at 519 per Lord Blackburn; *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374; *McFadden v Blue Star Line* [1905] 1 KB 697, sub nom *McFadden Bros and Co v Blue Star Line Ltd* 10 Asp MLC 55; *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA* [1960] 2 QB 115, [1960] 2 All ER 55,

[1960] 1 Lloyd's Rep 132, CA; *Athenian Tankers Management SA v Pyrena Shipping Inc, The Arianna* [1987] 2 Lloyd's Rep 376. As to the meaning of 'at the beginning of the voyage' in a long-term contract of affreightment where the Hague-Visby Rules apply see *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc, The Kriti Rex* [1996] 2 Lloyd's Rep 171 (especially at 187-190). As to provision where the Hague-Visby Rules are incorporated into the charterparty see art III r 1; and PARAS 98, 376, 377.

2 *The Rona* (1884) 5 Asp MLC 259. As to when the voyage may be said to commence see further PARA 476.

3 This principle applies also to time charterparties: *Havelock v Geddes* (1809) 10 East 555; *Ripley v Scaife* (1826) 5 B & C 167. As to the duty of repairing a ship which becomes unseaworthy on the voyage see PARA 478 et seq; and as to a voyage in stages see PARA 469.

4 *Dunbar v Smuthwaite* (1854) 3 WR 68; *Gilroy, Sons & Co v Price & Co* [1893] AC 56 at 63, 7 Asp MLC 314 at 315, HL, per Lord Herschell LC. The charterparty may incorporate express terms imposing on the owners a duty to maintain the vessel in a seaworthy state after the commencement of the voyage: see *International Fina Services AG v Katrina Shipping Ltd and Tonen Tanker Kabushiki Kaisha, The Fina Samco* [1995] 2 Lloyd's Rep 344; *Poseidon Schifffahrt GmbH v Nomadic Navigation Co Ltd, The Trade Nomad* [1999] 1 Lloyd's Rep 723.

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#### **472. Effect of unseaworthiness.**

If the shipowner is in breach of the implied undertaking of seaworthiness, he is liable for any loss or damage caused<sup>1</sup> by it, because exception clauses in the contract of carriage do not cover loss or damage occasioned by the initial unseaworthiness of the ship<sup>2</sup>. If the unseaworthiness is a real cause of the loss or damage, it is immaterial that there are contributory causes for which the shipowner is not liable<sup>3</sup>.

At the same time the shipowner may at common law<sup>4</sup> qualify or exclude the implied undertaking of seaworthiness, but this must be done in clear and unambiguous terms<sup>5</sup>. Thus, if the ship was unseaworthy owing to the fact that she started with an insufficient supply of fuel, the shipowner cannot rely on a negligence clause in the contract and escape responsibility on the ground that it was through the negligence of his employees that the fuel was insufficient at starting<sup>6</sup>. Similarly, where a porthole has been left open or insecurely fastened in circumstances amounting to unseaworthiness, the shipowner is responsible if sea water gains access to the cargo and damages it; he is not excused by an exception against perils of the sea<sup>7</sup>, nor by an exception against negligence<sup>8</sup>. The failure to provide a seaworthy ship does not, however, preclude the shipowner in every case of loss or damage from relying on an exception; he remains covered where the loss or damage complained of is unconnected with the initial unseaworthiness<sup>9</sup>. It seems, however, that, where there is an exception of negligence, but no exception of unseaworthiness, the shipowner is liable for the whole of any damage caused by water which enters the ship owing to unseaworthiness, although the damage would have been less if proper steps had been taken to reduce it<sup>10</sup>.

The undertaking to provide a seaworthy vessel is one of a complex character which cannot be categorised as being 'a condition' or 'a warranty'. It embraces obligations with respect to every part of the hull and machinery, stores, equipment and crew. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel. Consequently the problem is not soluble by considering whether the undertaking is a condition or a warranty. The undertaking is an undertaking one breach of which may give rise to an event which relieves the charterer of further performance of his part of the contract if he so elects, and another breach of which entitles him to monetary compensation in the form of damages<sup>11</sup>.

- 1 The test of causation is whether the act or default complained of is a proximate cause of the alleged damage: see *Kamilla Hans-Peter Eckhoff KG v AC Oerssleff's EFTF A/B, The Kamilla* [2006] EWHC 509 (Comm), [2006] 2 Lloyd's Rep 238.
- 2 *Lyon v Mells* (1804) 5 East 428; *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413; *Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, 8 Asp MLC 65, CA; *The Europa* [1908] P 84, 11 Asp MLC 19, DC. Nor may he rely on what is now the Merchant Shipping Act 1995 s 186(1)(a) (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059), when fire ensues owing to the defect: *Asiatic Petroleum Co Ltd v Lennard's Carrying Co Ltd* [1914] 1 KB 419, 12 Asp MLC 381, CA; affd [1915] AC 705, 13 Asp MLC 81, HL.
- 3 See *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997, [1940] 3 All ER 405, 19 Asp MLC 382, HL; *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, [1949] 1 All ER 1, 82 Ll L Rep 137, HL (where the voyage was not completed before the outbreak of war owing to unseaworthiness and further delay was caused by subsequent diversion; the owners were held liable).
- 4 As to the position where the Hague-Visby Rules apply see PARAS 376, 385 et seq.
- 5 *The Laertes (Cargo ex)* (1887) 12 PD 187, 6 Asp MLC 174; *The Northumbria* [1906] P 292, 10 Asp MLC 314, DC. Cf *South American Export Syndicate Ltd v Federal Steam Navigation Co Ltd* (1909) 11 Asp MLC 195; *Rathbone Bros & Co v D MacIver Sons & Co* [1903] 2 KB 378, 9 Asp MLC 467, CA; *Tattersall v National Steamship Co* (1884) 12 QBD 297, 5 Asp MLC 206; *Shawinigan Ltd v Vokins & Co Ltd* [1961] 3 All ER 396, [1961] 1 WLR 1206, [1961] 2 Lloyd's Rep 153.
- 6 *The Vortigern* [1899] P 140, 8 Asp MLC 523, CA.
- 7 Cf *The Glenfruin* (1885) 10 PD 103, 5 Asp MLC 413; *Buchanan & Co v Faber* (1899) 4 Com Cas 223.
- 8 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; followed in *Gilroy, Sons & Co v Price & Co* [1893] AC 56, 7 Asp MLC 314, HL. Cf *Seville Sulphur and Copper Co v Colvils, Lowden & Co* (1888) 15 R 616; *Upperton v Union Castle Mail Steamship Co Ltd* (1902) 9 Asp MLC 475, CA.
- 9 *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL, approving *The Europa* [1908] P 84, 11 Asp MLC 19, DC, and explaining *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC. Cf the effect of deviation: see PARA 248.
- 10 *The Christel Vinnen* [1924] P 208, 16 Asp MLC 413, CA. See also *Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997, [1940] 3 All ER 405, 19 Asp MLC 382, HL; and the text and note 2.
- 11 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 69-71, [1962] 1 All ER 474 at 487, 488, [1961] 2 Lloyd's Rep 478 at 493, 494, CA, per Diplock LJ.

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### **473. Burden of proof.**

The burden of proving unseaworthiness rests on the shipper or other cargo-interest bringing a cargo-claim against the carrier<sup>1</sup>. The fact that the ship becomes leaky or sinks shortly after putting to sea, without there being any storm or other external factor to account for her condition or loss, is prima facie evidence of unseaworthiness, and shifts to the shipowner the burden of proving that she was seaworthy at the time of her departure<sup>2</sup>. If, however, the shipowner proves that the damage was caused by a matter falling within the exceptions, the cargo owner must prove affirmatively that the ship was unseaworthy and that that unseaworthiness caused the damage<sup>3</sup>.

1 *Lindsay v Klein, The Tatjana* [1911] AC 194, 11 Asp MLC 562, HL. A ship is prima facie to be deemed seaworthy: *Parker v Potts* (1815) 3 Dow 23, HL. Where the Hague or the Hague-Visby Rules apply, the burden of proof is reversed: see art IV r 1; and PARA 385.

2 *Watson v Clark* (1813) 1 Dow 336, HL (commented on in *Pickup v Thames and Mersey Marine Insurance Co* (1878) 3 QBD 594, 4 Asp MLC 43, CA); *Parker v Potts* (1815) 3 Dow 23, HL; *Ajum Goolam Hossen & Co v Union Marine Insurance Co, Hajee Cassim Joosub v Ajum Goolam Hossen & Co* [1901] AC 362, 9 Asp MLC 167, PC; *Lindsay v Klein, The Tatjana* [1911] AC 194, 11 Asp MLC 562, HL; *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210.

3 *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep 265 at 271 per McNair J.

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## (B) PROSECUTION OF THE VOYAGE

### 474. Obtaining clearances.

When the loading is completed and everything is prepared for the commencement of the voyage, it is the master's duty to obtain the necessary clearances, or permission to sail, from the proper officer at the port of loading<sup>1</sup>, and, except where the charterer has undertaken to do so by the terms of the charterparty<sup>2</sup>, to pay the necessary port and other charges for that purpose<sup>3</sup>, including light dues, when payable<sup>4</sup>. Until this duty has been performed, the ship is not ready to commence her voyage<sup>5</sup>.

1 As to the necessary clearances see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 999 et seq.

2 A charterer who has undertaken to pay all port charges is not bound to pay pilotage dues: *Whittall & Co v Rahtken's Shipping Co Ltd* [1907] 1 KB 783, 10 Asp MLC 471; cf *London Transport Co Ltd v Bessler Waechter & Co Ltd* (1908) 24 TLR 531, HL (where the contract provided for payment by the ship of customs dues on the cargo, not exceeding a certain limit, and it was held that the limitation so imposed did not extend to an export tax, which the shipowner was, therefore, bound to pay). The charterer may similarly undertake to pay dock dues, which include all proper charges which can be and are imposed by the dock authority in respect of the entrance into and use of the dock by the ship: *The Katherine* (1913) 30 TLR 52, DC.

3 *London Transport Co Ltd v Bessler Waechter & Co Ltd* (1908) 24 TLR 531, HL; cf *SA Ungherese di Armamenti Marittimo v Hamburg South American Steamship Co* (1912) 12 Asp MLC 228.

4 *Newman and Dale v Lamport and Holt* [1896] 1 QB 20, 8 Asp MLC 76. As to light dues see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1083 et seq.

5 *Hudson v Bilton* (1856) 6 E & B 565; cf *Roelandts v Harrison* (1854) 9 Exch 444 at 456 per Parke B.

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### 475. Sailing from port.

On obtaining clearances, the master must begin the voyage without delay<sup>1</sup>. Where no time is specified for the ship's departure, he is bound to start within a reasonable time<sup>2</sup>. He need not, therefore, put to sea at once if the weather is unpropitious, considering the nature of the ship, but may wait until the weather moderates<sup>3</sup>. If, however, the master has no lawful excuse for his delay in starting, the shipowner is liable to the shipper for the consequences<sup>4</sup>, as the shipper's duty is fulfilled when the loading is completed<sup>5</sup>. All risk of subsequent delay falls on the

shipowner<sup>6</sup>, for example the risk of the detention of the ship through inability to obtain her clearances<sup>7</sup>, or by the inability of the ship to proceed on the voyage<sup>8</sup>, unless the cause of the inability is covered by an exception<sup>9</sup>.

- 1 See *The Wilhelm* (1866) 14 LT 636.
- 2 See PARA 244.
- 3 Cf *Burges v Wickham* (1863) 3 B & S 669.
- 4 *The Wilhelm* (1866) 14 LT 636.
- 5 *Smith v Wilson* (1817) 6 M & S 78; and see PARA 441.
- 6 *The Wilhelm* (1866) 14 LT 636.
- 7 *Barret v Dutton* (1815) 4 Camp 333.
- 8 *Pringle v Mollett* (1840) 6 M & W 80; *The Wilhelm* (1866) 14 LT 636.
- 9 See PARA 265 et seq.

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#### **476. What constitutes sailing.**

Whenever the contract specifies the date at which the ship is required to commence her voyage, it becomes important to consider what acts on the part of the ship constitute the commencement of the voyage, since a failure to begin the voyage on the due date is a breach of contract for which the shipowner is responsible, unless excused by an exception<sup>1</sup>. The point is also important in connection with the payment of advance freight<sup>2</sup>, which is usually made payable on the final sailing of the ship from her port of loading<sup>3</sup> or so many days afterwards<sup>4</sup> because, if she is lost after the completion of the loading but before she has finally sailed, the shipowner will not be entitled to recover even the advance freight<sup>5</sup>.

To constitute a 'final sailing' for these purposes, it is not sufficient that the ship should have her clearances on board and be ready to sail<sup>6</sup>, or even that she has left her moorings or broken ground<sup>7</sup>. She must have taken her final departure from her port of loading<sup>8</sup>, and must be at sea, outside the limits of the port in the commercial sense of the word<sup>9</sup>, ready to proceed on her voyage<sup>10</sup>. It is not necessary that she should be progressing under her own power, since she may be in charge of a tug<sup>11</sup>. Nor need she be making progress at all, as she may cast anchor in a roadstead outside for the purpose of awaiting more favourable weather<sup>12</sup>, but she has, nevertheless, got clear of the port for the purpose of proceeding on the voyage, and has, therefore, finally sailed within the meaning of the contract<sup>13</sup>.

If, at the time of the ship's departure, she had no intention of returning, it is immaterial that she is afterwards compelled to return to the port of loading or is driven within its limits by stress of weather<sup>14</sup>. If, however, at the time when the ship leaves the port, she is not ready to proceed on the voyage, either because she is not fully equipped or properly manned, or because the bills of lading have not been signed<sup>15</sup>, or her clearances obtained<sup>16</sup>, and if she leaves the port with the intention of anchoring<sup>17</sup> or waiting outside<sup>18</sup> until the necessary preparations have been completed, the fact that she has got clear of the port without any intention of returning does not constitute a final sailing, as she is not at that moment in a

position to proceed<sup>19</sup>. If, therefore, she is lost before such preparations are completed, no advance freight is payable<sup>20</sup>.

- 1 See PARAS 405-406.
- 2 As to advance freight see PARAS 600-602.
- 3 *Roelandts v Harrison* (1854) 9 Exch 444.
- 4 *Great Indian Peninsula Rly Co v Turnbull* (1885) 5 Asp MLC 465; *Price v Livingstone* (1882) 9 QBD 679, 5 Asp MLC 13, CA; *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, 5 Asp MLC 499, CA.
- 5 *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, 5 Asp MLC 499, CA; *Thompson v Gillespy* (1855) 5 E & B 209.
- 6 *Roelandts v Harrison* (1854) 9 Exch 444.
- 7 *Thompson v Gillespy* (1855) 5 E & B 209; *Roelandts v Harrison* (1854) 9 Exch 444; *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, 5 Asp MLC 499, CA; *Hudson v Bilton* (1856) 6 E & B 565.
- 8 *Roelandts v Harrison* (1854) 9 Exch 444; *Price v Livingstone* (1882) 9 QBD 679, 5 Asp MLC 13, CA.
- 9 As to the meaning of 'port' see *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, 5 Asp MLC 499, CA (approved in *Hunter v Northern Marine Insurance Co* (1888) 13 App Cas 717, HL); and see PARA 408.
- 10 *Roelandts v Harrison* (1854) 9 Exch 444 (where by the charterparty the advance freight was payable 'on the final sailing of the vessel from the port of loading').
- 11 *Price v Livingstone* (1882) 9 QBD 679, 5 Asp MLC 13, CA.
- 12 *Thompson v Gillespy* (1855) 5 E & B 209; *Price v Livingstone* (1882) 9 QBD 679, 5 Asp MLC 13, CA.
- 13 *Price v Livingstone* (1882) 9 QBD 679, 5 Asp MLC 13, CA.
- 14 *Price v Livingstone* (1882) 9 QBD 679, 5 Asp MLC 13, CA.
- 15 *Thompson v Gillespy* (1855) 5 E & B 209.
- 16 *Hudson v Bilton* (1856) 6 E & B 565.
- 17 *Thompson v Gillespy* (1855) 5 E & B 209; *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580 at 587, 5 Asp MLC 499 at 500, CA, per Brett MR.
- 18 *Hudson v Bilton* (1856) 6 E & B 565.
- 19 *Thompson v Gillespy* (1855) 5 E & B 209.
- 20 *Roelandts v Harrison* (1854) 9 Exch 444; *Thompson v Gillespy* (1855) 5 E & B 209; *Hudson v Bilton* (1856) 6 E & B 565.

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#### **477. Proceeding without delay.**

After commencing the voyage, except in so far as he has some lawful excuse, it is the master's duty to proceed to the port of discharge without delay, and without calling at any intermediate port, or deviating from the proper course of navigation<sup>1</sup>; and this will be a course customarily taken by similar vessels on the voyage in question, unless some other course is agreed by the terms of the contract<sup>2</sup>. Parties are deemed to contract with reference to settled usage, so that,

if the regular course of trade fixes a customary track which is consistent with the voyage described in the contract, the ship must follow that track<sup>3</sup>. If the voyage is described by reference to a series of intermediate ports of call, those ports must be taken in the order in which they are named in the contract<sup>4</sup>. Where there is liberty given 'to call at any ports', the ship may call at such ports as may fairly be considered ports of call on the voyage named, but those ports must be taken in their geographical order<sup>5</sup>. The addition of the words 'in any order' dispenses with the necessity of the ship observing the geographical order<sup>6</sup>.

1 As to deviation see PARA 248; and as to the circumstances in which deviation is excused see PARAS 249, 250. Where the Hague-Visby Rules apply any deviation in saving or attempting to save life or property at sea or any reasonable deviation is not deemed to be an infringement or breach of those Rules or of the contract of carriage: see art IV r 4; and PARAS 378, 385.

2 *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] AC 562, [1939] 3 All ER 444, 19 Asp MLC 311, HL.

3 If after the date of the contract the usual route becomes blocked, the contract is not necessarily frustrated; if another route is available, which would not render the contract commercially or fundamentally different, even if considerably longer, it must be taken: *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1960] 2 QB 318 at 348, [1960] 2 All ER 160, [1960] 1 Lloyd's Rep 349, CA (cif contract) (distinguished in *Société Franco Tunisienne D'Armement v Sidermar SpA* [1961] 2 QB 278, [1960] 2 All ER 529, [1960] 1 Lloyd's Rep 594 (alternative route so circuitous, geographically unnatural and different in many respects from usual route that it was a fundamentally different voyage)).

4 See *Beatson v Haworth* (1803) 6 Term Rep 531.

5 *Leduc & Co v Ward* (1888) 20 QBD 475, 6 Asp MLC 290, CA. See also *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783, 13 Asp MLC 504, CA (where Le Havre was held not to be a port intermediate to Napier, New Zealand and London).

6 *Leduc & Co v Ward* (1888) 20 QBD 475 at 482, 6 Asp MLC 290 at 292, CA, per Lord Esher MR.

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#### **478. Keeping the ship seaworthy.**

It is the master's duty, as he represents the shipowner, to carry the goods to the port of discharge in the same ship<sup>1</sup>, although, in the execution of this duty, he must consider the interests of all persons concerned in the adventure<sup>2</sup>. He must, therefore, if she becomes unseaworthy, execute any repairs which may be necessary to maintain her in a seaworthy state, provided that he has a reasonable opportunity of doing so without unreasonable delay or expense to the various interests involved<sup>3</sup>. If the master fails to perform his duty in this respect, the shipowner is responsible to the owners of the goods on board his ship for any damage resulting, except in so far as he may be excused by the terms of the contract<sup>4</sup>. Even where the unseaworthiness is caused by an excepted peril, it is the master's duty to remedy it by every reasonable means in his power<sup>5</sup>, otherwise he is guilty of negligence, and the shipowner is not excused, unless he is protected by the terms of his contract against the consequences of the master's negligence<sup>6</sup>. Thus, where the actual safety of the ship, and consequently of the cargo, is endangered, it is the master's duty, if possible, to save the ship by removing the cause of danger, for example by stopping up a leak<sup>7</sup>, or keeping down the water in the holds by pumping<sup>8</sup>, or by returning to the port of loading or proceeding to a port of refuge for the purpose of executing the necessary repairs<sup>9</sup>.

As a mere error of judgment is not necessarily equivalent to negligence, the master is, however, not guilty of negligence in continuing the voyage without putting into a port for

repairs if he honestly and reasonably believes that, in spite of her condition, the ship is capable of reaching her destination, and it is not conclusive against him that she founders before she does so<sup>10</sup>. Once she has reached a port of refuge, whatever may be the cause of her unseaworthiness, she must not proceed to sea again in an unseaworthy condition<sup>11</sup>, otherwise the shipowner is responsible, whether the original cause of her unseaworthiness is covered by an exception or not, since the master, in leaving the port of refuge without repairing her, is guilty of negligence<sup>12</sup>. Even if the shipowner is protected by an exception against such negligence, nevertheless, if the port of refuge marks the commencement of a new stage, it may be that the undertaking of seaworthiness must be satisfied when the ship resumes her voyage<sup>13</sup>.

1 *Duranty v The Hart, Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289 at 319.

2 *The Rona* (1884) 5 Asp MLC 259.

3 *Svensden v Wallace Bros* (1885) 10 App Cas 404 at 417, 418, 5 Asp MLC 453 at 457, HL, per Lord Blackburn (approving *Rosetto v Gurney* (1851) 11 CB 176 and *Shipton v Thornton* (1838) 9 Ad & El 314); *Hill v Wilson* (1879) 4 CPD 329 at 333, 4 Asp MLC 198 at 200 per Lindley J; *Moss v Smith* (1850) 9 CB 94 at 106 per Cresswell J; *Philpott v Swann* (1861) 11 CBNS 270; *Benson v Chapman* (1849) 2 HL Cas 696 at 720 per Alderson B; *The Rona* (1884) 5 Asp MLC 259. Most of these were insurance cases. The view has been expressed that the shipowner is not bound to execute any repairs at all (*Atwood v Sellar & Co* (1879) 4 QBD 342 at 358, 4 Asp MLC 153 at 157, 158 per Cockburn CJ; cf *Worms v Storey* (1855) 11 Exch 427 at 429, 430 per Parke B), but this is inconsistent with the cases cited above. See also *Wilson v Bank of Victoria* (1867) LR 2 QB 203 at 211, 212 per Blackburn J. The charterparty may contain an express term imposing on the owner the duty to maintain the vessel in a seaworthy condition: see PARA 472.

4 *The Cressington* [1891] P 152, 7 Asp MLC 27, DC; cf *The Glenochil* [1896] P 10, 8 Asp MLC 218.

5 *The Rona* (1884) 5 Asp MLC 259.

6 *Worms v Storey* (1855) 11 Exch 427.

7 *The Cressington* [1891] P 152, 7 Asp MLC 27, DC.

8 Cf *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

9 *Phelps, James & Co v Hill* [1891] 1 QB 605, 7 Asp MLC 42, CA. As to proceeding to a port of refuge see *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL.

10 *Cohn v Davidson* (1877) 2 QBD 455, 3 Asp MLC 374 (where the court acquitted the master of negligence).

11 *Worms v Storey* (1855) 11 Exch 427; and see PARA 464. As to the master's right to abandon the voyage see PARA 480.

12 *Worms v Storey* (1855) 11 Exch 427; *The Rona* (1884) 5 Asp MLC 259.

13 *The Vortigern* [1899] P 140, 8 Asp MLC 523, CA. See also PARA 469.

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#### **479. Master's power over cargo.**

For the purpose of ensuring the due prosecution of the voyage and of maintaining the ship in a seaworthy condition, the master has certain powers over the cargo, the exercise of which is, however, subject to various restrictions<sup>1</sup>.

Where the circumstances of the particular case justify it, he may sacrifice the whole or a portion of the cargo, for the purpose of preserving the ship and the rest of the cargo, by jettisoning goods to lighten the ship or by burning them to enable the fires to be kept up under the boilers<sup>2</sup>. He may sell a portion<sup>3</sup>, but not the whole<sup>4</sup>, of the cargo for the purpose of raising funds to defray the expenses of such repairs as may be necessary to enable the ship to complete the voyage<sup>5</sup>, and for the same purpose he may hypothecate even the whole of the cargo<sup>6</sup>. No portion of the cargo may, however, be sold or hypothecated unless the master is unable to raise funds in any other way<sup>7</sup>, and unless there is a prospect of benefit, direct or indirect, to the cargo owners<sup>8</sup>. Ship and freight are the primary resources, and, until these are exhausted, recourse may not be had to the cargo<sup>9</sup>. The master also has authority to conclude contracts for salvage operations on behalf of the owner of the property on board the ship<sup>10</sup>.

If the ship is unable to continue her voyage, the master is entitled to tranship the cargo and convey it upon another ship to its destination<sup>11</sup>. If he is unable to do so, he may abandon the voyage, in which case the cargo owner is entitled to claim delivery of the cargo at the place where the voyage is abandoned<sup>12</sup>. Except, however, where the failure to continue the voyage is attributable to some excepted peril, in abandoning the voyage, the shipowner is guilty of a breach of contract, as he has agreed to convey the cargo to its destination, and the cargo owner is entitled to recover any damages which he may have sustained<sup>13</sup>.

1 See PARA 487 et seq.

2 See PARA 514.

3 See PARA 508.

4 As to when the whole of the cargo may be sold see PARA 511.

5 See PARA 509.

6 *Hussey v Christie* (1808) 9 East 426; *The Gratitude* (1801) 3 Ch Rob 240; *The Elephanta* (1851) 15 Jur 1185. See also PARAS 505-507.

7 *The Dowthorpe* (1843) 2 Wm Rob 73; *La Constancia* (1845) 2 Wm Rob 404. As to hypothecation see PARAS 507, 513.

8 *Hallett v Wigram* (1850) 9 CB 580.

9 *La Constancia* (1845) 2 Wm Rob 404.

10 See the International Convention on Salvage (London, 28 April 1989; Cm 1526) art 6(2); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 897.

11 See PARA 496 et seq.

12 See PARA 500.

13 *Philpott v Swann* (1861) 11 CBNS 270; *Assicurazioni Generali and Schenker & Co v Bessie Morris Steamship Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA; cf *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL.

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#### **480. Obligation to repair ship.**

Even where the ship is damaged by an excepted peril, the shipowner is not necessarily absolved, as he is bound to fulfil the contract of carriage by every reasonable and practicable method<sup>1</sup>. Hence the ship cannot be regarded as having been rendered incapable of performing her voyage merely because she needs repairing<sup>2</sup> and cannot continue her voyage until she is repaired<sup>3</sup>.

It is important, therefore, to consider how far the shipowner is bound to repair the ship, since, if he does not repair her and abandons the voyage, the question may arise whether his inability to carry the cargo to its destination is to be attributed not to prevention by an excepted peril for which he is not responsible, but to his failure to repair, which is a breach of his duty towards the owner of the cargo<sup>4</sup>. There is clearly a prevention by an excepted peril where the ship is so damaged by it that she cannot be repaired<sup>5</sup>, or where, although she is capable of being repaired, the repairs are commercially impossible<sup>6</sup>.

The shipowner is bound to repair the ship if it is reasonably possible for him to do so<sup>7</sup>; and a failure to repair her, by which she is prevented from continuing her voyage, is not a prevention by an excepted peril<sup>8</sup>. However, the cost of repairs falls on the shipowner<sup>9</sup> unless the need for repairs is occasioned by a general average loss<sup>10</sup>, and, if the cost is so prohibitive that he cannot prudently and reasonably repair, he cannot be called on to do so<sup>11</sup>. If the cost of the repairs necessary to enable the ship to complete her voyage is out of all proportion to the benefit which the shipowner will derive from them, it is impossible, in a business sense, to repair her<sup>12</sup>, and the shipowner is, therefore, prevented from completing the voyage not by his failure to repair, but by an excepted peril<sup>13</sup>. The cost of repairs must, however, be unreasonable; the shipowner is not excused for a failure because the master believed that the repairs could not be executed at a reasonable cost<sup>14</sup>. In any case, whatever may be the cost of repairs, it is the shipowner's duty to continue the voyage if he has repaired the ship<sup>15</sup>.

1 See *Shipton v Thornton* (1838) 9 Ad & El 314; *Tronson v Dent* (1853) 8 Moo PCC 419; *Ferruzzi France SA and Ferruzzi SpA v Oceania Maritime Inc, The Palmea* [1988] 2 Lloyd's Rep 261 (delay in commencing repairs to vessel).

2 *Moss v Smith* (1850) 9 CB 94.

3 *Benson v Chapman* (1849) 2 HL Cas 696 at 720.

4 *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289; *Hill v Wilson* (1879) 4 CPD 329, 4 Asp MLC 198; *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA; *Hansen v Dunn* (1906) 11 Com Cas 100; cf *Benson v Duncan* (1849) 3 Exch 644, Ex Ch; and see PARA 500.

5 *Moss v Smith* (1850) 9 CB 94; *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA.

6 *Moss v Smith* (1850) 9 CB 94 at 103 per Maule J; *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA. See also *Carras v London and Scottish Assurance Corp Ltd* [1936] 1 KB 291, 18 Asp MLC 581, CA; *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, [1936] 2 All ER 242, 55 Ll L Rep 55, CA. Much of the authority on this point is to be found in insurance cases: see **INSURANCE** vol 25 (2003 Reissue) PARAS 461, 466-467.

7 See PARA 500.

8 *Philpott v Swann* (1861) 11 CBNS 270; *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA.

9 *Benson v Duncan* (1849) 3 Exch 644; *Hallett v Wigram* (1850) 9 CB 580.

10 See PARA 615.

11 *Moss v Smith* (1850) 9 CB 94.

12 *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA; *Carras v London and Scottish Assurance Corp Ltd* [1936] 1 KB 291, 18 Asp MLC 581, CA.

13 *Moss v Smith* (1850) 9 CB 94; *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA.

14 *Cannan v Meaburn* (1823) 1 Bing 243.

15 *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA.

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#### **481. Seeking port of refuge.**

Where the master is compelled to seek a port of refuge for the purpose of repairing the ship, he is not necessarily guilty of a deviation because he does not make for the nearest port; he is entitled to take into consideration the relative merits of different ports as regards their facilities for dealing with the ship or cargo, and may select that port which is, in his opinion, the most suitable<sup>1</sup>.

1 *Phelps, James & Co v Hill* [1891] 1 QB 605, 7 Asp MLC 42, CA.

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### **(C) PRESERVATION OF THE CARGO**

#### **482. Extent of shipowner's duties.**

In so far as the shipowner is in the position of a common carrier, it is unnecessary to consider his duties in respect of the custody and protection of the cargo during the voyage, as he is absolutely responsible for its safety<sup>1</sup>. He is, therefore, equally liable to its owner in case of its loss or damage, whether caused by the failure of himself or his employees to exercise due care<sup>2</sup> or by some peril wholly beyond his control, an act of God, Queen's enemies and inherent vice always excepted<sup>3</sup>.

The existence of a special contract containing exceptions modifies the extent of his liability<sup>4</sup>, but he remains, as before, liable for all loss or damage not attributable to an excepted peril<sup>5</sup>. Where, however, the question arises whether or not the loss or damage is to be attributed to an excepted peril, the nature and extent of the shipowner's duties must be taken into account<sup>6</sup>. In the absence of any express provision in the contract to the contrary<sup>7</sup>, he is responsible to the cargo owner for the due performance of such duties, and is not protected by the terms of his contract if, in spite of the happening of an excepted peril, the loss or damage might have been avoided had such duties been duly performed<sup>8</sup>.

1 See PARA 264.

2 *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284; *Grill v General Iron Screw Collier Co* (1868) LR 3 CP 476, Ex Ch; *The Accomac* (1890) 15 PD 208, 6 Asp MLC 579, CA; *The Chasca* (1875) LR 4 A & E 446, 2 Asp

MLC 600; *Steinman & Co v Angier Line* [1891] 1 QB 619, 7 Asp MLC 46, CA; *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521, 5 Asp MLC 65, CA; *Hayn v Culliford* (1879) 4 CPD 182, 4 Asp MLC 128, CA.

3 *Spence v Chodwick* (1847) 10 QB 517; *Benson v Duncan* (1849) 3 Exch 644, Ex Ch; *Kay v Wheeler* (1867) LR 2 CP 302, Ex Ch; *Laveroni v Drury* (1852) 8 Exch 166; *Finlay v Liverpool and Great Western Steamship Co Ltd* (1870) 23 LT 251; *De Rothschild v Royal Mail Steam Packet Co* (1852) 7 Exch 734; *Thrift v Youle & Co* (1877) 2 CPD 432, 3 Asp MLC 357, DC. In most cases also the shipowner will not be liable for loss resulting from a general average act.

4 See PARA 265 et seq. As to the carrier's obligations where the Hague-Visby Rules apply see PARA 372 et seq.

5 See eg *Thrift v Youle & Co* (1877) 2 CPD 423, 3 Asp MLC 357, DC; *De Rothschild v Royal Mail Steam Packet Co* (1852) 7 Exch 734; and the cases cited in notes 2, 3.

6 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch. See also PARA 493.

7 See PARA 280.

8 *Adam v Morris* (1890) 18 R 153. See also PARA 494.

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### 483. Taking care of the cargo.

It is the master's duty, as representing the carrier<sup>1</sup>, to take reasonable care of the goods entrusted to him<sup>2</sup>. The extent of this duty varies according to the nature of the goods and the circumstances of the particular case<sup>3</sup>. If the goods, from their nature, require airing or ventilating, for example in the case of a fruit cargo, he must adopt the usual and proper methods for the purpose<sup>4</sup>. If the goods are capable of being damaged by water, he must keep the water away from them by pumping the holds clear of water<sup>5</sup>, or by battening down the hatches during heavy weather<sup>6</sup>, or by taking any other measures which may be reasonably required<sup>7</sup>. Similarly, if the goods are capable of being stolen during the voyage, he must protect them against theft<sup>8</sup>. The carrier is responsible for loss or damage attributable to the master's failure to perform this duty, in spite of an exception covering the actual cause of such loss or damage<sup>9</sup>, since, if the goods become hot through lack of ventilation<sup>10</sup>, or are damaged by water<sup>11</sup> or by other goods<sup>12</sup>, or are stolen<sup>13</sup> through the master's neglect to take care of them, the effective<sup>14</sup> cause of the loss or damage is the master's negligence<sup>15</sup>, not the heating, or the peril of the sea, or the theft, for all of which there may by the terms of the contract be no responsibility.

Where the master has taken all reasonable precautions to preserve the goods, the fact that, notwithstanding such precautions, the goods are lost or damaged does not preclude the carrier from relying on the exceptions of the contract<sup>16</sup>, and the same principle applies where the master is prevented, by the happening of an excepted peril, from carrying out his duties, as, for example, where he is prevented from ventilating the cargo by a storm<sup>17</sup>. Even where the loss or damage is attributable to the precautions actually adopted by the master, as, for example, where in a storm goods are jettisoned<sup>18</sup>, or the cargo becomes hot owing to the hatches being battened down<sup>19</sup>, the fact that such precautions were rendered necessary by an excepted peril must be taken into consideration, and the excepted peril, and not the master's act, must be regarded as the effective cause<sup>20</sup>.

1 As to the master's duties as representing the cargo owner see PARA 486.

2 *Notara v Henderson* (1872) LR 7 QB 225 at 235, 1 Asp MLC 278 at 281, Ex Ch, per Willes J; cf *Gatoil International Inc v Tradax Petroleum Ltd, The Rio Sun* [1985] 1 Lloyd's Rep 350 (cargo of crude oil which solidified; charterers not liable for failure to ensure that cargo was heated). Under the Hague-Visby Rules the carrier's duty is properly and carefully to carry, keep and care for the goods carried: see art III r 2 and PARA 383.

In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill: see the Supply of Goods and Services Act 1982 s 13; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 97.

3 *Notara v Henderson* (1872) LR 7 QB 225 at 237, 1 Asp MLC 278 at 282, Ex Ch, per Willes J. The extent of the master's duty also depends upon the law of the ship's flag: *The Bahia* (1864) 12 LT 145.

4 *Tronson v Dent* (1853) 8 Moo PCC 419 at 456; *Calcutta Steamship Co Ltd v Andrew Weir & Co* reported on this point (1910) 15 Com Cas 172 at 190 per Hamilton J. Similarly, if the cargo is composed of live cattle, he must provide an adequate quantity of drinking water: *Vallée v Bucknall Nephews* (1900) 16 TLR 362.

5 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch; *The Nepoter* (1869) LR 2 A & E 375; cf *Stanton v Richardson* (1875) 3 Asp MLC 23, HL.

6 *The Thrunsoe* [1897] P 301, 8 Asp MLC 313, DC. See also *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218 (locking bars supplied to prevent theft; duty to use in heavy weather).

7 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch.

8 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 547.

9 *Vallée v Bucknall Nephews* (1900) 16 TLR 362.

10 *Freedom (Owners) v Simmonds, Hunt & Co, The Freedom* (1871) LR 3 PC 594, 1 Asp MLC 28; *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; cf *Phillips v Clark* (1857) 2 CBNS 156; *Leuw v Dudgeon* (1867) LR 3 CP 17n.

11 *The Cressington* [1891] P 152, 7 Asp MLC 27, DC; *Siordet v Hall* (1828) 4 Bing 607; cf *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 3 Asp MLC 516, HL; *The Accomac* (1890) 15 PD 208, 6 Asp MLC 579, CA; *The Nepoter* (1869) LR 2 A & E 375.

12 *Ministry of Food v Lamport and Holt Line Ltd* [1952] 2 Lloyd's Rep 371 (where the shipowners were held liable for damage caused to a cargo of maize by tallow stowed above it, although the goods belonged to the same consignees); *UBC Chartering Ltd v Liepaya Shipping Co Ltd, The Liepaya* [1999] 1 Lloyd's Rep 649 (contamination of cargo by residue of previous cargo).

13 *The Prinz Heinrich* (1897) 14 TLR 48.

14 See PARAS 493-494.

15 The shipowner may be protected by an express exception against the master's negligence: *The Cressington* [1891] P 152, 7 Asp MLC 27, DC; *Blackburn v Liverpool, Brazil and River Plate Steam Navigation Co* [1902] 1 KB 290, 9 Asp MLC 263; *Smitton v Orient Steam Navigation Co Ltd* (1907) 10 Asp MLC 459. Where the Hague-Visby Rules apply, neither the carrier nor the ship is responsible for loss or damage arising or resulting from the act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship: see art IV r 2(a); and PARA 388.

16 *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; *Laurie v Douglas* (1846) 15 M & W 746. The burden of proving that the master has not taken all reasonable precautions lies on the shipper: *Czech v General Steam Navigation Co* (1867) LR 3 CP 14; *Moes, Molière and Tromp v Leith and Amsterdam Shipping Co* (1867) 5 M 988 (followed in *Horsley v Baxter Bros & Co* (1893) 20 R 333); *Ohrloff v Briscall, The Helene*; *Craig and Rose v Delargy* (1879) 6 R 1269; *The Glendarroch* [1894] P 226, 7 Asp MLC 420, CA; *The Ida* (1875) 2 Asp MLC 551, PC; *Muddle v Stride* (1840) 9 C & P 380; *Williams v Dobbie* (1884) 11 R 982.

17 *The Thrunsoe* [1897] P 301, 8 Asp MLC 313, DC.

18 See PARA 486.

19 *The Thrunsoe* [1897] P 301, 8 Asp MLC 313, DC.

20 *The Thrunsoe* [1897] P 301, 8 Asp MLC 313, DC; cf *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55, [1940] 4 All ER 169, 67 Ll L Rep 549, PC (marine insurance).

## UPDATE

### 483 Taking care of the cargo

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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#### 484. Checking deterioration.

It is the master's duty not merely to do what is necessary to preserve the goods on board the ship during the ordinary incidents of the voyage, but also to take reasonable measures to check and arrest their loss, destruction or deterioration through accidents, for the unavoidable effects of which there is, by reason of an exception in the contract, no original liability on the carrier<sup>1</sup>. The carrier is equally responsible for the master's failure to perform this part of his duty<sup>2</sup>.

In considering what measures are reasonable, it is not sufficient to point to the fact that the goods have been lost or damaged, and to suggest measures which might have been taken to prevent their being so lost or damaged<sup>3</sup>; it is necessary to take into account all the circumstances affecting the risk, trouble, delay and inconvenience, and, in particular, the place, the season, the extent of the deterioration, the opportunity and means at hand and the interests of other persons concerned in the adventure, which it might be unfair to prejudice for the sake of the part of the cargo in peril<sup>4</sup>. It must be shown that the measures suggested would have been reasonable and prudent to take in the interest of the shipper, and would have been taken by him if the whole adventure had been under his control and at his risk<sup>5</sup>, and, in addition, that there is nothing in the circumstances of the case indicating any special risk, trouble, inconvenience or other objection<sup>6</sup>.

Moreover, the liability of the carrier does not necessarily depend on the result of the measures actually taken by the master<sup>7</sup>. A fair allowance must be made for the difficulties in which the master may be involved. It must be borne in mind that he is to exercise a discretionary power, and no liability arises unless it can be affirmatively proved that he has been guilty of a breach of duty<sup>8</sup>. At the same time the question whether a particular course of action is justified does not depend on the master's honest belief that what he proposes to do is the right thing; the master must consider the interest not merely of the ship, but of the whole adventure, and act accordingly<sup>9</sup>.

1 *Notara v Henderson* (1872) LR 7 QB 225 at 235, 1 Asp MLC 278 at 281, Ex Ch, per Willes J; *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218; cf *Tronson v Dent* (1853) 8 Moo PCC 419 at 456.

2 *Adam v Morris* (1890) 18 R 153.

3 *Notara v Henderson* (1872) LR 7 QB 225 at 237, 1 Asp MLC 278 at 282, Ex Ch, per Willes J; cf PARA 485 et seq.

4 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch; *Tronson v Dent* (1853) 8 Moo PCC 419; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Acatos v Burns* (1878) 3 Ex D 282, CA.

5 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch; *Atlantic Mutual Insurance Co v Huth* (1860) 16 ChD 474, 4 Asp MLC 369, CA.

6 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch. The master is, therefore, at liberty to take into account questions of expense: *Tronson v Dent* (1853) 8 Moo PCC 419; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407.

7 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch.

8 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407.

9 *The Rona* (1882) 4 Asp MLC 520; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA; *Tronson v Dent* (1853) 8 Moo PCC 419; *Acatos v Burns* (1878) 3 Ex D 282, CA. See further PARAS 501, 508, 513.

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#### **485. Preventing damage from spreading.**

In the performance of his duty to prevent deterioration of the cargo<sup>1</sup>, the master must, if the goods suffer damage in the course of the voyage, endeavour to save them, and must use all proper means available, as, for example, by pumping water out of the holds, to prevent the damage from spreading<sup>2</sup>.

He is not, however, bound to seek a port of refuge as soon as it becomes clear that, by going on, damage will be done to part of the cargo, especially if such a course will put all concerned to enormous expense<sup>3</sup>, and the ship remains in a fit condition to continue her voyage<sup>4</sup>. Indeed, in such circumstances, it is doubtful whether a deviation could be justified. The performance of this duty, whether it is for the joint benefit of the shipowner and the cargo owner, or for the benefit of the cargo owner only, cannot be insisted on if a deviation is involved<sup>5</sup>. Nevertheless, in considering the question whether a deviation is justifiable or not<sup>6</sup>, the interests of the cargo as well as of the ship must be taken into account as influencing the master's decision<sup>7</sup>. Moreover, reasonable delay at a port of call for purposes connected with the voyage, although not necessary for its completion, does not amount to a deviation<sup>8</sup>. If, therefore, the ship puts into a port of call or seeks a port of refuge where an opportunity of coping with the damage presents itself, the master is entitled to make use of the opportunity, if it is possible to do so without unreasonably delaying the ship<sup>9</sup>. As regards the owner of the particular goods affected, it is the master's duty to make use of the opportunity and means reasonably available, otherwise the shipowner is responsible for the consequences of the master's breach of duty<sup>10</sup>.

The master's duty does not extend beyond the safe custody of the goods and their protection from injury or damage. He is not bound to procure an advantage for the goods, for example by assortment<sup>11</sup>. Thus, if it is reasonably possible to remedy the damage by landing the goods promptly, the master must land them at once, and the shipowner is responsible for any damage occasioned to the goods by their being kept on board, even if the original cause of the damage to them is covered by an exception<sup>12</sup>.

In addition, the master must take any other reasonable measures which may be necessary, either by way of drying the goods<sup>13</sup> or otherwise<sup>14</sup>, for the purpose of checking the deterioration and rendering the goods fit to be carried on<sup>15</sup>. The master's duty in this respect is not confined to cases of physical damage and deterioration; if from any cause whatever it becomes dangerous to carry the goods on, as, for example, where they are contraband of war so that, if

he had continued the voyage with the goods on board, he would have been acting recklessly, it is his duty to land them and to place them in safe custody<sup>16</sup>.

Where the whole of the cargo may be in danger of being lost, it is the master's duty to save the most valuable portion of the cargo first, if it is possible to do so without unreasonably neglecting the interests of the owners of the other portions of the cargo<sup>17</sup>.

1 See PARA 484.

2 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch.

3 *The Rona* (1882) 4 Asp MLC 520.

4 *Notara v Henderson* (1870) LR 5 QB 346 at 354 per Cockburn CJ.

5 *Notara v Henderson* (1872) LR 7 QB 225 at 237, 1 Asp MLC 278 at 282, Ex Ch, per Willes J.

6 See PARA 248 et seq. A deviation, otherwise justifiable, does not become unjustifiable because the danger is attributable to the shipowner's default: *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL.

7 *Phelps, James & Co v Hill* [1891] 1 QB 605, 7 Asp MLC 42, CA. It is doubtful whether deviation to save the cargo alone, the ship not being in danger, is justifiable: see *Notara v Henderson* (1870) LR 5 QB 346 at 354 per Cockburn CJ; *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218.

8 *Notara v Henderson* (1872) LR 7 QB 225 at 237, 1 Asp MLC 278 at 282, Ex Ch, per Willes J.

9 *Tronson v Dent* (1853) 8 Moo PCC 419; cf *Blasco v Fletcher* (1863) 14 CBNS 147.

10 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch; *Hansen v Dunn* (1906) 11 Com Cas 100; *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218.

11 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245 at 270 per Knight Bruce LJ.

12 *Adam v Morris* (1890) 18 R 153; *Hansen v Dunn* (1906) 11 Com Cas 100 (where a cargo of maize was improperly kept in the ship's hold at a port of refuge pending negotiations for pro rata freight); *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218.

13 *Tronson v Dent* (1853) 8 Moo PCC 419; *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch; cf *Acatos v Burns* (1878) 3 Ex D 282, CA.

14 *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch.

15 If the cargo is capable of being carried on, the shipowner is entitled to insist on its being reshipped, unless the full freight is paid: *The Blenheim* (1885) 10 PD 167 at 171, 5 Asp MLC 522 at 524. Cf PARA 500.

16 *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326, 8 Asp MLC 181; *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519.

17 *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362 at 376, DC, per Wills J.

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#### **486. Master's implied authority on behalf of cargo owner.**

Although, in dealing with the cargo for the purpose of preserving it from harm, the master acts as agent of the shipowner, so as to render the shipowner liable for his breach of duty, he has also an implied authority<sup>1</sup> in cases of accident and emergency to deal with the cargo on its

owner's behalf, and for the protection of his interests to act for the safety of the cargo in the best manner possible in the circumstances in which it is placed<sup>2</sup>. Indeed, the master has a duty in many cases of accident and emergency to take active measures for the safety of the cargo and, as a correlative right, he is entitled to charge to the cargo owner all expenses properly incurred<sup>3</sup>. In the exercise of this implied authority he may jettison a portion of the cargo<sup>4</sup> and he may make arrangements for drying the cargo at a port of refuge and rendering it fit to be carried on<sup>5</sup>. If in his opinion it is unsafe to continue with the voyage, he may warehouse the cargo<sup>6</sup> or even sell it<sup>7</sup>; but, before dealing with the cargo in such manner, the master must, if possible, communicate with the cargo owner and obtain his directions<sup>8</sup>. These acts are done by the master in his capacity as agent of the cargo owner, and it is, therefore, the cargo owner and not the carrier who is bound by them, and who must accept responsibility for them<sup>9</sup>. As, however, the master's authority to act on the cargo owner's behalf is an implied authority, derived from the necessity of the case<sup>10</sup>, whereas his authority to act on the shipowner's behalf is a general authority, he cannot bind the cargo owner by an improper exercise of authority<sup>11</sup>, but the shipowner will be responsible<sup>12</sup>.

1 The contract may, however, provide that in certain events the master is to be deemed to be acting as agent of the cargo owner as well as of the shipowner.

2 *The Argos (Cargo ex)*, *Gaudet v Brown* as reported in (1873) LR 5 PC 134 at 165; cf *Droege v Suart*, *The Karnak* (1869) LR 2 PC 505. See further PARAS 504-507, 510, 511. As to the grounds necessary for the exercise of the master's implied authority see PARA 487 et seq. The master now has actual authority to conclude contracts for salvage operations on behalf of the owner of the property on board the ship: see the International Convention on Salvage (London, 28 April 1989; Cm 1526) art 6(2); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 897.

3 *The Argos (Cargo ex)*, *Gaudet v Brown* as reported in (1873) LR 5 PC 134 at 165 per Sir Montague Smith.

4 See PARA 611.

5 *Tronson v Dent* (1853) 8 Moo PCC 419; *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch; *Acatos v Burns* (1878) 3 Ex D 282, CA.

6 *Tronson v Dent* (1853) 8 Moo PCC 419; *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519; *Hansen v Dunn* (1906) 11 Com Cas 100.

7 See PARA 511.

8 *Acatos v Burns* (1878) 3 Ex D 282, CA; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Duranty v Hart*, *The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289 at 322 per Lord Kingsdown.

9 See PARAS 504, 505, 510. See also *China-Pacific SA v Food Corp'n of India*, *The Winson* [1982] AC 939, [1981] 3 All ER 688, HL (revsg [1981] QB 403, [1980] 3 All ER 556, [1980] 2 Lloyd's Rep 213, CA). It seems that the master has a lien on the cargo for expenses: *Hingston v Wendt* (1876) 1 QBD 367 at 373, 3 Asp MLC 126 at 128, DC, per Blackburn J.

10 This is said to be the only exception to the non-recognition of agency of necessity in English law: see *Jebara v Ottoman Bank* [1927] 2 KB 254 at 270, CA, per Scrutton LJ.

11 *Tronson v Dent* (1853) 8 Moo PCC 419 at 449; *Duranty v Hart*, *The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289 at 321; *Acatos v Burns* (1878) 3 Ex D 282, CA.

12 See PARAS 491, 510. The burden of proof lies on the party asserting that his exercise of authority was justifiable: *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA.

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#### 487. Justifiable exercise of master's authority.

To justify the master in exercising his implied authority on behalf of the cargo owner the following conditions must be fulfilled:

- 138 (1) it must be reasonably necessary, through the force of circumstances, that the master should deal with the cargo on its owner's behalf<sup>1</sup>;
- 139 (2) the course adopted must be a reasonable and proper course to adopt<sup>2</sup>; and
- 140 (3) it must be impossible, in the time available, to communicate with the cargo owner and so obtain his instructions<sup>3</sup>.

1 *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA; *The Pontida* (1884) 9 PD 177 at 180, 5 Asp MLC 330 at 333, CA, per Brett MR. Cf *Droege v Suart, The Karnak* (1869) LR 2 PC 505. See further PARA 488.

2 *Tronson v Dent* (1853) 8 Moo PCC 419; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Acatos v Burns* (1878) 3 Ex D 282, CA; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA. See further PARA 489.

3 *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289 (explaining *Wilkinson v Wilson, The Bonaparte* (1853) 8 Moo PCC 459); *The Olivier* (1862) Lush 484; *The Argos (Cargo ex), Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519; *The Lizzie* (1868) LR 2 A & E 254; *Acatos v Burns* (1878) 3 Ex D 282, CA; cf *La Ysabel* (1812) 1 Dods 273. See further PARA 490. As to the application of these principles see PARAS 503-507, 510-511.

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#### 488. Necessity must arise through the force of circumstances.

The first condition required to be present to justify the exercise by the master of his implied authority on behalf of the cargo owner<sup>1</sup> is that the necessity that the master should deal with the cargo in some way or other on its owner's behalf must arise, not through the act of persons with whom the master is connected<sup>2</sup>, but through the force of circumstances, by reason of the events which have happened casting on him the duty of acting on the cargo owner's behalf<sup>3</sup>, because the cargo must not be left to perish or be left unguarded or uncared for, and there is no one else who can perform the duty of guarding the cargo or taking care of it, or doing the best with it, except the master<sup>4</sup>. Moreover, the necessity must involve the interests of the cargo owner; the mere necessity of the ship, apart from the adventure, does not entitle the master to act on behalf of the cargo owner<sup>5</sup>. The basis of the master's authority is the prospect of benefit, direct or indirect, to the owner of the cargo<sup>6</sup>.

1 See PARAS 486, 487.

2 *Tronson v Dent* (1853) 8 Moo PCC 419 at 449.

3 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222 at 230, 1 Asp MLC 407 at 409. It is immaterial whether the necessity arises from the inherent vice of the goods or from some other cause: *Acatos v Burns* (1878) 3 Ex D 282 at 290, CA, per Brett LJ.

4 *Tronson v Dent* (1853) 8 Moo PCC 419 at 449.

5 *The Onward* (1873) LR 4 A & E 38, 1 Asp MLC 540; *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289.

6 *The Onward* (1873) LR 4 A & E 38 at 57, 1 Asp MLC 540 at 553 per Sir Robert Phillimore.

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#### **489. Course adopted must be reasonably necessary.**

The second condition required to be present to justify the exercise by the master of his implied authority on behalf of the cargo owner is that the course adopted by the master in dealing with the cargo must have been reasonably necessary in the circumstances of the case<sup>1</sup>. The mere fact that, in consequence of the events which have happened, something must be done with the cargo, and the master is, therefore, compelled to decide between alternative courses, does not, in itself, bind the cargo owner to accept the course which is actually adopted<sup>2</sup>. It is not sufficient to show that the master thought that he was doing his best, or even that the course adopted was, so far as can be ascertained, the best<sup>3</sup> for all concerned<sup>4</sup>. It may have been a reasonable course<sup>5</sup>; it may be clear that the cargo might have suffered further damage if the master had not acted as he did<sup>6</sup>. Nevertheless, it may not have been the proper course to adopt<sup>7</sup>. To bind the cargo owner it must be shown that, in dealing with the goods, the master has adopted the course which, according to the judgment of a wise and prudent person, is apparently the best for the persons for whom he acts in the emergency which has arisen<sup>8</sup>.

1 See PARA 487.

2 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Acatos v Burns* (1878) 3 Ex D 282 at 287, CA, per Bramwell LJ.

3 *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474 at 481, 4 Asp MLC 369 at 374, CA, per Cotton LJ. See, however, *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222 at 230, 1 Asp MLC 407 at 409; *Acatos v Burns* (1878) 3 Ex D 282 at 290, CA, per Brett LJ.

4 *Tronson v Dent* (1853) 8 Moo PCC 419; cf PARAS 507, 511.

5 *Acatos v Burns* (1878) 3 Ex D 282, CA.

6 *Tronson v Dent* (1853) 8 Moo PCC 419.

7 *Acatos v Burns* (1878) 3 Ex D 282, CA.

8 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Acatos v Burns* (1878) 3 Ex D 282, CA; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474 at 478, 4 Asp MLC 369 at 373, CA, per Thesiger LJ; cf *Christy v Row* (1808) 1 Taunt 300.

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#### **490. Inability to communicate with the cargo owner.**

The third condition required to be present to justify the exercise by the master of his implied authority on behalf of the cargo owner is that the master must be unable to communicate with the cargo owner in time to receive his instructions before dealing with the cargo<sup>1</sup>. It is the master's duty to communicate with the cargo owner unless it is impossible to do so owing to the urgency of the case, as, for example, where there is danger of an immediate loss unless prompt measures are taken to remedy the damage<sup>2</sup>. In considering whether communication is possible, the cost and risk incidental to the delay from the attempt to communicate, and the probability of failure after every exertion has been made, must be taken into account<sup>3</sup>. Moreover, regard must be had to the means of communication available and to the prospect of obtaining an answer in time<sup>4</sup>. However, in view of the many modern means of communication available the circumstances in which the master is unable to communicate with the cargo owner at all must now be very limited.

In addition, where the ship is a general ship, the position is modified by the circumstances that the cargo belongs to different owners and that the task of tracing out and communicating with them must add greatly to the master's labours, and might lead to the neglect of more pressing duties connected with saving and dealing with the goods<sup>5</sup>. These circumstances do not, however, in themselves absolve the master of a general ship from the duty of communicating with such owners of cargo as are known to him<sup>6</sup>.

1 See PARA 487.

2 *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289. If, however, the cargo is not perishable, there may be no urgency: *The Onward* (1873) LR 4 A & E 38, 1 Asp MLC 540; *Kleinwort, Cohen & Co v Cassa Marittima of Genoa* (1877) 2 App Cas 156, 3 Asp MLC 358, PC.

3 *Droege v Suart, The Karnak* (1869) LR 2 PC 505 at 513.

4 *Wallace v Fielden, The Oriental* (1851) 7 Moo PCC 398; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407.

5 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Phelps, James & Co v Hill* [1891] 1 QB 605, 7 Asp MLC 42, CA.

6 *The Gratitude* (1801) 3 Ch Rob 240 at 266 per Lord Stowell.

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#### **491. Where communication with the cargo owner is possible.**

Where communication is possible, a master who fails to communicate with the cargo owner cannot bind him by his dealings with it, since his implied authority to act on the owner's behalf has never come into existence<sup>1</sup>. He remains, therefore, the agent of the carrier, and, if he deals improperly with the cargo in the purported exercise of such authority, renders the carrier liable for the consequences<sup>2</sup>.

If the cargo owner neglects to reply to the communication<sup>3</sup>, or refuses to give instructions<sup>4</sup>, the master's implied authority, if the circumstances otherwise justify its exercise, comes into existence, and he is entitled to take such steps as may appear to him to be reasonably necessary. He may not, however, disregard any instructions which he may receive, and it is immaterial that, in disregarding them, he acted in good faith and that the steps which he took

were reasonable<sup>5</sup>. The master may not substitute his own judgment for the will of the cargo owner<sup>6</sup>.

1 *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289; *The Onward* (1873) LR 4 A & E 38, 1 Asp MLC 540; *Acatos v Burns* (1878) 3 Ex D 282, CA. The communication must state fully what steps the master proposes to take: *The Onward*; *Kleinwort, Cohen & Co v Cassa Marittima of Genoa* (1877) 2 App Cas 156, 3 Asp MLC 358, PC.

2 As to the measure of damages see *Acatos v Burns* (1878) 3 Ex D 282, CA.

3 *Droege v Suart, The Karnak* (1869) LR 2 PC 505.

4 *Garriock v Walker* (1873) 1 R 100; cf *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407.

5 *Acatos v Burns* (1878) 3 Ex D 282 at 291, CA, per Brett LJ; *Dymond v Scott* (1877) 5 R 196. See also PARAS 505, 512-513.

6 *Acatos v Burns* (1878) 3 Ex D 282 at 291, CA, per Brett LJ; *Dymond v Scott* (1877) 5 R 196.

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#### 492. Expenses.

Whenever the master has implied authority to deal with the cargo on its owner's behalf, he is entitled to charge the owner with the expenses properly incurred in so doing<sup>1</sup>, and, if necessary, he may exercise a lien over the cargo in respect of those expenses<sup>2</sup>. He is also entitled to raise funds for the purposes of defraying those expenses by hypothecating the whole of the cargo<sup>3</sup>, or by selling a portion of it<sup>4</sup>, and, in case of need, may pledge the cargo owner's credit<sup>5</sup>. He may not, however, charge the cargo owner with such expenses as are properly payable by the shipowner<sup>6</sup>.

1 *The Argos (Cargo ex), Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519. In insurance law extraordinary expenses incurred for the protection of a particular article are called 'particular charges': see **INSURANCE** vol 25 (2003 Reissue) PARA 434.

2 *Hingston v Wendt* (1876) 1 QBD 367, 3 Asp MLC 126.

3 *The Sultan (Cargo ex)* (1859) Sw 504; *The Glenmanna* (1860) Lush 115; and see PARAS 505-507.

4 See PARAS 512-513.

5 *Hingston v Wendt* (1876) 1 QBD 367 at 371, 3 Asp MLC 126 at 128 per Blackburn J.

6 *The Argos (Cargo ex), Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519.

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#### 493. Carrier's liability.

Even if the master has not been guilty of a breach of duty in relation either to the ship or to the cargo<sup>1</sup>, the carrier is nevertheless liable for any loss or damage which the cargo<sup>2</sup> may sustain unless the cause of the loss or damage is covered by an exception in the contract<sup>3</sup>.

To exempt the carrier, it is not sufficient to prove that the loss or damage took place and that, at the same time, an excepted peril happened<sup>4</sup>; he must show that the loss or damage was proximately caused by the excepted peril<sup>5</sup>.

The court will look at the *causa causans* and the fact that the proximate cause of the loss or damage is excepted will not avail the shipowner if its operation was induced by his negligence or misconduct<sup>6</sup>. To escape liability in such a case the carrier must show that the negligence or misconduct which effectively caused the loss or damage was itself expressly excepted<sup>7</sup>. Where there is only one cause to which the loss or damage can be attributed, the carrier's position depends merely on the construction to be placed on the language of the particular exception<sup>8</sup>. If the language used is wide enough to include the actual cause of the loss, he is exempt from liability<sup>9</sup>; if he has failed to include it, he remains liable<sup>10</sup>. Thus, a cargo which is eaten by rats in the ship's hold is not lost, within the meaning of an exception, by a peril of the sea<sup>11</sup>, or by an act of God<sup>12</sup>. Where, however, there has been a succession at intervals of causes which must have existed in order to bring about the loss, the question arises which cause must be taken as the cause to which the loss is to be attributed<sup>13</sup>.

1 See PARAS 464 et seq, 482 et seq.

2 As to the measure of damages recoverable see PARA 458 et seq.

3 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 577. See also PARA 265 et seq; *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546 at 550, 2 Asp MLC 275 at 277. The shipowner cannot, however, rely on an exception in the contract if a cause of the loss was unseaworthiness: *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997, [1940] 3 All ER 405, 19 Asp MLC 382, HL. See also PARA 472.

4 *Thomas Wilson, Sons & Co v Xantho (Cargo Owners)* (1887) 12 App Cas 503 at 512, 6 Asp MLC 207 at 210, HL, per Lord Herschell; *Philpott v Swann* (1861) 11 CBNS 270.

5 *Smith v Shepherd* (1796) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 578n; *Thomas Wilson, Sons & Co v Xantho (Cargo Owners)*, *The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL; *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 6 Asp MLC 212, HL; *Freedom (Owners) v Simmonds, Hunt & Co, The Freedom* (1871) LR 3 PC 594, 1 Asp MLC 28; *William France, Fenwick & Co Ltd v North of England Protecting and Indemnity Association* [1917] 2 KB 522, 14 Asp MLC 92. Cf **INSURANCE** vol 25 (2003 Reissue) PARAS 356-357.

6 *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284; *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 1 KB 747 at 758, 759 (affd [1916] 2 KB 783, 13 Asp MLC 504, CA). Cf *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997, [1940] 3 All ER 405, 19 Asp MLC 382, HL.

7 *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16, sub nom *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* 11 Asp MLC 1, HL. There may be more than one effective cause of a loss: cf *Reischer v Borwick* [1894] 2 QB 548, 7 Asp MLC 493, CA (an insurance case).

8 As to the rules of construction to be applied see PARA 227 et seq.

9 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 6 Asp MLC 212, HL; *The Pearlmoor* [1904] P 286, 9 Asp MLC 540.

10 *Taylor v Dunbar* (1869) LR 4 CP 206; *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Frazer & Co* (1887) 12 App Cas 484, 6 Asp MLC 200, HL; *Dale v Hall* (1750) 1 Wils 281; *Laveroni v Drury* (1852) 8 Exch 166; *Kay v Wheeler* (1867) LR 2 CP 302, Ex Ch; *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546, 2 Asp MLC 275; *The Nepoter* (1869) LR 2 A & E 375; *Thriff v Youle & Co* (1877) 2 CPD 432, 3 Asp MLC 357, DC; *Barrow v Williams & Co* (1890) 7 TLR 37; and see PARA 265 et seq.

11 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 6 Asp MLC 212, HL; *Kay v Wheeler* (1867) LR 2 CP 302, Ex Ch; *Laveroni v Drury* (1852) 8 Exch 166.

12 *Dale v Hall* (1750) 1 Wils 281.

13 Cf *Reischer v Borwick* [1894] 2 QB 548 at 551, 7 Asp MLC 493 at 494, CA, per Lindley LJ.

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#### 494. Proximate cause.

If there has been an interruption in the sequence of causes resulting in loss of or damage to the cargo, the last cause alone must be taken into consideration and the others rejected, even though the loss could not have been brought about without them<sup>1</sup>.

Thus, where a cargo is damaged owing to the fact that seawater gains access to it through a hole in the ship's side, the damage is attributable, if no question of negligence on the part of the master or crew or seaworthiness of the ship arises, to a peril of the sea<sup>2</sup>; and it is unnecessary to inquire into the cause of there being a hole through which the seawater is enabled to enter the ship<sup>3</sup>. Although it is true that the water could not have entered in the absence of the hole, and that the damage would not have happened if the cause which produced the hole had not operated, nevertheless, the immediate and proximate cause of the damage is the entrance of the water<sup>4</sup>. The cause which produced the hole, whether it is a shot piercing the ship<sup>5</sup> or a rat gnawing a pipe which communicates with the sea<sup>6</sup>, must be disregarded as being only the remote cause of the damage.

Where loss or damage is the effect or outcome of concurrent causes, the proximate cause is not necessarily that which occurs last in point of time<sup>7</sup>. The question is one of fact, namely which was the direct or dominant cause of the casualty<sup>8</sup>. The preceding cause may, in fact, for the purpose of an exception, be the effective cause of the loss<sup>9</sup>. Thus, where the water gains access to the cargo through a porthole negligently left open<sup>10</sup>, any damage to the cargo, although in one sense attributable to a peril of the sea, namely the entrance of the water, is at least equally attributable to the negligence which leaves the porthole open; and the shipowner cannot, therefore, rely on the one cause of the damage which is covered by an exception against perils of the sea, to the exclusion of the other cause which falls outside this exception<sup>11</sup>.

1 Cf *Pink v Fleming* (1890) 25 QBD 396 at 397, 6 Asp MLC 554 at 555, CA, per Lord Esher MR, as explained in *Reischer v Borwick* [1894] 2 QB 548, 7 Asp MLC 493, CA.

2 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 6 Asp MLC 212, HL; *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL.

3 *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503, 6 Asp MLC 207, HL; *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 6 Asp MLC 212, HL.

4 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 6 Asp MLC 212, HL.

5 *Thomas Wilson, Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503 at 509, 6 Asp MLC 207 at 209, HL, per Lord Herschell, doubting *Cullen v Butler* (1816) 5 M & S 461; cf *Leyland Shipping Co v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 14 Asp MLC 258, HL.

6 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 6 Asp MLC 212, HL.

7 *The Thrunscocoe* [1897] P 301, 8 Asp MLC 313, DC; cf *Reischer v Borwick* [1894] 2 QB 548, 7 Asp MLC 493, CA; and see **INSURANCE** vol 25 (2003 Reissue) PARAS 356, 357.

8 *The Christel Vinnen* [1924] P 208, 16 Asp MLC 413; *Lobitos Oil Fields Ltd v Admiralty Comrs* (1918) 34 TLR 466, DC.

9 Cf *Nugent v Smith* (1876) 1 CPD 423, 3 Asp MLC 198, CA; *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600; *Reischer v Borwick* [1894] 2 QB 548, 7 Asp MLC 493, CA.

10 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 88, 3 Asp MLC 516 at 520, HL, per Lord Blackburn; *The Accomac* (1890) 15 PD 208, 6 Asp MLC 579, CA.

11 See also *Phillips v Clark* (1857) 2 CBNS 156; *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284; *Grill v General Iron Screw Collier Co* (1868) LR 3 CP 476, Ex Ch; *Ohrloff v Briscall, The Helene* (1866) LR 1 PC 231; *Freedom (Owners) v Simmonds, Hunt & Co, The Freedom* (1871) LR 3 PC 594, 1 Asp MLC 28; *The Nepoter* (1869) LR 2 A & E 375. As to the effect of wilful stranding or scuttling see PARA 272.

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## (D) STOPPAGE IN TRANSIT

### 495. Unpaid seller's right to stoppage in transit.

When the buyer of goods becomes insolvent<sup>1</sup> the unpaid seller<sup>2</sup> who has parted with the possession of the goods has the right of stopping them in transit<sup>3</sup>, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price<sup>4</sup>. The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice of his claim to the carrier in whose possession the goods are<sup>5</sup>. Whilst the seller's right to stop in transit and to recover possession of the goods from the carrier depends on the existence of the facts that the seller is unpaid and that the buyer is insolvent, the seller does not have to prove to the carrier that such facts exist<sup>6</sup>. If, therefore, the carrier complies with a seller's notice to stop goods in transit, he may find himself in a difficult position if the seller was not in fact entitled to stop the transit. If the buyer has demanded delivery and the carrier refuses, he will be liable for damages for conversion<sup>7</sup> and may also be liable for damages for breach of the contract of carriage. Where the goods are demanded by the buyer or seller or both, the carrier may give a qualified refusal to deliver to either of them until he has had a reasonable opportunity to ascertain which of them is entitled to possession<sup>8</sup>. If either party then brings proceedings against the carrier for refusal to deliver the goods, he may interplead<sup>9</sup>.

1 As to when a person is deemed to be insolvent for these purposes see the Sale of Goods Act 1979 s 61(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 206.

2 As to the unpaid seller for these purposes see the Sale of Goods Act 1979 s 38(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 238.

3 As to stoppage in transit generally see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq.

4 See the Sale of Goods Act 1979 ss 39(1)(b), 44; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256. If after stoppage in transit the buyer proves not to be insolvent, he is entitled to the delivery of the goods and to receive an indemnity from the seller for any loss caused by the stoppage: see *The Constantia* (1807) 6 Ch Rob 321; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 258. When goods are delivered to a ship chartered by the buyer, it is a question depending on the particular circumstances of the case whether they are in the possession of the master as a carrier or as agent to the buyer: see the Sale of Goods Act 1979 s 45(5); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 269.

5 See the Sale of Goods Act 1979 s 46; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 271-272.

6 *The Tigress* (1863) Brown & Lush 38.

7 *Syeds v Hay* (1791) 4 Term Rep 260; *Wilson v Anderton* (1830) 1 B & Ad 450; *Clendon v Dinneford* (1831) 5 C & P 13; *Verrall v Robinson* (1835) 2 Cr M & R 495; *Catterall v Kenyon* (1842) 3 QB 310; *Caunce v Spanton* (1844) 7 Man & G 903; *Pillott v Wilkinson* (1864) 3 H & C 345, Ex Ch; *Wetherman v London and Liverpool Bank of Commerce Ltd* (1914) 31 TLR 20.

8 *Lee v Bayes and Robinson* (1856) 18 CB 599; *Clayton v Le Roy* [1911] 2 KB 1031 at 1051, CA, per Fletcher Moulton LJ.

9 *Wilson v Anderton* (1830) 1 B & Ad 450.

## UPDATE

### 495 Unpaid seller's right to stoppage in transit

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## (E) TRANSHIPMENT OF THE CARGO

### 496. Different kinds of transhipment.

As the contract of carriage usually implies a term that the cargo is to be carried to its destination in the same ship<sup>1</sup>, it is necessary to consider how far the rights and liabilities of the parties are affected by the transhipment of the cargo during the voyage, in order that it may be carried to its destination in another ship. For this purpose three kinds of transhipment must be distinguished:

- 141 (1) transhipment under a liberty reserved in the contract<sup>2</sup>;
- 142 (2) transhipment in the interest of the shipowner where the ship is unable to continue her voyage<sup>3</sup>; and
- 143 (3) transhipment in the interests of the cargo owner where the voyage has been abandoned<sup>4</sup>.

In an ordinary contract for carriage by sea, if the ship carrying the goods is damaged beyond repair, the shipowner may tranship the goods but he is not bound to do so<sup>5</sup>.

Where cargo is transhipped during the course of a general average and forwarded by another vessel, the parties may enter into a non-separation agreement relating to certain allowances in general average<sup>6</sup>.

1 See PARA 478.

2 See PARA 497.

3 See PARA 500. The position of the master as regards transhipment of this kind depends upon the law of the ship's flag: *The Bahia* (1864) 12 LT 145; *The Express* (1872) LR 3 A & E 597, 1 Asp MLC 355. Cf PARA 505 note 2.

4 See PARA 504.

5 *Terkol Rederierne v Petroleo Brasileiro SA and Frota Nacional de Petroleiros, The Badagry* [1985] 1 Lloyd's Rep 395 at 398, CA, per Sir J Donaldson MR.

6 See PARA 609.

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#### **497. Transhipment under liberty reserved in contract.**

Where transhipment takes place under a liberty to tranship reserved in the contract, the rights and liabilities of the parties depend on the construction and effect of the liberty so reserved<sup>1</sup>. There may be a liberty in any contract of carriage giving the shipowner power at any port to tranship the goods and forward them by another ship<sup>2</sup>. Such a liberty is useful where the contract authorises the shipowner to change the destination of the ship by diverting her from the port for which a particular cargo has been shipped<sup>3</sup>. In this situation the liberty to tranship enables the shipowner to perform the contract and earn the specified freight by forwarding the particular cargo to its port of discharge in another ship<sup>4</sup>. As there has been no breach of contract in changing the destination of the ship, the shipowner is not deprived of the benefit of the exceptions in the contract<sup>5</sup>.

1 *Greeves v West India and Pacific Steamship Co Ltd* (1870) 22 LT 615, Ex Ch; *Stuart v British and African Steam Navigation Co* (1875) 2 Asp MLC 497; *Carali v Xenos* (1862) 2 F & F 740; *Hadji Ali Akbar & Sons Ltd v Anglo-Arabian and Persian Steamship Co Ltd* (1906) 10 Asp MLC 307; *Wiles & Co Ltd v Ocean Steamship Co Ltd* (1912) 107 LT 825.

2 *Hadji Ali Akbar & Sons Ltd v Anglo-Arabian and Persian Steamship Co Ltd* (1906) 10 Asp MLC 307. See also PARA 395 note 6.

3 See PARA 250.

4 *Hadji Ali Akbar & Sons Ltd v Anglo-Arabian and Persian Steamship Co Ltd* (1906) 10 Asp MLC 307.

5 *Hadji Ali Akbar & Sons Ltd v Anglo-Arabian and Persian Steamship Co Ltd* (1906) 10 Asp MLC 307; cf *Bruce, Marriott & Co v Houlder Line Ltd* [1917] 1 KB 72, 13 Asp MLC 550, CA (where it was held that there was no breach of contract in landing the cargo in the course of restowage undertaken for the safety and trim of the ship). See also *Marcelino Gonzalez y Compania S en C v James Nourse Ltd* [1936] 1 KB 565, 18 Asp MLC 590.

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#### **498. Liberty to overcarry and tranship.**

In the absence of special circumstances, a liberty to overcarry and tranship does not entitle the shipowner to refuse delivery of the cargo if the ship calls at the port of discharge<sup>1</sup>.

1 *Sargant & Sons v East Asiatic Co Ltd* (1915) 85 LJKB 277.

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#### **499. Bills of lading, combined transport documents and transhipment.**

A through bill of lading or combined transport document containing or evidencing a contract for the carriage of goods under which they are to be carried in separate stages by more than one ship, or partly by sea and partly by some other means of transport, for example by road, rail or air, will usually contain a term as to transhipment<sup>1</sup>.

Where a bill of lading is tendered under a letter of credit governed by the ICC Uniform Customs and Practice for Documentary Credits<sup>2</sup>, that instrument regulates the tender of bills of lading containing terms as to transhipment, contemplating three separate circumstances:

- 144 (1) where the bill of lading states that the goods will be transhipped without indicating that the goods will only be transhipped if they are shipped in containers, trailers or lash barges, the bill of lading constitutes good tender if the entire ocean carriage is covered by one and the same bill of lading<sup>3</sup>;
- 145 (2) where the bill of lading states that the goods will be transhipped in containers, trailers or lash barges, the bill of lading constitutes good tender whether or not the letter of credit prohibits transhipment<sup>4</sup>; and
- 146 (3) it is provided that clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded<sup>5</sup>.

1 As to through bills of lading and combined transport documents see PARA 322.

2 *ICC Uniform Customs and Practice for Documentary Credits* (2007 Revision) (UCP600) (see PARA 366).

3 *Uniform Customs and Practice for Documentary Credits* (2007 Revision) arts 19(c)(i), 20(c)(i).

4 *Uniform Customs and Practice for Documentary Credits* (2007 Revision) arts 19(c)(ii), 20(c)(ii).

5 *Uniform Customs and Practice for Documentary Credits* (2007 Revision) art 20(d).

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#### **500. Transhipment to earn freight.**

The fact that the ship is prevented by an excepted peril from continuing the voyage does not, in itself, entitle the master to tranship the goods and forward them to their destination by another ship<sup>1</sup>, as it is his primary duty to complete the voyage in his own ship<sup>2</sup>. If it is reasonably possible, he must, therefore, repair the ship so as to render her fit to proceed on the voyage<sup>3</sup>; and, when this is done, he may insist on reshipping the goods, if they have been landed, for the purpose of completing the voyage<sup>4</sup>. If, however, it is impossible to repair her because she is a wreck<sup>5</sup>, or if owing to the extent of the damage which she has sustained she cannot be repaired without incurring unreasonable delay<sup>6</sup> or unreasonable expense<sup>7</sup>, the

master is prevented, by an excepted peril, from performing his duty, and he is, therefore, discharged from his obligation to repair the ship and to carry the goods in the same ship<sup>8</sup>.

As, however, no freight is earned unless the goods are delivered by the shipowner at the port of destination (unless otherwise provided by the contract)<sup>9</sup>, the master may, for the purpose of enabling the freight to be earned, tranship the goods, or forward them by some other means to their place of destination, on behalf of the shipowner<sup>10</sup>. It is not, it seems, the duty of the master, as representing the shipowner, to tranship the goods<sup>11</sup>, and he cannot, therefore, be compelled to do so against his will<sup>12</sup>.

If the master thinks fit, he may give up the attempt to forward the goods to their destination on the shipowner's behalf, and may abandon the voyage altogether<sup>13</sup>. In this case he must deliver the goods to their owner at the place where they lie, and no freight will be payable<sup>14</sup>, inasmuch as the condition on which alone it becomes payable has not been performed, and has been rendered incapable of performance by the master's own act<sup>15</sup>.

At the same time, he is not bound to abandon the voyage; it is right to tranship the goods for the purpose of earning the freight if, in his opinion, such a course would be beneficial to the interests of the shipowner<sup>16</sup>. The forwarding of the goods to their destination in this manner is deemed to be a fulfilment of the original contract<sup>17</sup>. If, therefore, the master decides to exercise his right, the owner of the goods cannot require him to hand them over at the place where they lie, except on the terms of paying the whole amount of the freight<sup>18</sup>.

Where a ship is driven on shore, then, in order to earn the freight, the master must either repair her or procure another ship, and, having performed the voyage, he is then entitled to the freight; but he is not entitled to the whole freight unless he performs the whole voyage, except where the owner of the goods prevents him from doing so; nor is he entitled to pro rata freight except under a new agreement<sup>19</sup>. The acceptance of the goods by their owner at an intermediate port may be some evidence of a new contract to pay freight pro rata where the voyage has been abandoned without the fault of the shipowner, who would have been ready and willing to tranship the goods or to forward them in some other manner had not the further carriage of the goods been dispensed with by their owner<sup>20</sup>. The mere fact of such acceptance will, however, hardly be sufficient in itself especially if done at the request of the carrier<sup>21</sup>.

1 *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289.

2 *Shipton v Thornton* (1838) 9 Ad & El 314 at 333 per Lord Denman CJ; *The Bahia* (1864) 12 LT 145 (citing *Blasco v Fletcher* (1863) 14 CBNS 147 and *Benson v Chapman* (1849) 2 HL Cas 696 at 720). The extent of the master's duty in this respect depends upon the law of the ship's flag: *The Bahia*; *The Express* (1872) LR 3 A & E 597, 1 Asp MLC 355.

3 *Cook v Jennings* (1797) 7 Term Rep 381 at 385 per Lawrence J; *Benson v Chapman* (1849) 2 HL Cas 696; *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA; *Hansen v Dunn* (1906) 11 Com Cas 100; *Hill v Wilson* (1879) 4 CPD 329 at 333, 4 Asp MLC 198 at 199, 200 per Lindley J; *Moss v Smith* (1850) 9 CB 94 at 106 per Cresswell J; *Svendsen v Wallace Bros* (1885) 10 App Cas 404 at 418, 5 Asp MLC 453 at 457, HL, per Lord Blackburn (disapproving *Atwood v Sellar & Co* (1879) 4 QBD 342 at 358, 4 Asp MLC 153 at 157 per Cockburn CJ).

4 *Blasco v Fletcher* (1863) 14 CBNS 147; *The Blenheim* (1885) 10 PD 167, 5 Asp MLC 522.

5 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 523; cf *Moss v Smith* (1850) 9 CB 94; *Assicurazioni Generali and Schenker & Co v SS Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, 7 Asp MLC 217, CA.

6 The time necessary for repairs must be so long as to defeat the object of the adventure: *Bensaude v Thames and Mersey Marine Insurance Co* [1897] AC 609, 8 Asp MLC 315, HL.

7 *De Cuadra v Swann* (1864) 16 CBNS 772; *Moss v Smith* (1850) 9 CB 94; *Hansen v Dunn* (1906) 11 Com Cas 100. See also *Carras v London and Scottish Assurance Corp'n Ltd* [1936] 1 KB 291, 18 Asp MLC 581, CA (where the authorities on the question of the shipowner's right to abandon the voyage in the event of damage to the ship are considered and explained). The true test in a case turning on the question of the expense involved in

repairing the ship is whether the cost of repairs sufficient to enable the ship to complete the voyage with her cargo would exceed her value when repaired: *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, [1936] 2 All ER 242, 55 Ll L Rep 55, CA. If the cost of such repairs as are necessary for the completion of the voyage exceeds the repaired value, the ship is said to be a commercial loss, but the criteria of a commercial loss for the purpose of a contract of affreightment and of a constructive total loss for the purpose of a hull policy of marine insurance, although in a sense analogous, are by no means necessarily the same: *Kulukundis v Norwich Union Fire Insurance Society*; *Carras v London and Scottish Assurance Corp'n Ltd* (insurance cases).

8 *Shipton v Thornton* (1838) 9 Ad & El 314; *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22 at 31 per Pollock CB; *Benson v Duncan* (1849) 3 Exch 644 at 655, Ex Ch, per Patteson J. The same principle applies where the cargo has been rendered unfit to be carried on: *The Savona* [1900] P 252; *Blasco v Fletcher* (1863) 14 CBNS 147. In an ordinary contract for carriage by sea, if the ship carrying the goods is damaged beyond repair, the shipowner may tranship the goods but he is not bound to do so: *Terkol Rederierne v Petroleo Brasileiro SA and Frota Nacional de Petroleiros, The Badagry* [1985] 1 Lloyd's Rep 395 at 398, CA, per Sir J Donaldson MR.

9 See PARA 590.

10 *Hunter v Prinsep* (1808) 10 East 378 at 394 per Lord Ellenborough CJ; cf *Hickie v Rodocanachi* (1859) 4 H & N 455; *William Thomas & Sons v Harrowing Steamship Co* [1915] AC 58, 12 Asp MLC 532, HL (where the ship was wrecked outside her port of discharge, but part of the cargo was saved and delivered by the master to the consignee).

11 The question whether it is the master's duty to tranship the cargo was discussed, but not decided, in *Shipton v Thornton* (1838) 9 Ad & El 314. See also *Cook v Jennings* (1797) 7 Term Rep 381 at 385 per Lawrence J; *The Gratitude* (1801) 3 Ch Rob 240; *Tronson v Dent* (1853) 8 Moo PCC 419 at 455; *De Cuadra v Swann* (1864) 16 CBNS 772; *The Bahia* (1864) 12 LT 145 (citing *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289 at 319); *Hansen v Dunn* (1906) 11 Com Cas 100 at 102 (where Kennedy J expressed the opinion that the master was not bound to employ another vessel to complete the voyage at his own loss). It may, however, be the master's duty, in the interests of the cargo owner, to tranship the cargo; but see the observations of Greene LJ in *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 at 17, [1936] 2 All ER 242 at 257, 55 Ll L Rep 55 at 61, CA (cited in note 7). See also PARA 504.

12 *De Cuadra v Swann* (1864) 16 CBNS 772.

13 As to what constitutes an abandonment cf *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA, with *The Leptir* (1885) 5 Asp MLC 411. See also *The Kathleen* (1874) LR 4 A & E 269, 2 Asp MLC 367; *The Arno* (1895) 8 Asp MLC 5, CA; *Denny, Mott and Dickson Ltd v Benvenuto* (1921) 55 ILT 129, HL. To constitute an abandonment in a case of attack by an enemy submarine, the ship must be a 'derelict' in the legal sense of the term (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 987); thus she must have been left by the master and crew without intention of returning to her and without hope of recovery (*Bradley v H Newsom Sons & Co* [1919] AC 16, 14 Asp MLC 340, HL; see also *Court Line v R, The Lavington Court* [1945] 2 All ER 357, 78 Ll L Rep 390, CA).

14 *Cook v Jennings* (1797) 7 Term Rep 381; *Hunter v Prinsep* (1808) 10 East 378; *Liddard v Lopes* (1809) 10 East 526; *The Kathleen* (1874) LR 4 A & E 269, 2 Asp MLC 367; *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA; *The Arno* (1895) 8 Asp MLC 5, CA. As to when pro rata freight will be payable see PARA 603; *Bradley v H Newsom Sons & Co* [1919] AC 16, sub nom *Bradley v Newsom, Sons & Co Ltd* 14 Asp MLC 340, HL.

15 *Hunter v Prinsep* (1808) 10 East 378; *Cleary v M'Andrew (Cargo ex), The Galam* (1863) 2 Moo PCCNS 216; *Metcalf v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407; *Castel and Latta v Trechman* (1884) Cab & El 276; *Denny, Mott and Dickson Ltd v Benvenuto* (1921) 55 ILT 129, HL.

16 *Shipton v Thornton* (1838) 9 Ad & El 314; *Hansen v Dunn* (1906) 11 Com Cas 100.

17 *Shipton v Thornton* (1838) 9 Ad & El 314 at 335 per Lord Denman CJ; *Gibbs v Grey, Grey v Gibbs* (1857) 2 H & N 22 at 33 per Pollock CB; *Hill v Wilson* (1879) 4 CPD 329 at 333, 4 Asp MLC 198 at 200 per Lindley J.

18 *Lutwidge v Grey* (1736) HL, noted in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 717, 718; *Luke v Lyde* (1759) 2 Burr 882; *Shipton v Thornton* (1838) 9 Ad & El 314 at 336 per Lord Denman CJ; *Blasco v Fletcher* (1863) 14 CBNS 147; *The Bahia* (1864) 12 LT 145. Cf *The Blenheim* (1885) 10 PD 167, 5 Asp MLC 522. Discount will, however, be allowed to be deducted in respect of the payment being made at an earlier date: *Blasco v Fletcher*.

19 *Cook v Jennings* (1797) 7 Term Rep 381 at 385 per Lawrence J; *Hunter v Prinsep* (1808) 10 East 378; *Shipton v Thornton* (1838) 9 Ad & El 314; *Blasco v Fletcher* (1863) 14 CBNS 147; *Cleary v M'Andrew (Cargo ex), The Galam* (1863) 2 Moo PCCNS 216; cf *The Soblomsten* (1866) LR 1 A & E 293 (where pro rata freight was allowed).

20 *Mitchell v Darthez* (1836) 2 Bing NC 555; *Dakin v Oxley* (1864) 15 CBNS 646 at 665 per Willes J; *Luke v Lyde* (1759) 2 Burr 882; *Osgood v Groning* (1810) 2 Camp 466 at 470; *Blasco v Fletcher* (1863) 14 CBNS 147 at 178.

21 *The Soblomsten* (1866) LR 1 A & E 293; *Metcalf v Britannia Ironworks* (1877) 2 QBD 423; *Cook v Jennings* (1797) 7 Term Rep 381.

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### 501. Master's duties.

Notwithstanding that their owner has demanded their delivery, the master is entitled to retain the goods in his possession for a reasonable time while considering which is the best course to adopt: to repair the ship; to forward the goods in another ship; or to abandon the voyage<sup>1</sup>.

At the same time he has no right to sacrifice the interests of the owner of the goods to the interests of the shipowner; he must not neglect his duty as regards the preservation of the goods entrusted to his care<sup>2</sup>. For the purpose of ascertaining what is a reasonable time, all the circumstances of the case must, therefore, be taken into account, including any delay attributable to the interference of the authorities, whether judicial or administrative, at the place where the goods are lying<sup>3</sup>. The condition of the goods must also be taken into consideration<sup>4</sup>, and, if, being perishable, they deteriorate through the master's failure to tranship promptly or, as the case may be, to notify their owner promptly of the decision to abandon the voyage, the shipowner will be answerable in damages<sup>5</sup>.

1 *Cleary v M'Andrew (Cargo ex), The Galam* (1863) 2 Moo PCCNS 216; *The Bahia* (1864) 12 LT 145; *The Soblomsten* (1866) LR 1 A & E 293; *Hansen v Dunn* (1906) 11 Com Cas 100.

2 *Hansen v Dunn* (1906) 11 Com Cas 100.

3 *The Bahia* (1864) 12 LT 145; cf *Cleary v M'Andrew (Cargo ex), The Galam* (1863) 2 Moo PCCNS 216.

4 *Blasco v Fletcher* (1863) 14 CBNS 147.

5 *Hansen v Dunn* (1906) 11 Com Cas 100 at 103 per Kennedy J.

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### 502. Original contract unaffected.

Where the master tranships the goods in order to earn the freight, the original contract of carriage remains in force as between the shipowner and the owner of the goods until their final delivery at the port of discharge<sup>1</sup>. The contract made by the master with the owner of the ship in which the goods are to be forwarded is made on the original shipowner's behalf and not by the master as agent for the owner of the goods<sup>2</sup>. It is, therefore, a contract between the two shipowners, and does not affect the existing contractual rights of the owner of the goods<sup>3</sup>. He remains liable to pay freight, when the goods arrive at their destination, to the shipowner with whom he originally contracted<sup>4</sup>. He must pay freight at the original rate, and is not entitled to take advantage of the fact that the freight payable by the shipowner himself on the

transhipment is at a lower rate<sup>5</sup>. He cannot, therefore, claim to have his goods delivered to him on paying pro rata freight<sup>6</sup> at the original rate in respect of the portion of the voyage performed before the transhipment, together with a sum equivalent to the actual freight payable under the contract of transhipment<sup>7</sup>.

The amount of freight payable by him is the full freight which would have been paid by him in the ordinary course if the voyage had not been interrupted<sup>8</sup>, less any money advanced to the master of the original ship<sup>9</sup>. The first shipowner remains bound, however, by the terms of the original contract; unless excused by those terms, he is, therefore, responsible for the safe carriage of the goods to their destination<sup>10</sup>, and cannot rely on any exception contained in the contract of transhipment which is not already contained in the original contract<sup>11</sup>.

1 *Lutwidge v Grey* (1736) HL, noted in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 717, 718.

2 *Matthews v Gibbs* (1860) 3 E & E 282. The name inserted in the bill of lading given in respect of the transhipment is usually that of the agent of the ship from which the goods are transhipped: *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22 at 24n; *Sipton v Thornton* (1838) 9 Ad & El 314.

3 *Ronneberg v Falkland Islands Co* (1864) 17 CBNS 1; *Matthews v Gibbs* (1860) 3 E & E 282; cf *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22 at 31 per Pollock CB. If the goods are damaged after the transhipment, their owner may have a remedy in tort against the second shipowner: cf *Ronneberg v Falkland Islands Co*; *Hayn v Culliford* (1879) 4 CPD 182, 4 Asp MLC 128, CA. See also *Dalyell v Tyrer* (1858) EB & E 899; *Foulkes v Metropolitan District Rly Co* (1880) 5 CPD 157 at 159, CA, per Bramwell LJ; *The Termagant* (1914) 19 Com Cas 239 (where barge owners were held liable in tort to shippers for supplying an unseaworthy barge for the transhipment of cargo from an ocean liner to a coasting steamer).

4 *Sipton v Thornton* (1838) 9 Ad & El 314.

5 *Sipton v Thornton* (1838) 9 Ad & El 314 (where the question was also raised, but not decided, as to whether, if the shipowner had to pay freight at a higher rate than the original rate, he could charge the goods with the difference as a general average loss, and it was pointed out that the master's right to tranship on the shipowner's account might be limited to cases in which the voyage could be completed on the original terms as to freight, and that, if freight could not be procured at that rate, the master might tranship the goods as agent for their owner). As to transhipment on behalf of the owner of the goods see PARA 504.

6 As to pro rata freight see PARA 603.

7 *Sipton v Thornton* (1838) 9 Ad & El 314.

8 *Sipton v Thornton* (1838) 9 Ad & El 314; cf *The Hibernian* [1907] P 277, 10 Asp MLC 501, CA.

9 *Matthews v Gibbs* (1860) 3 E & E 282.

10 *Ronneberg v Falkland Islands Co* (1864) 17 CBNS 1.

11 *The Bernina* (1886) 12 PD 36, 6 Asp MLC 112; *Matthews v Gibbs* (1860) 3 E & E 282. The ship to which the goods are transhipped must not be an unsafe or unsuitable ship for the purpose: *Ronneberg v Falkland Islands Co* (1864) 17 CBNS 1.

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### 503. Prevention of voyage.

The master may tranship the goods for the purpose of earning the freight where the continuance of the voyage in the same ship is prevented by some cause which is not within his or the shipowner's control, and not excepted from the contract<sup>1</sup>. Where, however, he abandons

the voyage, the shipowner will be responsible to the owner of the goods for his failure to carry the goods to their destination unless the completion of the voyage is prevented by a cause for which the shipowner is excused<sup>2</sup>.

1 *The Bernina* (1886) 12 PD 36, 6 Asp MLC 112.

2 See PARA 479. It seems that the shipowner may be excused on the general principle of frustration, independently of an express exception, where the completion of the voyage is prevented by a cause arising without his default: *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL.

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#### **504. Transhipment on behalf of cargo owner.**

Although transhipment, as a method of fulfilling the original contract in the interests of the shipowner, may prove impracticable on the grounds of expense, as, for example, where the freight payable under the contract of transhipment would exceed the full freight payable under the original contract<sup>1</sup>, nevertheless the master may be entitled, as agent of necessity, to tranship the goods on their owner's behalf<sup>2</sup>. His duty as regards the preservation of the goods does not come to an end with the abandonment of the voyage<sup>3</sup>, and, although he has no longer any right to tranship the goods on the shipowner's behalf<sup>4</sup>, it is still his duty to consider the interests of the owner of the goods<sup>5</sup>.

He must, therefore, land the goods and warehouse them until they can be delivered to their owner, or until their owner's instructions can be received<sup>6</sup>. If, however, it is necessary to act promptly and there is no time or opportunity to consult the owner before deciding what course to take<sup>7</sup>, the master may tranship the goods at once, without communicating with the owner, if, in the circumstances of the case, immediate transhipment is reasonably justifiable as being the most beneficial course to be taken in the interests of the owner of the goods<sup>8</sup>.

Thus, transhipment is justifiable where the goods are perishable<sup>9</sup> or where the ship is in danger of foundering when she is met by another ship to which they can be transferred<sup>10</sup>. In this case the master enters into the contract of transhipment as agent of the owner of the goods and not as representing the shipowner<sup>11</sup>. The owner of the goods is, therefore, bound by the terms of the contract, and may be liable to pay to the second shipowner freight at a rate higher than that reserved by the original contract<sup>12</sup>.

The master must, however, make a reasonable contract of transhipment; he has no general authority to represent the owner of the goods, and cannot bind him by a contract to pay freight at a rate exceeding the current rate at the port of transhipment<sup>13</sup>; nor can he bind him to pay freight, even at the current rate, on a larger quantity of goods than is transhipped. His authority is limited to the transhipment of the actual goods in his possession, and he cannot, therefore, contract on behalf of their owner to load a full cargo on the ship which he has engaged, or alternatively, to pay dead freight<sup>14</sup>. In accordance with the same principle, he has no authority to make false statements as to the quantity of goods to be transhipped<sup>15</sup>.

Where the master tranships the goods on their owner's behalf, both he and the shipowner are, after the transhipment, free from further responsibility<sup>16</sup>, and the shipowner cannot claim freight for the portion of the voyage performed by the substituted ship<sup>17</sup>.

- 1 *Hansen v Dunn* (1906) 11 Com Cas 100. It is possible that, where the freight chargeable for the transshipment exceeds the original freight, the master's right to tranship on the shipowner's account ceases: *Shipton v Thornton* (1838) 9 Ad & El 314 at 337 per Lord Denman CJ.
- 2 *Mitchell v Darthez* (1836) 2 Bing NC 555. As to agency of necessity see also PARA 488.
- 3 *The Glenmanna* (1860) Lush 115 (where the master was not allowed to charge the cargo owner for his services, as they were tendered in the performance of his ordinary duties as master); cf *Ronneberg v Falkland Islands Co* (1864) 17 CBNS 1 at 10, 13 per Erle CJ.
- 4 *Shipton v Thornton* (1838) 9 Ad & El 314 at 337 per Lord Denman CJ; *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA.
- 5 *Shipton v Thornton* (1838) 9 Ad & El 314.
- 6 *Liddard v Lopes* (1809) 10 East 526.
- 7 The master has no authority to tranship the goods on behalf of their owner if the goods are at a port where their owner has, to the master's knowledge, an agent or house of business, without communicating with him or giving him the option of receiving the goods there: *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22 at 31 per Pollock CB, applying *Shipton v Thornton* (1838) 9 Ad & El 314.
- 8 See *The Gratitude* (1801) 3 Ch Rob 240; *Ferruzzi France SA and Ferruzzi SpA v Oceania Maritime Inc, The Palmea* [1988] 2 Lloyd's Rep 261. As to when the master may sell the goods see PARA 508 et seq; and as to his power to hypothecate the goods see PARAS 505-507.
- 9 *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22 at 29 per Martin B.
- 10 See, however, *The Bernina* (1886) 12 PD 36, 6 Asp MLC 112.
- 11 *Mitchell v Darthez* (1836) 2 Bing NC 555; *Shipton v Thornton* (1838) 9 Ad & El 314 at 337 per Lord Denman CJ.
- 12 *Shipton v Thornton* (1838) 9 Ad & El 314.
- 13 *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22; *Matthews v Gibbs* (1860) 3 E & E 282.
- 14 *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22 at 26. As to the meaning of 'dead freight' see PARA 460.
- 15 *Gibbs v Grey*, *Grey v Gibbs* (1857) 2 H & N 22; cf *Matthews v Gibbs* (1860) 3 E & E 282 (where the contract was shown to be fraudulent).
- 16 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 528.
- 17 *Mitchell v Darthez* (1836) 2 Bing NC 555. See also *Wiles & Co Ltd v Ocean Steamship Co Ltd* (1912) 107 LT 825.

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## (F) HYPOTHECATION OF THE CARGO

### 505. Meaning of 'hypothecation of the cargo'.

Subject to certain conditions<sup>1</sup>, the master is entitled<sup>2</sup>, as agent of necessity on behalf of the cargo owner, to hypothecate<sup>3</sup> the cargo<sup>4</sup> for the purpose of raising funds to enable him either to complete the voyage in the same ship, or to forward the goods to their destination.

1 As to the conditions justifying hypothecation see PARA 507.

2 The extent of the master's authority is governed by the law of the ship's flag: *Droege v Suart, The Karnak* (1869) LR 2 PC 505; *The Gaetano and Maria* (1882) 7 PD 137, 4 Asp MLC 535, CA; *Lloyd v Guibert* (1865) LR 1 QB 115, Ex Ch. See, however, *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289.

3 Where the hypothecation applies to the cargo only, the contract is called 'respondentia'; and, where, as is usually the case, ship and freight are included, the contract is called 'bottomry', the bottom of the ship being used figuratively to denote the whole of the ship. Sometimes bottomry takes the form of a bill of sale: see *Johnson v Shippen* (1704) 2 Ld Raym 982. Bills of exchange drawn by the master on the owner as security for money advanced to the master, even if accompanied by an oral agreement that the ship is to be pledged, are not instruments of bottomry: *Ex p Halkett* (1814) 3 Ves & B 135; *Miller & Co v Potter, Wilson & Co* (1875) 3 R 105. Bottomry bonds have been described as of 'a high and privileged nature', 'favoured instruments' to be liberally protected: *The Alexander* (1812) 1 Dods 278; *The Kennersley Castle* (1833) 3 Hag Adm 1 at 7; *The Reliance* (1833) 3 Hag Adm 66 at 74. See, however, *The Vibilia* (1838) 1 Wm Rob 1 at 5; *The Mary Ann* (1846) 4 Notes of Cases 376.

As long ago as 1926 bottomry bonds were, however, uncommon (see *The St George* [1926] P 217 at 229 per Lord Merrivale P); and they are now obsolete in practice. Actions of bottomry and respondentia are, however, still part of the jurisdiction in rem and in personam of the Admiralty court: see the Supreme Court Act 1981 s 20(2)(r); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 134.

4 'Hypothecation of the cargo' means a pledge of the cargo without an immediate change of possession; it gives a right to the person making advances on the faith of it to have the possession of the goods if the advances are not repaid at the specified time; but it leaves to the owner of the goods hypothecated the power of making the repayment, and thereby freeing them from the obligation. It is, therefore, contrary to the nature of the transaction, and consequently contrary to the duty and beyond the power of the master, to agree that the lender is at all events to have the goods delivered at their port of destination to him or his agents, to be there sold or disposed of by him or them, without reserving the right of redemption to their owner, and such an agreement will not be binding on their owner, who will still have the right to take the goods on repayment of the money for which they may have been pledged.

## UPDATE

### 505 Meaning of 'hypothecation of the cargo'

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 506. Right conferred on the lender.

All that the hypothecation confers on the lender is a maritime lien<sup>1</sup> enforceable against the cargo<sup>2</sup>, and the cargo owner is not responsible beyond its value<sup>3</sup>. Moreover, the transaction involves a maritime risk; thus the repayment of the advance depends on the safe arrival of the cargo at its port of destination<sup>4</sup>. To entitle the lender to payment in full of his advance, the whole of the cargo hypothecated must arrive; if only a portion arrives, owing to the rest being lost on the way, a proportionate part of the loss falls on the lender, who is entitled to be repaid only a proportionate amount of his advance, whereas, if no cargo arrives at all, he loses the whole of his money<sup>5</sup>.

1 As to maritime liens see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1014 et seq.

2 *The Gratitude* (1801) 3 Ch Rob 240; cf *Busk v Fearon* (1803) 4 East 319. As to the method of enforcing a maritime lien see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1037 et seq.

3 *The Nostra Senora del Carmine* (1854) 18 Jur 730.

4 *The Onward* (1873) LR 4 A & E 38, 1 Asp MLC 540; *The Elephanta* (1851) 15 Jur 1185; cf *Stainbank v Shepard* (1853) 13 CB 418.

5 *The Sultan (Cargo ex)* (1859) 5 Jur NS 1060. If, however, a portion of the cargo hypothecated is afterwards sold, the cargo owner is not entitled to a deduction in respect of the value of such portion: *The Salacia* (1862) Lush 578.

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### 507. Conditions justifying the hypothecation of the cargo.

The conditions which must be fulfilled to justify the master in hypothecating the cargo<sup>1</sup> for the purpose of raising funds to enable him to complete the voyage are:

- 147 (1) the expenditure for which the funds are required must be reasonably necessary for the completion of the voyage<sup>2</sup>;
- 148 (2) the master must be unable to procure funds in any other way<sup>3</sup>;
- 149 (3) the expenditure must be necessary in the interests of the cargo as well as of the ship<sup>4</sup>;
- 150 (4) the master must have been unable to communicate with the cargo owner<sup>5</sup>.

1 As to hypothecation of the cargo see PARA 505.

2 *The Gratitude* (1801) 3 Ch Rob 240; *Droege v Suart, The Karnak* (1869) LR 2 PC 505; *The Pontida* (1884) 9 PD 177, 5 Asp MLC 330, CA; cf *Gunn v Roberts* (1874) LR 9 CP 331.

3 *The Faithful* (1862) 31 LJPM & A 81.

4 *The Gratitude* (1801) 3 Ch Rob 240; *The Jonathan Goodhue* (1859) Sw 524; *The Onward* (1873) LR 4 A & E 38, 1 Asp MLC 540; *The Gaetano and Maria* (1882) 7 PD 137, 4 Asp MLC 535, CA; *Hussey v Christie* (1808) 9 East 426.

5 *The Nuova Loanese* (1852) 17 Jur 263; *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289; *The Onward* (1873) LR 4 A & E 38, 1 Asp MLC 540; *Kleinwort, Cohen & Co v Cassa Marittima of Genoa* (1877) 2 App Cas 156, 3 Asp MLC 358, PC; *The Sultan (Cargo ex)* (1859) 5 Jur NS 1060. If communication is impossible, it is immaterial that the cargo owner resides in the country where the hypothecation takes place: *La Ysabel* (1812) 1 Dods 273. In considering whether communication is possible or not, the nature of the cargo (ie whether it is perishable or imperishable) must be taken into account: *The Onward*.

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### (G) SALE OF THE CARGO

#### 508. Master's authority to sell the cargo.

The authority of the master to dispose of the cargo by way of sale arises out of the necessity of the situation in which he is placed<sup>1</sup>, and its exercise is governed by the same principles as govern the exercise of his authority to hypothecate the cargo<sup>2</sup>. Thus, a sale is justifiable:

- 151 (1) where funds are required for the purpose of enabling the voyage to be completed, and cannot be raised in any other way<sup>3</sup>; and
- 152 (2) where the cargo, owing to its nature or condition, cannot safely be carried to its destination<sup>4</sup>.

1 *Acatos v Burns* (1878) 3 Ex D 282 at 290, CA, per Brett LJ; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407. The extent of his authority is governed by the law of the ship's flag: *The August* [1891] P 328, 7 Asp MLC 110. As to necessity see PARA 511.

2 *Gunn v Roberts* (1874) LR 9 CP 331 at 337, 2 Asp MLC 250 at 252 per Brett J; *Acatos v Burns* (1878) 3 Ex D 282, CA. As to hypothecation see PARAS 505-507; and as to the effect of a wrongful sale see PARA 513.

3 See PARA 509.

4 See PARA 510.

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### **509. Sale of the cargo to enable the completion of the voyage.**

The master has no authority, for the purpose of enabling the voyage to be completed, to sell the whole of the cargo, as such a sale is inconsistent with the due transportation of the cargo to its destination<sup>1</sup>, and cannot possibly be of benefit to its owner, who is wholly deprived of it<sup>2</sup>. Where, however, the circumstances would justify the hypothecation of the whole of the cargo<sup>3</sup>, as, for example, where the ship is unable to continue her voyage without repairs<sup>4</sup>, the master may sell a part of the cargo for the purpose of raising the funds necessary to enable him to convey the remainder to its destination<sup>5</sup>, the sale of the part and the hypothecation of the whole being considered as equivalent<sup>6</sup>. As in the case of hypothecation, the necessity of the case must justify the actual method of raising funds adopted, and it must be shown that it was impossible for the master to raise funds in any other way<sup>7</sup>.

1 *Van Omeron v Dowick* (1809) 2 Camp 42; *Wilson v Millar* (1816) 2 Stark 1. As to the effect of a wrongful sale see PARA 513.

2 *The Onward* (1873) LR 4 A & E 38 at 57, 1 Asp MLC 540 at 553 per Sir Robert Phillimore.

3 See PARAS 505-507.

4 *Hopper v Burness* (1876) 1 CPD 137 at 140, 3 Asp MLC 149 at 151 per Brett J.

5 *Gunn v Roberts* (1874) LR 9 CP 331, 2 Asp MLC 250; *Hopper v Burness* (1876) 1 CPD 137; cf *Parmeter v Todhunter* (1808) 1 Camp 541. In a proper case the cargo owner cannot restrain by injunction the sale of a portion of his cargo to pay for repairs, if at the same time he insists on the goods being carried on: *Rayne v Benedict* (1841) 10 LJ Ch 297.

6 *Benson v Duncan* (1849) 3 Exch 644, Ex Ch.

7 *Underwood v Robertson* (1815) 4 Camp 138 at 139 per Lord Ellenborough CJ. As to necessity see PARA 511.

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### 510. Sale for preservation of cargo.

Where the master sells the cargo on the ground that it cannot safely be carried to its destination, he acts as agent of necessity for the cargo owner<sup>1</sup>, and, as his authority is derived from the necessity of the case, a sale which is not justified by necessity is unauthorised and does not bind the cargo owner<sup>2</sup>. To justify a sale<sup>3</sup>:

- 153 (1) there must be a necessity for the sale<sup>4</sup>; and
- 154 (2) the master must be unable to communicate with the cargo owner<sup>5</sup>.

1 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222 at 228, 1 Asp MLC 407 at 409; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA; cf *Sims & Co v Midland Rly Co* [1913] 1 KB 103, DC. As to agency of necessity see **AGENCY** vol 1 (2008) PARA 24.

2 *Tronson v Dent* (1853) 8 Moo PCC 419; *Acatos v Burns* (1878) 3 Ex D 282, CA; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA. As to the effect of a wrongful sale see PARA 513.

3 The burden of proof lies on the buyer: *Freeman v East India Co* (1822) 5 B & Ald 617; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474 at 481, 4 Asp MLC 369 at 374, CA, per Cotton LJ.

4 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Acatos v Burns* (1878) 3 Ex D 282, CA. As to necessity see PARA 511.

5 As to inability to communicate see PARA 512.

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### 511. Necessity for sale of the cargo.

As it is the master's first duty to carry the cargo to its destination, a sale is the last thing to which he should resort<sup>1</sup>, and is only justified by necessity<sup>2</sup>. In determining whether a sale is justified or not, the circumstances of each particular case must be taken into consideration<sup>3</sup>. The principal circumstances to be considered are the situation of the cargo<sup>4</sup>, and its nature and condition<sup>5</sup>. To justify the master's selling the cargo it must be shown that he has used all reasonable efforts to have it carried to its destination and that he could not, by any means available to him, carry it, or procure it to be carried, to its destination in a merchantable condition<sup>6</sup>, or that he could not do so without incurring an expenditure clearly exceeding the value of the cargo at its destination<sup>7</sup>.

As the justification of the sale is the impossibility of forwarding the cargo to its destination, the master's authority to sell is not limited to a part of the cargo, as, for example, where a sale is necessary for the purpose of raising funds<sup>8</sup>, but extends, in a proper case, to the whole cargo<sup>9</sup>. In considering the propriety of a sale of the whole cargo, especially where it belongs to different owners, its composition, as well as its state and situation, must be taken into account<sup>10</sup>, as it does not follow as a matter of course that, because the sale of a part is necessary, the sale of the whole is equally justifiable<sup>11</sup>.

- 1 *Underwood v Robertson* (1815) 4 Camp 138.
- 2 *Tronson v Dent* (1853) 8 Moo PCC 419; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA. As to the effect of a wrongful sale see PARA 513.
- 3 *Tronson v Dent* (1853) 8 Moo PCC 419; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Acatos v Burns* (1878) 3 Ex D 282, CA; cf *Cammell v Sewell* (1860) 5 H & N 728, Ex Ch.
- 4 *Acatos v Burns* (1878) 3 Ex D 282, CA.
- 5 Eg whether it is perishable or imperishable. It is immaterial whether the goods become perishable through inherent vice or through being damaged by perils of the sea: *Acatos v Burns* (1878) 3 Ex D 282 at 289, CA, per Brett LJ.
- 6 *Roux v Salvador* (1836) 3 Bing NC 266; *Vlierboom v Chapman* (1844) 13 M & W 230; *Tronson v Dent* (1853) 8 Moo PCC 419; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; cf *Underwood v Robertson* (1815) 4 Camp 138.
- 7 *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474 at 481, 4 Asp MLC 369 at 374, CA, per Cotton LJ; *Tronson v Dent* (1853) 8 Moo PCC 419; cf *Moss v Smith* (1850) 9 CB 94 at 103 per Maule J.
- 8 See PARA 509.
- 9 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407.
- 10 *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407.
- 11 *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA.

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## **512. Inability to communicate with the cargo owner.**

Before resorting to a sale of the cargo, the master must be unable to communicate with the owner of the cargo so as to obtain his instructions<sup>1</sup>. The sale must be justified by necessity; hence, it must be shown not merely that it was necessary to sell the cargo<sup>2</sup>, but also that it was necessary to sell it at once, without waiting for instructions<sup>3</sup>. Whether the cargo is of a perishable nature or not, if it is possible to communicate with the owner before it actually perishes, the master may not sell the cargo without communicating with him and obtaining his instructions<sup>4</sup>. After communicating, the master must wait a reasonable time for an answer<sup>5</sup>; if no answer is then received, or if the owner refuses to give him any instructions, the master has discharged his duty and may sell the cargo<sup>6</sup>. If, however, the owner sends him definite instructions, he must obey them; he is not justified in selling the cargo in defiance of his instructions, even if, in the circumstances, a sale would be the most beneficial course to adopt in the interests of the cargo owner<sup>7</sup>.

1 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Wilkinson v Wilson, The Bonaparte* (1853) 8 Moo PCC 459 at 473; *Duranty v Hart, The Hamburg (Cargo ex)* (1864) 2 Moo PCCNS 289. Cf *Springer v Great Western Rly Co* [1921] 1 KB 257, 15 Asp MLC 86. If the master can communicate, he should allow the cargo owner time to answer before selling, for, if it subsequently appears that he neglected to do so, and the sale, although a prudent measure, was not necessary, the shipowner will be liable for the consequences: *Acatos v Burns* (1878) 3 Ex D 282, CA. As to communication with the owner see also PARAS 490-491; and as to the effect of a wrongful sale see PARA 513.

2 As to necessity see PARA 511.

3 *Acatos v Burns* (1878) 3 Ex D 282, CA.

4 *Acatos v Burns* (1878) 3 Ex D 282, CA.

5 *Acatos v Burns* (1878) 3 Ex D 282, CA. The communication must state, or clearly indicate, the master's intention to sell: *Kleinwort, Cohen & Co v Cassa Marittima of Genoa* (1877) 2 App Cas 156, 3 Asp MLC 358, PC; *The Onward* (1873) LR 4 A & E 38, 1 Asp MLC 540.

6 *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222, 1 Asp MLC 407; *Miles v Haslehurst & Co* (1906) 12 Com Cas 83.

7 *Acatos v Burns* (1878) 3 Ex D 282 at 291, CA, per Brett LJ.

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### 513. Effect of wrongful sale.

As it is primarily the master's duty to carry the cargo to its destination, he has no general authority to sell<sup>1</sup> it in the course of the voyage<sup>2</sup>. If, therefore, he sells it without lawful excuse, he is guilty of a breach of duty, by which the further performance of the contract of carriage is rendered impossible, and in respect of which the cargo owner acquires a right of action both against the master himself<sup>3</sup> and against the shipowner<sup>4</sup>. Where the sale is wrongful, the measure of damages is not the proceeds of the sale, but the value of the goods to the owner<sup>5</sup>. No allowance is to be made for pro rata freight, inasmuch as by the sale of the goods the shipowner has disabled himself from forwarding them to their destination and, in effect, has declined to proceed to earn any freight<sup>6</sup>.

Moreover, the sale, being made by a person who had no authority from the owner of the cargo to sell, is not binding on the owner<sup>7</sup>. He may, therefore, claim the return of the cargo or its value from the buyer<sup>8</sup> unless by the law of the country in which the sale took place the buyer has in the circumstances acquired a good title against the true owner<sup>9</sup>. Thus, a sale of the cargo abroad which, by the law of the country in which it took place, is a wrongful disposition of the cargo so far as the master is concerned may nevertheless, so far as the buyer is concerned, be recognised by the law of the same country as conferring a good title on him<sup>10</sup>.

1 Sale of the cargo, like hypothecation, is rarely met with under modern conditions and is, therefore, treated very briefly.

2 *Van Omeron v Dowick* (1809) 2 Camp 42; *Acatos v Burns* (1878) 3 Ex D 282 at 290, CA, per Brett LJ. As to a sale under a court order see *The Kathleen* (1874) LR 4 A & E 269, 2 Asp MLC 367.

3 *Tronson v Dent* (1853) 8 Moo PCC 419.

4 *Van Omeron v Dowick* (1809) 2 Camp 42; *Cannan v Meaburn* (1823) 1 Bing 243; *Ewbank v Nutting* (1849) 7 CB 797. A charterer is not, however, responsible for a sale by the master where the charterparty does not amount to a demise: *Wagstaff v Anderson* (1880) 5 CPD 171, 4 Asp MLC 290.

5 *Acatos v Burns* (1878) 3 Ex D 282 at 291, 292, CA, per Brett LJ. As to the validity of a bottomry bond given, by order of a foreign court, to cover the damages arising from a sale on a previous voyage see *The Ida* (1872) LR 3 A & E 542, 1 Asp MLC 443.

6 *Hunter v Prinsep* (1808) 10 East 378; *Morris v Robinson* (1824) 3 B & C 196; *Acatos v Burns* (1878) 3 Ex D 282, CA; *Hill v Wilson* (1879) 4 CPD 329, 4 Asp MLC 198. As to pro rata freight see PARA 603.

7 *Freeman v East India Co* (1822) 5 B & Ald 617; *Morris v Robinson* (1824) 3 B & C 196.

8 *Morris v Robinson* (1824) 3 B & C 196; *Atlantic Mutual Insurance Co v Huth* (1880) 16 ChD 474, 4 Asp MLC 369, CA.

9 *Cammell v Sewell* (1860) 5 H & N 728, Ex Ch; disapproving *The Segredo (otherwise The Eliza Cornish)* (1853) 1 Ecc & Ad 36; cf *Freeman v East India Co* (1822) 5 B & Ald 617 (where the foreign law gave no title); *Morris v Robinson* (1824) 3 B & C 196; *The Gratitude* (1801) 3 Ch Rob 240.

10 *Cammell v Sewell* (1860) 5 H & N 728, Ex Ch.

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## (H) JETTISON OF THE CARGO

### 514. Master's authority to jettison cargo.

In case of imminent danger to the ship or the lives on board her, the master may jettison such amount of cargo as may be necessary to remove the danger. In extreme cases he may jettison the whole of the cargo. When jettisoning he may select what articles he pleases, and may determine what quantity<sup>1</sup>. If the master jettisons more cargo than is necessary to remedy the danger to the ship, the shipowner is liable to make good the full value to the cargo owner, and the shipowner is similarly liable when cargo has been rightly jettisoned in case of necessity, but at a time when there has been a deviation from the specified voyage<sup>2</sup>.

Whenever cargo is jettisoned from necessity, its owners are entitled to average contribution unless the cargo was carried on deck and there is no custom justifying such carriage<sup>3</sup>.

1 *The Gratitude* (1801) 3 Ch Rob 240 at 258. Jettison by the master in case of panic does not relieve the shipowner from liability to the cargo owner for the value of his goods: *Notara v Henderson* (1872) LR 7 QB 225 at 236, 1 Asp MLC 278 at 282, Ex Ch.

2 See *Notara v Henderson* (1872) LR 7 QB 225, 1 Asp MLC 278, Ex Ch. As to deviation see PARA 248 et seq; cf PARAS 378, 385. See also *Leduc & Co v Ward* (1888) 20 QBD 475, CA; *Glynn v Margetson & Co* [1893] AC 351, 7 Asp MLC 366, HL; *The Dunbeth* [1897] P 133, 8 Asp MLC 284; *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660, 10 Asp MLC 431, CA.

3 *Wright v Marwood* (1881) 7 QBD 62, 4 Asp MLC 451, CA; *Apollinaris Co v Nord Deutsche Insurance Co* [1904] 1 KB 252 at 259, 9 Asp MLC 526 at 527. The fact that deck cargo is carried at merchant's risk does not relieve the shipowner from contributing in general average: *Burton v English* (1883) 12 QBD 218, 5 Asp MLC 187, CA. As to general average see also PARA 605 et seq; and **INSURANCE** vol 25 (2003 Reissue) PARA 420 et seq.

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## C. THE UNLOADING

### (A) ARRIVAL OF THE SHIP

#### 515. When the consignee's obligation arises.

The shipowner is not entitled to call on the consignee to take delivery of the cargo until he himself is in a position to deliver it<sup>1</sup>. For this purpose, the ship must have arrived at her destination within the meaning of the contract<sup>2</sup>, and she must be ready to discharge her cargo<sup>3</sup>. It is, therefore, necessary, for the purpose of ascertaining when the consignee's obligation to take delivery arises, to consider what constitutes arrival at the port of discharge<sup>4</sup>.

1 *Murphy v Coffin* (1883) 12 QBD 87, 5 Asp MLC 531n, DC; *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 608, 4 Asp MLC 302 at 304, HL, per Lord Selborne LC.

2 *Nelson v Dahl* (1879) 12 ChD 568, 4 Asp MLC 172, CA (affd sub nom *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL); *Metcalf v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA.

3 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL.

4 See PARA 516 et seq.

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### **516. Arrival of the ship.**

The general principles to be applied are the same whether the arrival under consideration is arrival at the port of loading or arrival at the port of discharge<sup>1</sup>. In the case of arrival at the port of discharge the shipowner's position is, however, complicated by the presence of the cargo on board the ship<sup>2</sup>. It is no longer possible for him merely to refuse to allow her to proceed to an unsuitable port, or to treat the contract as at an end, where the circumstances render its performance impossible<sup>3</sup>, as the cargo must be discharged and disposed of in some way or other<sup>4</sup>. It will, therefore, be expedient to consider in detail the application of the general principles to arrival at the port of discharge<sup>5</sup>.

Where, however, a vessel waits off a port at the charterers' request, the shipowner is entitled to reasonable remuneration for acceding to their request<sup>6</sup>.

1 *Steel, Young & Co v Rose, TP Richards Ltd* (1915) 139 LT Jo 28; and see PARA 406.

2 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 53, 4 Asp MLC 392 at 397, HL, per Lord Blackburn.

3 See PARA 442.

4 *Geipel v Smith* (1872) LR 7 QB 404 at 414, 1 Asp MLC 268 at 274 per Blackburn J (citing *Hadley v Clarke* (1799) 8 Term Rep 259); *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 53, 4 Asp MLC 392 at 397, HL, per Lord Blackburn.

5 See PARA 517 et seq.

6 *Greenmast Shipping Co SA v Jean Lion et Cie SA, The Saronikos* [1986] 2 Lloyd's Rep 277 (vessel waited off Aqaba for nine days at the charterers' request to enable them to resolve problems regarding the sale of the cargo).

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### 517. Port as ordered.

In many cases, the port of discharge is not named in the contract, but it is provided that the ship is to proceed to a port as ordered by the charterer<sup>1</sup>. The area within which this port must be situated is usually specified, and, in addition, the charterer's freedom of choice is often restricted by the requirement that the port is to be a safe port<sup>2</sup>, or that it is to be not only a safe port but also one in which the ship can always lie and discharge afloat<sup>3</sup>.

The charterer's failure to give any orders as provided in the charterparty, so that no port is named at all, does not necessarily impose any duty on the master to communicate with the charterer and to ask for his instructions<sup>4</sup>; but nor does it necessarily disentitle the charterer to cancel for non-delivery<sup>5</sup>. If there is no duty communicated with the charterer and the master acts as a prudent and honest person, he may take the course which he reasonably believes to be the best for the advantage of the charterer; and he may, therefore, proceed to any port within the specified area, and call on the consignee to take delivery there<sup>6</sup>.

If the charterers' instruction to proceed to a port is one which the charterers are not entitled to give and is, therefore, a breach of the terms of the charterparty, the shipowner may recover damages for resulting loss, provided that he has not waived his right thereto, such waiver of the right to damages not being implied from mere compliance with the order. Alternatively, the shipowner's right can be founded on quantum meruit<sup>7</sup>.

If the charterparty provides that the ship is to proceed to a port of call for orders, the master is bound to wait a reasonable time for such orders even if the charterer has failed in his undertaking to give orders within a specified time after notice of the ship's arrival at the port of call<sup>8</sup>. Where the charterer names the place of discharge, he must name a port<sup>9</sup> which fulfils the requirements of the contract<sup>10</sup>; and, if he names a port which is unsafe, or which is otherwise not a proper port, the shipowner may refuse to allow the ship to proceed to it<sup>11</sup>, and may discharge the cargo at the nearest safe port or place of discharge<sup>12</sup>. Where the charterer is under an obligation to nominate an approved loading place, 'approved' means 'generally acceptable in the trade or business'<sup>13</sup>. A charterer who expressly states that a named port is a 'safe port' gives the shipowner a warranty to that effect<sup>14</sup>.

If the port chosen becomes unsafe, the shipowner may invite the charterer to select another and, if he fails to do so, may earn the chartered freight by delivery at the nearest safe port within the purview of the charterparty, for the impossibility of discharging at the port originally chosen will not dissolve the contract<sup>15</sup>.

1 See PARA 251.

2 As to the meaning of 'safe port' see PARA 518.

3 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA; cf *Allen v Coltart* (1883) 11 QBD 782, 5 Asp MLC 104. In *Vardinoyannis v Egyptian General Petroleum Corpn, The Evaggelos TH* [1971] 2 Lloyd's Rep 200, a distinction was drawn between a safe port and one 'where the vessel can always lie safely afloat', the latter phrase being held to be concerned exclusively with marine characteristics and not the possibility of war damage.

4 *Sieveling v Maass* (1856) 6 E & B 670, Ex Ch; cf *Rae v Hackett* (1844) 12 M & W 724. See also PARA 403.

5 See *Mansel Oil Ltd v Troon Storage Tankers SA* [2008] EWHC 1269 (Comm), [2008] 2 Lloyd's Rep 304, [2008] All ER (D) 95 (Jun); and PARA 252.

6 *Sieveling v Maass* (1856) 6 E & B 670, Ex Ch.

7 *Batis Maritime Corpn v Petroleos del Mediterraneo SA, The Batis* [1990] 1 Lloyd's Rep 345 (change of nomination by charterers because of congestion).

8 *Procter, Garrett Marston Ltd v Oakwin Steamship Co Ltd* [1926] 1 KB 244, 16 Asp MLC 600, CA. As to the measure of damages for detaining the ship see *Ethel Radcliffe Steamship Co v Barnett* (1926) 95 LJKB 561, 17 Asp MLC 55, CA.

9 As to what constitutes a port see *The Alhambra* (1881) 6 PD 68 at 72, 4 Asp MLC 410 at 411, CA, per Brett LJ.

10 *The Alhambra* (1881) 6 PD 68 at 72, 4 Asp MLC 410 at 411, CA. As to the effect of an exception on the right to order the ship to a particular place see *Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA.

11 *Aktieselskabet Olivebank v Dansk Svovlsyre Fabrik* [1919] 2 KB 162, 14 Asp MLC 426, CA.

12 *Ogden v Graham* (1861) 1 B & S 773; *Samuel v Royal Exchange Assurance Co* (1828) 8 B & C 119; *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 44, 4 Asp MLC 392 at 394, HL, per Lord Blackburn; *The Alhambra* (1881) 6 PD 68 at 73, 74, 4 Asp MLC 410 at 411, CA; *Aktieselskabet Olivebank v Dansk Svovlsyre Fabrik* [1919] 2 KB 162, 14 Asp MLC 426, CA. By signing bills of lading making goods deliverable at a named port, the shipowner may be precluded from objecting that the port so named is not a safe port within the meaning of the charterparty: *Capper & Co v Wallace* (1880) 5 QBD 163, 4 Asp MLC 223, DC.

13 *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 QB 68, [1955] 2 All ER 241, [1955] 1 Lloyd's Rep 349, CA.

14 See *AIC Shipping Ltd v Marine Pilot Ltd, The Archimidis* [2008] EWCA Civ 175, [2008] 2 All ER (Comm) 545, [2008] 1 Lloyd's Rep 597; *STX Pan Ocean Co Ltd v Ugland Bulk Transport AS, The Livanita* [2007] EWHC 1317 (Comm), [2008] 1 Lloyd's Rep 86. See, however, *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc, The Reborn* [2008] EWHC 1875 (Comm), [2008] All ER (D) 22 (Aug) (absence of warranty), where the word 'safety' was deleted in the term 'as she may safely get'.

15 *The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214.

## UPDATE

### 517 Port as ordered

NOTE 14--*The Reborn*, cited, affirmed: [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639, [2009] All ER (D) 83 (Jun).

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### 518. Meaning of 'safe port'.

A port is not a safe port unless it is a port which the ship can enter as a laden ship<sup>1</sup> without undue delay or danger<sup>2</sup>, and where she can discharge always afloat<sup>3</sup>, and from which she can safely return<sup>4</sup>. The charterer's duty, often expressed in the charterparty but also possibly implied<sup>5</sup>, is to nominate a port which is prospectively safe, that is to say that, when the charterer nominates a port, that port must be likely to be safe in the sense described above at the time of arrival<sup>6</sup>.

It is necessary, therefore, to consider the physical features of the port named<sup>7</sup>, and to take into account the size and draught of the ship<sup>8</sup>. If, being consigned to a safe port, the ship is unable to enter by reason of her overdraught, the master is not required as a general rule, to lighten in the roads or estuary<sup>9</sup> in order to gain access to the port; and any custom to this effect is inadmissible in evidence as being inconsistent with the express provision of the charterparty that the port of discharge is to be a safe port<sup>10</sup>. If there are insufficient tugs at the port of discharge for a vessel of the size concerned, the port is unsafe<sup>11</sup>. When, however, the consignee

is at hand and ready, at the entrance to the port, to receive the surplus cargo which, without substantially breaking the continuity of the voyage, can be removed, without risk or detriment to the shipowner, it may be the master's duty to lighten the ship and proceed to the port of discharge<sup>12</sup>. Any physical obstruction must, however, in order that it may have this effect, be of a permanent character; the existence of a temporary impediment, such as a bar which the ship cannot cross owing to the tides being neap<sup>13</sup> or the water in the river being low<sup>14</sup>, or the presence of ice obstructing the entrance to the port<sup>15</sup>, does not render the port unsafe, and the ship may not, therefore, refuse to proceed<sup>16</sup>. The port is not unsafe because the ship must necessarily take the ground at certain states of the tide<sup>17</sup>, although, if the contract provides that the ship is to lie always afloat, the shipowner may refuse to proceed to such a port<sup>18</sup>.

It is not, however, sufficient that the port named should be a safe port in the sense that there is no physical danger to the ship<sup>19</sup>. There must be no danger of capture or seizure from political causes<sup>20</sup>. The charterer must not, therefore, name a port in which the unloading of the cargo is by law prohibited<sup>21</sup>, or which cannot be reached by the ship without running the risk of hostile capture<sup>22</sup>. Similar considerations apply where the destination to which the ship is ordered is not a port, in the wide sense of the word, but a berth<sup>23</sup> or a dock<sup>24</sup>.

Where, after the charterer has given his order for the ship to proceed to a safe port, the port becomes unsafe, then, unless the cause of its becoming unsafe is temporary only, the charterer must, at least in the case of a time charterparty, cancel his original order and order the ship to another port which is prospectively safe<sup>25</sup>. Where the ship has reached a safe port but after her arrival the port becomes unsafe, the charterer must either order the ship to leave the port, whether she has completed unloading or not, and go to another port which is prospectively safe if she can thereby avoid the danger in the port which has arisen, or, if she cannot so leave the port, the charterer must leave the ship there, in which case he will not be liable for any ensuing damage to her<sup>26</sup>.

1 *Shield v Wilkins* (1850) 5 Exch 304 at 305 per Rolfe B, followed in *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA.

2 *The Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245 at 261; *Johnston Bros v Saxon Queen Steamship Co* (1913) 12 Asp MLC 305. See also *East Asiatic Co Ltd v Tronto Steamship Co Ltd* (1915) 31 TLR 543 (where the danger from minefields was not considered sufficiently great to make the port of destination unsafe); *GW Grace & Co Ltd v General Steam Navigation Co Ltd* [1950] 2 KB 383, [1950] 1 All ER 201, 83 Ll L Rep 297 (danger from ice; port held unsafe). In *Leeds Shipping Co Ltd v Société Française Bunge* [1958] 2 Lloyd's Rep 127 at 131, CA, Sellers LJ gave the following definition of 'safe port': 'If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law'. This dictum was applied in *Kristiansands Tankrederi A/S v Standard Tankers (Bahamas) Ltd, The Polyglory* [1977] 2 Lloyd's Rep 353 (where something more than ordinary prudence and skill was required to avoid exposure to danger at Port La Nouvelle); and in *Kodros Shipping Corp v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736, [1982] 3 All ER 350, [1982] 2 Lloyd's Rep 307, HL (where a vessel was ordered to Basrah and was subsequently trapped by hostilities between Iran and Iraq, and it was held that Basrah was a safe port because the unsafety was due to an unexpected and abnormal event), applied in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL.

3 *Hall Bros Steamship Co Ltd v R and W Paul Ltd* (1914) 12 Asp MLC 543; cf *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486, 8 Asp MLC 402, HL; *AIC Shipping Ltd v Marine Pilot Ltd, The Archimidis* [2008] EWCA Civ 175, [2008] 2 All ER (Comm) 545, [2008] 1 Lloyd's Rep 597. A term in a charterparty that the ship must only be employed between safe ports may include by implication a provision that she must only be loaded at safe berths within such ports: *Lensen Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* (1935) 40 Com Cas 320, CA.

4 *Limerick Steamship Co Ltd v WH Stott & Co Ltd* [1921] 2 KB 613, 15 Asp MLC 323, CA; *Islander Shipping Enterprises SA v Empresa Maritima del Estado SA, The Khian Sea* [1979] 1 Lloyd's Rep 545, CA (where a berth at Valparaiso was held to be unsafe for there was no evidence of any system to ensure that vessels using it would have adequate searoom if they had to leave in a hurry); *Mediolanum Shipping Co v Japan Lines Ltd, The Mediolanum* [1982] 1 Lloyd's Rep 47 (where a vessel grounded at Las Minas, Panama, on her way to a bunkering place within the port, and the port was held to be unsafe).

5 See *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1960] 1 QB 439 at 488, 489, [1959] 3 All ER 434 at 452, [1959] 2 Lloyd's Rep 229 at 249, 250 per McNair J; *Ogden v Graham* (1861) 1 B & S 773 at 779; *Axel Brostrom & Son v Louis Dreyfus & Co* (1832) 38 Com Cas 79 at 85, cited in *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 QB 68 at 105, [1955] 2 All ER 241 at 255, [1955] 1 Lloyd's Rep 349 at 373, CA, per Morris LJ; cf *Atkins International HA v Islamic Republic of Iran Shipping Lines, The APJ Priti* [1987] 2 Lloyd's Rep 37, CA (no such warranty implied).

6 *Kodros Shipping Corp v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736, [1982] 3 All ER 350, [1982] 2 Lloyd's Rep 307, HL (port must be prospectively safe); *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp, The Saga Cob* [1992] 2 Lloyd's Rep 545, CA.

7 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA (followed in *Reynolds & Co v Tomlinson* [1896] 1 QB 586, 8 Asp MLC 150, DC); *Johnston Bros v Saxon Queen Steamship Co* (1913) 12 Asp MLC 305; *Dollar & Co v Blood Holman & Co* (1920) 36 TLR 843 (where Sharpness was held to be a usual port in the sense of a substantial port in common use and that, in the circumstances, it was, moreover, a safe port within the meaning of the charterparty in question); *Leeds Shipping Co Ltd v Société Française Bunge* [1958] 2 Lloyd's Rep 127, CA (where, by reason of dangerous and unpredictable weather conditions, the port was held unsafe for the particular vessel); *Transoceanic Petroleum Carriers v Cook Industries Inc, The Mary Lou* [1981] 2 Lloyd's Rep 272 (where a port approachable only through a channel which was laden with silt and whose depth varied from time to time was held to be unsafe); *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc, The Reborn* [2008] EWHC 1875 (Comm), [2008] All ER (D) 22 (Aug) ('safety', or otherwise, of different berths at the named port).

8 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA; *Leeds Shipping Co Ltd v Société Française Bunge* [1958] 2 Lloyd's Rep 127, CA; cf *Re Goodbody & Co and Balfour, Williamson & Co* (1899) 9 Asp MLC 69, CA. If the entrance to the port is so narrow that the ship cannot proceed without the help of a tug, the port is unsafe unless tugs are available at that port: *Axel Brostrom & Son v Louis Dreyfus & Co* (1932) 38 Com Cas 79.

9 As to lightening the ship after arrival to enable her to reach her berth see PARA 525.

10 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA; *Reynolds & Co v Tomlinson* [1896] 1 QB 586, 8 Asp MLC 150, DC; cf *Hayton v Irwin* (1879) 5 CPD 130, 4 Asp MLC 212, CA.

11 *Palm Shipping Inc v Vitol SA, The Universal Monarch* [1988] 2 Lloyd's Rep 483.

12 *Hillstrom v Gibson and Clark* (1870) 8 M 463; *Capper & Co v Wallace* (1880) 5 QBD 163 at 166, 4 Asp MLC 223 at 224, DC, per Lush J.

13 *Bastifell v Lloyd* (1862) 1 H & C 388; cf *Parker v Winlow* (1857) 7 E & B 942; *The Curfew* [1891] P 131, 7 Asp MLC 29, DC.

14 *Schilizzi v Derry* (1855) 4 E & B 873.

15 *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; *Schilizzi v Derry* (1855) 4 E & B 873 at 887 per Lord Campbell CJ. The presence of ice may amount to more than a merely temporary obstruction: see *GW Grace & Co Ltd v General Steam Navigation Co Ltd* [1950] 2 KB 383, [1950] 1 All ER 201, 83 Ll L Rep 297. As to what is meant by an ice-bound port see *Limerick Steamship Co Ltd v WH Stott & Co Ltd* [1921] 2 KB 613, 15 Asp MLC 324, CA.

16 A temporary danger or obstacle may render a port unsafe if it is operative for a period which, having regard to the nature of the adventure and of the contract, would involve inordinate delay: *Unitramp v Garnac Grain Co Inc, The Hermine* [1979] 1 Lloyd's Rep 212, CA (where Destrehan was held to be a safe port and a delay of 37 days in leaving it due to the accretion of silt from floods originating upstream was not such as to frustrate the adventure); see however *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd, The Count* [2006] EWHC 3222 (Comm), [2007] 1 All ER (Comm) 882, [2008] 1 Lloyd's Rep 72 (a port would not lack the characteristics of a safe port merely because some delay, insufficient to frustrate the adventure, could be caused to the vessel in her attempt to reach, use and leave the port, by some temporary evident obstruction or hazard). As to where the obstruction is permanent see PARA 522.

17 As to the shipowner's position if the ship is damaged through taking the ground see *The Moorcock* (1889) 14 PD 64, 6 Asp MLC 373, CA (distinguished in *Parker v Plomesgate RDC* (1903) 9 Com Cas 107); *Great Lakes Steamship Co v Maple Leaf Milling Co Ltd* (1924) 41 TLR 21, 20 Ll L Rep 2, PC (where damage to a ship by grounding at the port of discharge was attributed to the charterers' failure to lighten the ship to a safe winter draught in accordance with the terms of their contract with the shipowner).

18 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA. As to the distinction between 'lie afloat' and 'deliver, always afloat' cf *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486 at 495, 8 Asp MLC 402 at 404, HL, per Lord Watson. See also PARA 406.

19 Cf PARA 521.

20 *The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214; *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp*, *The Saga Cob* [1992] 2 Lloyd's Rep 545, CA.

21 *Ogden v Graham* (1861) 1 B & S 773; *Aktieselskabet Olivebank v Dansk Svovlsyre Fabrik* [1919] 2 KB 162, 14 Asp MLC 426, CA.

22 *The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214. Dangers of the voyage are material to the question whether the port is safe: see *Palace Shipping Co Ltd v Gans Steamship Line* [1916] 1 KB 138, 13 Asp MLC 494 (where it was held that Newcastle-upon-Tyne was a safe port notwithstanding German threats to destroy hostile ships in English waters).

23 *Atkins International HA v Islamic Republic of Iran Shipping Lines, The APJ Priti* [1987] 2 Lloyd's Rep 37, CA (vessel damaged by a missile during the Iran/Iraq war while on her approach voyage to Bandar Khomeini).

24 *Parker v Winlow* (1857) 7 E & B 942; *Allen v Coltart* (1883) 11 QBD 782, 5 Asp MLC 104. The consignee is, apparently, bound to select a dock into which admittance can be procured: *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 44, 4 Asp MLC 392 at 394, HL, per Lord Blackburn, citing *Samuel v Royal Exchange Assurance Co* (1828) 8 B & C 119.

25 *Kodros Shipping Corp v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736, [1982] 3 All ER 350, [1982] 2 Lloyd's Rep 307, HL (time charterparty; Lord Roskill said that he found it much more difficult to say what are the comparable obligations under a voyage charterparty at any rate where there is no express right to renominate; and he left further consideration of the problems vis-à-vis voyage charterparties for later consideration if and when they arise).

26 See note 25.

## UPDATE

### 518 Meaning of 'safe port'

NOTE 7--*The Reborn*, cited, affirmed: [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639, [2009] All ER (D) 83 (Jun).

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### 519. Consequences of naming unsafe port.

A charterer who names an unsafe port must indemnify the shipowner against the consequences<sup>1</sup>. Provided that the port is not obviously unsafe, the shipowner is entitled to use it, and may thus affirm the charterparty and claim for resulting damage on the ordinary principles of the law of contract<sup>2</sup>. The charterer must, therefore, pay any demurrage<sup>3</sup> or damages for detention<sup>4</sup> which may become payable by reason of any delay caused, and, if the ship has had to be shifted to another port, any extra port charges incurred<sup>5</sup>. He is not, however, liable for any damage which the ship may sustain during the shifting, nor for the costs of an action improperly brought against the shipowner by the consignee for his failure to deliver the cargo at the named port<sup>6</sup>.

1 *Lensen Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* (1935) 40 Com Cas 320, CA. As to the effect of a cesser clause in such a case see *French v Gerber* (1877) 2 CPD 247, 3 Asp MLC 403, CA; and PARA 304. The time at which a port becomes unsafe is relevant: *Vardinoyannis v Egyptian Petroleum Corp*, *The Evaggelos TH* [1971] 2 Lloyd's Rep 200.

2 *GW Grace & Co Ltd v General Steam Navigation Co Ltd* [1950] 2 KB 383, [1950] 1 All ER 201, 83 Ll L Rep 297; *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 QB 68 at 80, [1955] 2 All ER 241, [1955] 1 Lloyd's Rep 349, CA; *Reardon Smith Line Ltd v Australian Wheat Board* [1956] AC 266, [1956] 1 All ER 456, [1956] 1 Lloyd's Rep 1, PC. On 'the general and difficult question of the position of the master if and when he realises or suspects danger or the possibility of danger' see *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 QB 68 at 77, [1954] 3 All ER 563 at 568, 569, [1954] 2 Lloyd's Rep 397 at 414, 415 per Devlin J, adopted in *Reardon Smith Line Ltd v Australian Wheat Board* at 282, 461 and 9.

3 *Evans v Bullock* (1877) 3 Asp MLC 552.

4 *Ogden v Graham* (1861) 1 B & S 773.

5 *Evans v Bullock* (1877) 3 Asp MLC 552.

6 *Evans v Bullock* (1877) 3 Asp MLC 552.

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## **520. Shipowner's duty to reach port of discharge.**

It is the shipowner's duty to reach the port of discharge, whether specified in the contract or named afterwards, and to deliver the cargo there, unless he has some lawful excuse<sup>1</sup>. If he is unable to complete the voyage, his inability to do so may be excused by the terms of his contract<sup>2</sup>; but, as he has not fulfilled the condition on which freight becomes payable<sup>3</sup>, he is not entitled, as a general rule, to claim payment even of pro rata freight, even though he has delivered the cargo to the consignee<sup>4</sup>. If, however, the cause which prevents him from reaching the port of discharge and delivering the cargo there is not excepted by the contract, he not only loses his right to freight, but also becomes liable for his failure to deliver the cargo at its destination<sup>5</sup>, unless the circumstances amount to a frustration of the adventure<sup>6</sup>.

1 See PARA 477.

2 *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423 at 428, 3 Asp MLC 407 at 410, CA, per Bramwell LJ.

3 See PARA 590.

4 *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA. As to pro rata freight see PARA 603.

5 *Mongaldai Tea Co Ltd v Ellerman Lines Ltd* (1920) 2 Ll L Rep 639.

6 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 14 Asp MLC 370, HL. As to frustration see PARA 237.

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## **521. Proceeding 'so near to port of discharge as ship can safely get'.**

In practice, the contract usually provides that the ship is to proceed to the port of discharge or so near to it as she can safely get<sup>1</sup>. This provision is intended to benefit the shipowner, and its effect is to substitute another destination to which the ship may proceed<sup>2</sup>. By proceeding to this other destination and delivering the cargo there, the shipowner equally completes the voyage in accordance with the terms of the contract, and is thus entitled to be paid the full freight<sup>3</sup>.

The right to proceed to this other destination does not arise unless it is unsafe or impossible for the ship to proceed to her original destination<sup>4</sup>. The safety of the ship herself must be involved<sup>5</sup>; it is not sufficient to show that, if she were to proceed to her original destination, the cargo would be exposed to danger<sup>6</sup>. If the cargo alone is exposed to danger, the shipowner may be excused from proceeding further<sup>7</sup>, but the delivery of the cargo at an intermediate port is not a performance of the contract of carriage, and, therefore, no freight will be payable<sup>8</sup>. At the same time, as the object of the contract is the delivery of the cargo, the standard of safety is the safety of the ship as a laden ship<sup>9</sup>. She is, therefore, not bound to proceed to her original destination if the presence of the cargo renders it unsafe for her to do so<sup>10</sup>, even where in the absence of the cargo there would be no difficulty or danger<sup>11</sup>. Thus, if the ship cannot reach her port of discharge without lightening<sup>12</sup>, the master may call on the consignee to take delivery of the cargo before reaching the port, as he is not bound to lighten the ship<sup>13</sup>. The same principle applies where the port of discharge is rendered unsafe by reason of a blockade<sup>14</sup> or embargo<sup>15</sup>.

The master must not, however, stop too soon<sup>16</sup>; he must proceed as near as he can safely get in the direction of the port of discharge<sup>17</sup>. He is not entitled to call on the consignee to accept delivery under the contract until he is unable to go any further without endangering the ship<sup>18</sup>; and the place of delivery is the place where the ship is stopped through her inability to proceed<sup>19</sup>. The delivery of the cargo at any other place cannot be regarded as a delivery at the other destination provided in the contract; and, however reasonably the master may have acted, he must be taken to have abandoned the voyage by delivering the cargo short of its destination<sup>20</sup>. Even a delivery at the nearest safe port is not sufficient to entitle the master to the freight<sup>21</sup> unless the ship cannot in fact proceed any further with safety<sup>22</sup>. The contract may, however, by its terms provide that, if it becomes unsafe for the ship to proceed, through the happening of some specified event<sup>23</sup>, to her port of discharge, the master is to have the option of landing the goods at some other safe port<sup>24</sup>. In that event it must be shown that the port of discharge has become unsafe; it is not sufficient that the master exercised his option in the honest belief that he was justified in doing so<sup>25</sup>.

1 This condition is satisfied if the ship gets within a distance of the port which is reasonable in all the circumstances: *The Athamas (Owners) v Dig Vijay Cement Co Ltd* [1963] 1 Lloyd's Rep 287, CA (where discharge at Saigon, which was 250 miles from Phnom-Penh, was held to be sufficient compliance with the terms of the charterparty). Sometimes the shipowner is empowered to carry the goods on if they cannot be delivered at their destination without undue delay: *Searle v Lund* (1904) 9 Asp MLC 557, CA.

2 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL.

3 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL; cf *The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214.

4 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 57, 4 Asp MLC 392 at 398, HL, per Lord Watson; cf *Bastifell v Lloyd* (1682) 1 H & C 388.

5 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA, following *Shield v Wilkins* (1850) 5 Exch 304.

6 *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326, 8 Asp MLC 181.

7 *Brunner v Webster* (1900) 5 Com Cas 167 (where the shipowner was not excused, there being no danger); cf PARA 486.

8 *Liddard v Lopes* (1809) 10 East 526.

9 *Shield v Wilkins* (1850) 5 Exch 304.

10 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA; *Reynolds & Co v Tomlinson* [1896] 1 QB 586, 8 Asp MLC 150, DC.

11 *Shield v Wilkins* (1850) 5 Exch 304.

12 It has been held that, if there is a custom to lighten outside the port, the shipowner is bound to do so (*Hillstrom v Gibson and Clark* (1870) 8 M 463, followed in *Dickinson v Martini & Co* (1874) 1 R 1185), provided the amount of lightening required is not unreasonable (*Capper & Co v Wallace* (1880) 5 QBD 163, 4 Asp MLC 223, following *Hillstrom v Gibson and Clark*). This view is, however, inconsistent with *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA (followed in *Reynolds & Co v Tomlinson* [1896] 1 QB 586, 8 Asp MLC 150 and *Treglia v Smith's Timber Co Ltd* (1896) 1 Com Cas 360) (where Brett LJ declined to follow *Hillstrom v Gibson and Clark*). As to lightening inside the port see PARA 525.

13 *Treglia v Smith's Timber Co Ltd* (1896) 1 Com Cas 360; *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA; *Reynolds & Co v Tomlinson* [1896] 1 QB 586, 8 Asp MLC 150. The contract may, however, contain a stipulation as to the lightening of the ship outside the port: see *Darling v Raeburn* [1907] 1 KB 846, 10 Asp MLC 429, CA.

14 *Castel and Latta v Trechman* (1884) Cab & El 276.

15 *Geipel v Smith* (1872) LR 7 QB 404, 1 Asp MLC 268; *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, 2 Asp MLC 435, Ex Ch. Cf, however, *Hadley v Clarke* (1799) 8 Term Rep 259, explained and distinguished in *Horlock v Beal* [1916] 1 AC 486, 13 Asp MLC 250, HL.

16 *Castel and Latta v Trechman* (1884) Cab & El 276; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; cf *Schilizzi v Derry* (1855) 4 E & B 873; *East Asiatic Co Ltd v Tronto Steamship Co Ltd* (1915) 31 TLR 543.

17 *Castel and Latta v Trechman* (1884) Cab & El 276; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA.

18 *Castel and Latta v Trechman* (1884) Cab & El 276. If the ship cannot proceed at all, she cannot get safely within the meaning of the phrase: *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 50, 4 Asp MLC 392 at 396, HL, per Lord Blackburn.

19 *Schilizzi v Derry* (1855) 4 E & B 873; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326, 8 Asp MLC 181.

20 *Castel and Latta v Trechman* (1884) Cab & El 276.

21 *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; *Castel and Latta v Trechman* (1884) Cab & El 276.

22 *Medeiros v Hill* (1832) 8 Bing 231; *The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214; *East Asiatic Co Ltd v Tronto Steamship Co Ltd* (1915) 31 TLR 543.

23 It is not sufficient that the event should render the port unsafe at the moment; the port must be unsafe for a period which would involve inordinate delay: *SS Knutsford Ltd v Tillmanns & Co* [1908] AC 406, 11 Asp MLC 105, HL.

24 *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326, 8 Asp MLC 181; *SS Knutsford Ltd v Tillmanns & Co* [1908] AC 406, 11 Asp MLC 105, HL.

25 *SS Knutsford Ltd v Tillmanns & Co* [1908] AC 406, 11 Asp MLC 105, HL.

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## 522. What amounts to obstruction.

It is the master's duty to proceed on the original voyage until he is prevented from proceeding any further by some permanent obstruction<sup>1</sup>, which may be either physical<sup>2</sup> or political<sup>3</sup>. A permanent obstruction does not mean an obstruction which will remain forever; there must, in

every case, be some limit of time beyond which a continuing obstacle ceases to be temporary<sup>4</sup>. No impediment arising in the ordinary course of navigation<sup>5</sup>, or arising in the usual and ordinary course of management of a particular port<sup>6</sup>, and not lasting beyond what is, in the circumstances, a reasonable time, is, however, to be regarded as a permanent obstruction; and in these cases the ship must wait until the obstruction has ceased to exist<sup>7</sup>, and must proceed to the port of discharge before the consignee can be required to take delivery of the cargo<sup>8</sup>. Thus, the ship may be unable to proceed beyond a particular place because, when she arrives there, there is not sufficient water to allow her to proceed further<sup>9</sup>. Nevertheless if, by waiting until the tide allows, she is able to proceed, she must wait, and may not deliver her cargo there<sup>10</sup>. The contract may, however, by its terms relieve the shipowner of the risk of delay from the state of the tide on the ship's arrival at the entrance to the port of discharge<sup>11</sup>.

1 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 58, 4 Asp MLC 392 at 398, HL, per Lord Watson; *The Athamas (Owners) v Dig Vijay Cement Co Ltd* [1963] 1 Lloyd's Rep 287, CA.

2 *The Alhambra* (1881) 6 PD 68, 4 Asp MLC 410, CA; *Reynolds & Co v Tomlinson* [1896] 1 QB 586, 8 Asp MLC 150, DC; *GW Grace & Co Ltd v General Steam Navigation Co Ltd* [1950] 2 KB 383, [1950] 1 All ER 201, 83 Ll L Rep 297 (ice).

3 *The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214; *The Fox* (1914) 83 LJP 89, CA (strike).

4 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 59, 4 Asp MLC 392 at 397, HL, per Lord Watson; *The Athamas (Owners) v Dig Vijay Cement Co Ltd* [1963] 1 Lloyd's Rep 287, CA.

5 *Schilizzi v Derry* (1855) 4 E & B 873; *Parker v Winlow* (1857) 7 E & B 942; *Bastifell v Lloyd* (1862) 1 H & C 388; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA.

6 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL; *Kell v Anderson* (1842) 10 M & W 498; *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA; *Watson v H Borner & Co Ltd* (1900) 5 Com Cas 377, CA.

7 See the cases cited in notes 5, 6.

8 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 61, 4 Asp MLC 392 at 398, HL, per Lord Watson.

9 *Bastifell v Lloyd* (1862) 1 H & C 388; *Schilizzi v Derry* (1855) 4 E & B 873.

10 *Bastifall v Lloyd* (1862) 1 H & C 388; cf *Parker v Winlow* (1857) 7 E & B 942.

11 *Horsley v Price* (1883) 11 QBD 244, 5 Asp MLC 106 ('so near thereto as she may safely get at all times of tide and always afloat'); *Allen v Coltart* (1883) 11 QBD 782, 5 Asp MLC 104.

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### 523. What amounts to arrival of the ship.

Even when the ship has actually reached the port of discharge, she has not necessarily reached the destination contemplated by the contract<sup>1</sup>. In the absence of any term in the charterparty<sup>2</sup> or custom<sup>3</sup> to the contrary, she has arrived when, if she cannot proceed immediately to a berth, she has reached a position within the port where she is at the immediate and effective disposition of the charterer<sup>4</sup>. If she is at the place where waiting ships usually lie, she is in such a position unless there are some extraordinary circumstances, proof of which lies on the charterer<sup>5</sup>. If the vessel is waiting at some other place in the port, it is for the shipowner to prove that she is as fully at the disposition of the charterer as she would be if she were in the vicinity of the berth for discharge<sup>6</sup>.

Where the contract requires the ship to reach a particular dock<sup>7</sup>, she cannot be considered as having arrived at her destination until she is inside the dock<sup>8</sup>, in the usual place of discharge<sup>9</sup>, although she need not have reached her actual discharging berth<sup>10</sup>. The question is on whom falls the risk of delay in waiting until a discharging berth is ready. If no berth is named in the charterparty and no provision is made for the ship to proceed to a berth as ordered by the charterer, the ship has arrived as soon as she is anchored or moored at the end of the voyage specified in the charterparty, and in a state to be made ready to discharge if so desired<sup>11</sup>. The contract may, however, by a special provision put the risk of delay on the charterer and enable the shipowner to claim demurrage, even though the ship is not an arrived ship<sup>12</sup>.

If the charterer fails to nominate the port of discharge within the time limited by the charterparty, there is no implied term that the master may make the nomination himself and thus cause the vessel to be an 'arrived ship'<sup>13</sup>.

A provision in a charterparty that time is to count as loading or discharging time 'whether in berth or not' puts the risk of delay where no berth is available on the charterer; it does not cover the case where a berth is available but cannot be reached immediately because of bad weather<sup>14</sup>.

1 *Brown v Johnson* (1842) 10 M & W 331 at 334 per Lord Abinger; *Kell v Anderson* (1842) 10 M & W 498; *Mongaldai Tea Co Ltd v Ellerman Lines Ltd* [1920] WN 152, 2 Ll L Rep 639.

2 *Murphy v Coffin* (1883) 12 QBD 87, 5 Asp MLC 532n. The contract may provide that time is to commence from an arbitrary point, such as the reporting of the ship at the custom house: see *Horsley Line Ltd v Roechling Bros* 1908 SC 866 (where the ship was reported before she arrived in the harbour). See also PARA 411.

3 *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC; *Brereton v Chapman* (1831) 7 Bing 559; cf *Robertson v Jackson* (1845) 2 CB 412 (where there was a government regulation as to the place of discharge).

4 *EL Oldendorff & Co GmbH v Tradax Export SA, The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, [1973] 2 Lloyd's Rep 285, HL; *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy* [1978] AC 1, [1977] 2 All ER 849, [1977] 2 Lloyd's Rep 301, HL.

5 *EL Oldendorff & Co GmbH v Tradax Export SA, The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, [1973] 2 Lloyd's Rep 285, HL; *Venizelos ANE of Athens v Société Commerciale de Cereales et Financière SA of Zurich, The Prometheus* [1974] 1 All ER 597, [1974] 1 Lloyd's Rep 350.

6 *EL Oldendorff & Co GmbH v Tradax Export SA, The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, [1973] 2 Lloyd's Rep 285, HL.

7 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL; *Brown v Johnson* (1842) 10 M & W 331 (followed in *Tapscott v Balfour* (1872) LR 8 CP 46, 1 Asp MLC 501).

8 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL (where, the dock being named in the contract as the destination, it was held that the consignee was not bound to obtain admittance for the ship); *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC; *Shadforth v Cory* (1863) 1 Mar LC 363, Ex Ch. See, however, *Ashcroft v Crow Orchard Colliery Co* (1874) LR 9 QB 540, 2 Asp MLC 397; *Davies v McVeagh* (1879) 4 Ex D 265, 4 Asp MLC 149, CA (where, however, the ship was admitted into the dock).

9 *Nelson v Dahl* (1879) 12 ChD 568, 4 Asp MLC 172, CA; affd sub nom *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL.

10 *Brown v Johnson* (1842) 10 M & W 331.

11 *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204, 14 Asp MLC 84, CA.

12 *Roland-Linie Schiffahrt GmbH v Spillers Ltd* [1957] 1 QB 109, [1956] 1 All ER 383, [1956] 2 Lloyd's Rep 211 (ship compelled to wait outside the discharging port owing to congestion at dock), following *North River Freighters Ltd v HE President of India* [1956] 1 QB 333, [1956] 1 All ER 50, [1956] 2 Lloyd's Rep 668, CA. See also *Aldebaran Compania Maritima SA Panama v Aussenhandel AG Zurich* [1977] AC 157, [1976] 2 All ER 963, [1976] 2 Lloyd's Rep 359, HL, overruling *Metals and Ropes Co Ltd v Filia Compania Lda, The Vastric* [1966] 2 Lloyd's Rep 219.

13 *Zim Israel Navigation Co Ltd v Tradax Export SA, The Timna* [1970] 2 Lloyd's Rep 409. In the Court of Appeal this aspect of the case was not considered, and the court decided the case on other grounds: see [1971] 2 Lloyd's Rep 91, CA.

14 *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd, The Kyzikos* [1989] AC 1264, [1988] 3 All ER 745, [1989] 1 Lloyd's Rep 1, HL. See also PARA 411.

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#### **524. Where arrival at berth necessary.**

In naming the destination of the ship, the contract may describe a more limited area, such as a quay or quay berth, or a particular part of a port or dock, in which event the ship must actually be at the place named before she can be said to have reached her destination<sup>1</sup>. If, therefore, without any default on the part of the consignee<sup>2</sup>, the ship is unable to reach her berth at once, as, for example, where the berth is already occupied<sup>3</sup> or where the tides are too low to permit her to proceed for the present<sup>4</sup>, the risk of delay falls on the shipowner and not on the consignee<sup>5</sup>, and, if by the custom of the port it is usual to lighten ships after their arrival in the port to enable them to reach their destination, the shipowner must lighten his ship if necessary<sup>6</sup>. The same principle applies if the ship is chartered to a berth 'as ordered' or to a berth which, by express words, the charterer is entitled to name<sup>7</sup>. Provided that he acts reasonably, he may name any berth which complies with the requirements of the contract<sup>8</sup>.

Unless, therefore, the contract expressly requires him to name a vacant berth<sup>9</sup>, the berth named, if otherwise in order, need not be vacant when the ship arrives in the port, and the shipowner is bound, if necessary, to wait for a reasonable time until the berth is free<sup>10</sup>. In this case also the ship has not reached her destination until she has actually reached her berth, the risk of delay in the meanwhile falling on the shipowner<sup>11</sup>. Where, however, the obstruction which causes the delay is of a permanent and not merely of a temporary nature<sup>12</sup>, as, for example, where the berth will not be available until after the lapse of a time which, having regard to the objects of the adventure of both charterer and shipowner, is, as a matter of business, wholly unreasonable<sup>13</sup>, the shipowner is only bound to proceed as near to the berth, whether specified in the contract<sup>14</sup> or named afterwards<sup>15</sup>, as he can safely get<sup>16</sup>. When, by doing this, he has reached a destination which must be deemed as between the parties to be that provided by the contract<sup>17</sup>, he is entitled to require the consignee to take delivery of the cargo from the ship as she lies<sup>18</sup>, if this course is legal and practicable<sup>19</sup>.

Where the charterer is obliged to nominate a safe berth, but there is no warranty that the port is safe, he is not liable for war damage sustained by the ship on her way to the discharging port because the promise that the berth is prospectively safe cannot be broken before the obligation to nominate the berth arises, and that obligation does not arise until the voyage to the port has been concluded<sup>20</sup>.

1 *Strahan v Gabriel* (1879) cited in 12 ChD at 589; *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC; *Bastifell v Lloyd* (1862) 1 H & C 388; *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA.

2 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL; *Milverton Sailing Ship Co Ltd v Cape Town and District Gas Light and Coke Co Ltd* (1897) 2 Com Cas 281; cf *Watson v H Borner & Co Ltd* (1900) 5 Com Cas 377, CA; *Jaques & Co v Wilson* (1890) 7 TLR 119 (where the charterers failed to give proper directions). As to the effect of the consignee's previous engagements see PARA 547.

3 *Strahan v Gabriel* (1879) cited in 12 ChD at 589; *The Cordelia* [1909] P 27, 11 Asp MLC 202.

4 *Bastifell v Lloyd* (1862) 1 H & C 388.

- 5 Where the place of arrival is fixed by custom, it is immaterial that the shipowner is a foreigner unacquainted with the custom: *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC.
- 6 *Brereton v Chapman* (1831) 7 Bing 559.
- 7 *Murphy v Coffin* (1883) 12 QBD 87, 5 Asp MLC 531n, DC (discussing *Davies v McVeagh* (1879) 4 Ex D 265, 4 Asp MLC 149, CA); *Parker v Winlow* (1857) 7 E & B 942; *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA. See also *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204 at 212, 14 Asp MLC 84 at 86, CA, per Scrutton LJ; cf *United States Shipping Board v Frank C Strick & Co Ltd* [1926] AC 545, 17 Asp MLC 40, HL. However, in the absence of an express provision entitling the charterer to name a berth, the shipowner must nevertheless observe the charterer's instructions as to the berth in the named port to which the ship is to be brought to discharge: see *Leonis Steamship Co Ltd v Rank Ltd* at 515.
- 8 *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA; cf *Hull Steam Shipping Co v Lamport and Holt* (1907) 23 TLR 445; *Jaques & Co v Wilson* (1890) 7 TLR 119. Where, however, the charterer has nominated a berth, he cannot afterwards alter it without the consent of the shipowner: *Anglo-Danubian Transport Co Ltd v Ministry of Food* [1949] 2 All ER 1068, 83 Ll L Rep 137; *Batis Maritime Corp v Petroleos del Mediterraneo SA, The Batis* [1990] 1 Lloyd's Rep 345. If he refuses to name any berth at all, the measure of damages is the freight which would have been earned if the cargo had been duly delivered: *Stewart v Rogerson* (1871) LR 6 CP 424.
- 9 *Harris v Jacobs* (1885) 15 QBD 247, 5 Asp MLC 531, CA.
- 10 *Murphy v Coffin* (1883) 12 QBD 87 at 89, 5 Asp MLC 531n, DC, per Mathew J (distinguishing *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 44, 4 Asp MLC 392 at 394, HL, per Lord Blackburn); *The Deerhound* (1901) 9 Asp MLC 189. See also *Pyman Bros v Dreyfus Bros & Co* (1889) 24 QBD 152, 6 Asp MLC 444, DC, per Mathew J.
- 11 *Murphy v Coffin* (1883) 12 QBD 87, 5 Asp MLC 531n, DC; *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA; *Bulman and Dickson v Fenwick & Co* [1894] 1 QBD 179, 7 Asp MLC 388, CA (where the outbreak of a strike did not affect the position, the contract containing a strike clause). See also *Watson v H Borner & Co Ltd* (1900) 5 Com Cas 377, CA.
- 12 Cf PARA 522.
- 13 *Nelson v Dahl* (1879) 12 ChD 568 at 593, 4 Asp MLC 172 at 178, CA, per Brett LJ; approved in *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 60, 4 Asp MLC 392 at 399, HL.
- 14 *Hull Steam Shipping Co v Lamport and Holt* (1907) 23 TLR 445.
- 15 *Allen v Coltart* (1883) 11 QBD 782, 5 Asp MLC 104.
- 16 As to these words see PARA 521.
- 17 See PARA 520.
- 18 *The Argos (Cargo ex), Gaudet v Brown* (1873) LR 5 PC 134 at 160; *Hull Steam Shipping Co v Lamport and Holt* (1907) 23 TLR 445; *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL.
- 19 *Waugh v Morris* (1873) LR 8 QB 202, 1 Asp MLC 573.
- 20 *Atkins International HA v Islamic Republic of Iran Shipping Lines, The APJ Priti* [1987] 2 Lloyd's Rep 37, CA.

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## 525. Proceeding to discharge berth.

On arrival at the port of discharge the ship must proceed to the place of discharge specified in the contract of carriage<sup>1</sup>. The shipowner may be restrained by injunction from discharging elsewhere<sup>2</sup>.

Where the ship is a general ship, the master is entitled to decide the place of discharge, subject to any custom of the port to the contrary<sup>3</sup>; and, where the ship is not under charter, the place of discharge may be chosen by the shipowner or the master. In the case of a chartered ship, the charterer, if he holds the bills of lading or, if not, the bill of lading holders or, in the case of failure to agree, a majority of the bill of lading holders, may choose the place of discharge<sup>4</sup>; but, if they cannot agree, the charterer or possibly the bill of lading holders with the majority interest may choose<sup>5</sup>.

If, however, the usual mode of delivering the particular kind of cargo is to unload a portion of the cargo in one part of the port, and then, when the ship is lightened, to go to another part of the port and there finish the unloading, the shipowner is bound to deliver the cargo in that way<sup>6</sup>.

It may be for the master to make sure of the safety of the berth before proceeding to it<sup>7</sup>. He cannot refuse to go to the chosen place of discharge merely on the ground that it will be more expensive for the shipowner to discharge the cargo there than would otherwise be the case<sup>8</sup>. If he has already gone to another berth, he must shift the ship to the chosen place of discharge, and he is not entitled to make it a condition of his doing so that the person or persons making the nomination is or are to pay any expenses already incurred<sup>9</sup>.

A usual and proper place must be chosen<sup>10</sup>, but, apart from special circumstances, the mere fact that the berth is unsafe and the ship suffers damage does not give the shipowner a remedy against the charterer.

The risk of delay in reaching the actual place or places of delivery falls on the charterer and not on the shipowner, since *ex hypothesi* the ship has already reached her destination, and time has, therefore, begun to run against the charterer<sup>11</sup>.

1 See PARA 520 et seq.

2 *Wood & Co v Atlantic Transport Co Ltd* (1900) 5 Com Cas 121.

3 *The Felix* (1868) LR 2 A & E 273; *George H Ireland & Sons v Southdown Steamship Co Ltd* (1926) 26 Ll L Rep 103; *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204 at 212, 14 Asp MLC 84 at 86, CA.

4 See note 3.

5 *The Felix* (1868) LR 2 A & E 273; *George H Ireland & Sons v Southdown Steamship Co Ltd* (1926) 26 Ll L Rep 103; *Co-operative Wholesale Society Ltd v M & LG Embiricos* (1928) 30 Ll L Rep 315, CA; *Mallozzi v Carapelli SpA* [1975] 1 Lloyd's Rep 229.

6 *Nielsen v Wait* (1885) 16 QBD 67, 5 Asp MLC 553, CA; *Caffarini v Walker* (1876) IR 10 CL 250, Ex Ch; *M'Intosh v Sinclair* (1877) IR 11 CL 456.

7 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245 at 261; *Samuel West Ltd v Wright's (Colchester) Ltd* (1935) 40 Com Cas 186. As to the circumstances in which a warranty may be implied see *The Moorcock* (1889) 14 PD 64, 6 Asp MLC 373, CA; and as to the requirements of a safe berth see *Islander Shipping Enterprises SA v Empresa Maritima del Estado SA, The Khian Sea* [1979] 1 Lloyd's Rep 545, CA.

8 *Holman v Peruvian Nitrate Co* (1878) 5 R 657.

9 *The Felix* (1868) LR 2 A & E 273.

10 *Nielsen v Wait* (1885) 16 QBD 67 at 69, 5 Asp MLC 553 at 555, CA, per Lord Esher MR; *George H Ireland & Sons v Southdown Steamship Co Ltd* (1926) 26 Ll L Rep 103 at 105 per Roche J.

11 *Leonis Steamship Co Ltd v Rank Ltd* [1908] 1 KB 499, CA; *Northfield Steamship Co v Compagnie l'Union des Gaz* [1912] 1 KB 434, 12 Asp MLC 87, CA; *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204, 14 Asp MLC 84, CA. The question may arise whether time lost waiting for a berth is to be added at the beginning or at the end of the lay days, and in *Government of Ceylon v Société Franco-Tunisienne d'Armement Tunis* [1962] 2 QB 416, [1960] 3 All ER 797, sub nom *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis, The Massalia (No 2)* [1960] 2 Lloyd's Rep 352, Diplock J, without assigning a reason, held that it should be added at the end of the lay days.

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## 526. Readiness to discharge.

To be ready to discharge, the ship must not only have reached her destination; she must also have complied with all the legal formalities necessary to enable the discharge to begin<sup>1</sup>. The master must, therefore, have reported the ship and crew, and must have delivered the manifest and other papers to the proper officers<sup>2</sup>. This rule does not, however, apply where the port authorities have already given the ship permission to begin the discharge of her cargo, and the consignee must then be prepared to take delivery at once<sup>3</sup>.

In accordance with the same principle, the mere physical presence of the ship at the place named or indicated in the contract as her destination is not an arrival at her destination so as to bind the consignee to take delivery of the cargo unless she has a legal right to remain there for the purpose of being discharged<sup>4</sup>. Unless the ship is consigned by the terms of the charterparty to a named discharging berth or to a discharging berth 'as ordered', she is not required to be in an immediate state of readiness to discharge on her arrival at the end of the contract voyage, but it is sufficient that she should be free from customs or quarantine restrictions and ready to proceed to the place of discharge so long as, on reaching it, she will be able to discharge at once<sup>5</sup>.

Readiness to discharge means readiness in relation to the cargo of the particular consignee concerned; thus, a ship is not in a state of readiness to discharge a particular cargo if she must first discharge overstowed cargo in order to get access to the particular cargo<sup>6</sup>.

1 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 562. A berthing permit may be required. If it is at the consignee's request that the master fails to comply with the formalities, the consignee is responsible for the delay: *Furnell v Thomas* (1828) 5 Bing 188, DC. The extent of the master's duty depends on the nature of the port: *Bailey v De Arroyave* (1838) 7 Ad & El 919 (where there was no custom house at the port).

2 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 562. The contract may provide that time is to count as soon as this is done: *Horsley Line Ltd v Roebling Bros* 1908 SC 866. 'Reporting day' in a charterparty may refer to a report to the consignees and not to the customs: see *Larrinaga Steamship Co v Green & Co* [1916] 2 IR 126.

3 *Major and Field v Grant* (1902) 7 Com Cas 231; *Cardiff Steamship Co Ltd v Jameson* (1903) 9 Asp MLC 367, DC. The contract may by its terms throw the risk of delay arising out of the necessity of complying with customs formalities onto the consignee: *Cobridge Steamship Co Ltd v Bucknall Steamship Lines Ltd* (1910) 15 Com Cas 138, CA.

4 *Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA.

5 *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204 at 213, 14 Asp MLC 84 at 87, CA, per Scrutton LJ.

6 *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis* [1962] 2 QB 416, [1960] 3 All ER 797, sub nom *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis, The Massalia (No 2)* [1960] 2 Lloyd's Rep 352 (where it was stated that the principle that a vessel is not ready to load until she is discharged in all her holds so as to give the charterer complete control of every part of the vessel available for cargo (see PARA 413) applies also to the discharge of a ship); *Agios Stylianos Compania Naviera SA v Maritime Associates International Ltd Lagos, The Agios Stylianos* [1975] 1 Lloyd's Rep 426 (where a cargo of cement was overstowed by a cargo of vehicles, and it was held that laytime did not begin to run until the cement was accessible). A notice of readiness to discharge cannot take effect until the vessel is ready: see *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis* at 428, 804 and 358.

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### **527. Receiver's duty to discover arrival.**

Apart from special contract<sup>1</sup> or custom or course of dealing<sup>2</sup>, it is the receiver's duty to use due and reasonable diligence to discover when the ship arrives with the cargo on board<sup>3</sup>; and the master is, therefore, under no obligation, in the absence of special contract or custom or course of dealing, to give notice of his arrival or readiness to unload, whether the ship is a general ship<sup>4</sup> or whether she is working under a charterparty<sup>5</sup>. In either case, time begins to run against the receiver as soon as the ship is ready to unload<sup>6</sup>, and it is immaterial that he was ignorant of her arrival<sup>7</sup>. Where, however, his ignorance is attributable to the fault of the shipowner or his agent, any delay occasioned by it falls on the shipowner<sup>8</sup>. The master must not, therefore, mislead the receiver by entering the ship at the custom house under a name so different from her real name that the receiver could not reasonably have identified her as the ship which he was expecting<sup>9</sup>.

The charterparty sometimes provides that the time is to count 'from 24 hours after the receipt of notice of readiness, and the vessel having also been entered at the customs house'<sup>10</sup>. For these purposes, 'entered' means entered on final entry; the filling of a ship's inward entry application is not sufficient<sup>11</sup>.

1 *E Clemens Horst Co v Norfolk and North American Shipping Co Ltd* (1906) 11 Com Cas 141 (where the bill of lading exempted the shipowner from the consequences of failing to give notice); *Forest Steamship Co v Iberian Iron Ore Co* (1899) 9 Asp MLC 1, HL; *Northfield Steamship Co v Compagnie L'Union des Gaz* [1912] 1 KB 434, 12 Asp MLC 87, CA.

2 *Houlder v General Steam Navigation Co* (1862) 3 F & F 170 (where the custom alleged was not proved).

3 *Houlder v General Steam Navigation Co* (1862) 3 F & F 170 at 174 per Cockburn J.

4 *Harman v Clarke* (1815) 4 Camp 159; *Harman v Mant* (1815) 4 Camp 161; *Houlder v General Steam Navigation Co* (1862) 3 F & F 170; *Major and Field v Grant* (1902) 7 Com Cas 231.

5 *Nelson v Dahl* (1879) 12 ChD 568 at 583, 4 Asp MLC 172 at 174, CA, per Brett LJ; affd sub nom *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL.

6 See the cases cited in notes 1, 2; and PARA 526.

7 *Harman v Mant* (1815) 4 Camp 161; *Harman v Clarke* (1815) 4 Camp 159; *Houlder v General Steam Navigation Co* (1862) 3 F & F 170.

8 *Bradley v Goddard* (1863) 3 F & F 638 (where the shipowner failed to address the ship, as provided by the charterparty, to the charterer's agents, who would have notified the consignees). The contract may, however, relieve the shipowner from the consequences of failing to give notice: *E Clemens Horst Co v Norfolk and North American Steam Shipping Co Ltd* (1906) 11 Com Cas 141.

9 *Harman v Clarke* (1815) 4 Camp 159.

10 *NZ Michalos v Food Corp'n of India, The Apollon* [1983] 1 Lloyd's Rep 409; *Food Corp'n of India v Carras Shipping Co Ltd, The Delian Leto* [1983] 2 Lloyd's Rep 496; *President of India v Davenport Marine Panama SA, The Albion* [1987] 2 Lloyd's Rep 365; *President of India v Diamantis Pateras (Hellas) Marine Enterprises Ltd, The Nestor* [1987] 2 Lloyd's Rep 649.

11 *President of India v Davenport Marina Panama SA, The Albion* [1987] 2 Lloyd's Rep 365; *President of India v Diamantis Pateras (Hellas) Marine Enterprises Ltd, The Nestor* [1987] 2 Lloyd's Rep 649.

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## (B) DELIVERY OF THE CARGO

### (a) Person to whom Delivery should be Made

#### 528. Holder of bill of lading.

The person who is entitled to claim delivery of the cargo is the holder of the bill of lading, whether as consignee named in it or as assignee of it under a valid indorsement<sup>1</sup>. If the shipowner delivers the cargo to a person who is not entitled to it without production of the bill of lading, he is responsible to the true owner for the value of the cargo<sup>2</sup>. He is not, however, bound to make delivery unless the bill of lading is produced<sup>3</sup> and any existing liens over the cargo are satisfied<sup>4</sup>. At the same time he may not claim damages for the detention of the ship by reason only of the consignee's failure to present the bill of lading if it is reasonably practicable to land the cargo and reserve his lien, or if a sufficient indemnity is offered by the consignee<sup>5</sup>.

It has been suggested that there are three exceptions to the rule that the goods can be delivered only against presentation of the bill of lading<sup>6</sup>. First, where the bill of lading has been lost or stolen, the master must deliver the goods where it is proved to his reasonable satisfaction both that the person seeking delivery is entitled to possession and what has become of the bill of lading<sup>7</sup>. Secondly, if the master is bound by the law of the place of discharge to deliver without presentation, then again he must so deliver<sup>8</sup>. Thirdly, if a custom of the port of discharge recognised delivery without presentation, then again the master would not be in breach if he delivered in accordance with such a custom.

1 *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 610, 4 Asp MLC 580 at 586, HL, per Lord Blackburn; cf *Brown v Hodgson* (1809) 2 Camp 36; *Gabarron v Kreeft, Kreeft v Thompson* (1875) LR 10 Exch 274, 3 Asp MLC 36. As to the holder of the bill of lading see PARA 333 et seq. A shipper who has paid freight in advance may sue the shipowner if the goods are not delivered in accordance with the bill of lading: *Joseph v Knox* (1813) 3 Camp 320.

2 *Erichsen v Barkworth* (1858) 3 H & N 894, Ex Ch, per Crompton J; *London Joint Stock Bank Ltd v British Amsterdam Maritime Agency Ltd* (1910) 11 Asp MLC 571; *Motis Exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 All ER (Comm) 91, [2000] 1 Lloyd's Rep 211, CA (carrier liable for loss where cargo misdelivered on production of forged bills of lading); see also *Trafigura Beheer BV v Mediterranean Shipping Co SA, The MSC Amsterdam* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622; and cf *Anderson v Clark* (1824) 2 Bing 20; *Strathlorne Steamship Co Ltd v Andrew Weir & Co* (1934) 40 Com Cas 168, CA (where the time charterers were held liable to indemnify the shipowners against the consequences of the master, on their instructions, delivering the cargo without production of bills of lading).

3 *Jesson v Solly* (1811) 4 Taunt 52; *Erichsen v Barkworth* (1858) 3 H & N 894, Ex Ch; *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134 at 159; *The Stettin* (1889) 14 PD 142, 6 Asp MLC 395; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, [1959] 2 Lloyd's Rep 114, PC; *Barclays Bank Ltd v Customs and Excise Comrs* [1963] 1 Lloyd's Rep 81 at 88 per Diplock LJ; *Rambler Cycle Co Ltd v Peninsular and Oriental Steam Navigation Co, Sze Hai Tong Bank Ltd (first third party), Southern Trading Co (second third party)* [1968] 1 Lloyd's Rep 42 (Malaysia Fed Ct); *Kuwait Petroleum Corp v I & D Carriers Ltd, The Houda* [1994] 2 Lloyd's Rep 541, CA. In this case the consignee is not justified in taking possession of the goods by force: *Lucas v Nockells* (1828) 4 Bing 729 at 741, Ex Ch, per Best CJ. As to whether presentation is required where the bill of lading is a straight bill of lading see PARA 364. As to delivery to a holder of the mate's receipt see PARAS 327, 530.

4 *Erichsen v Barkworth* (1858) 3 H & N 894, Ex Ch. As to liens see PARA 551 et seq; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1014 et seq.

5 *Carlberg v Wemyss Coal Co Ltd* 1915 SC 616 (where it was held that there was no absolute unqualified duty at common law on the part of consignees to present bills of lading the moment the ship is ready to discharge under pain of being found liable in damages for the detention of the ship).

6 *Sucre Export SA v Northern Shipping Ltd, The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266.

7 The existence of this exception was doubted by the Court of Appeal in *East West Corp v DKBS 1912 A/S* [2003] EWCA Civ 83, [2003] 2 All ER 700, [2003] 1 Lloyd's Rep 239 and by the commercial court in *East West Corp v DKBS 1912 A/S* [2002] EWHC 83 (Comm), [2002] 1 All ER (Comm) 676, [2002] 2 Lloyd's Rep 182 (affd as above) and *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S* [1999] 1 All ER (Comm) 579, [1999] 1 Lloyd's Rep 837 (affd [2000] 1 All ER (Comm) 91, [2000] 1 Lloyd's Rep 211, CA).

8 See *Sucre Export SA v Northern Shipping Ltd, The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266 at 275.

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## 529. Conflicting claims.

If conflicting claims are made<sup>1</sup> to the cargo, the shipowner must interplead<sup>2</sup>, unless he is prepared to take upon himself the risk of deciding who is the true owner<sup>3</sup>. He is, however, justified in delivering the cargo to the person who produces a bill of lading, and who appears to be the consignee named in it or the assignee of it, provided that he has no notice or knowledge of any defect in that person's title; and it is immaterial that the bill of lading produced purports to be one of a set<sup>4</sup>. In this case the delivery under the bill of lading produced relieves the master from further responsibility<sup>5</sup>. It does not, however, otherwise affect the rights of any other persons who may have a better title to the cargo than the person who took delivery<sup>6</sup>.

A delivery to the person named as consignee in the bill of lading, without requiring the production of the bill of lading, cannot, however, be justified if the consignee is not entitled to claim delivery<sup>7</sup>; but delivery without production to the persons entitled to have the goods delivered to them exhausts the bill of lading so that a subsequent indorsement of the bill after a rightful delivery will not convey a good title to the goods as against the shipowner<sup>8</sup>.

1 It is not necessary that an actual claim should be made; it is probably sufficient if the master is aware of circumstances giving rise to a claim: *Glyn, Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 610, 4 Asp MLC 580 at 586, HL, per Lord Blackburn.

2 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 859. The court does not, however, allow him to interplead where bills of lading for the same goods have been given to different persons who claim adversely: *Victor Söhne v British and African Steam Navigation Co* [1888] WN 84, DC.

3 *Glyn, Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 610, 4 Asp MLC 580 at 586, HL, per Lord Blackburn.

4 *Caldwell v Ball* (1786) 1 Term Rep 205; *The Tigress* (1863) Brown & Lush 38; *Glyn, Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591, 4 Asp MLC 580, HL. As to bills in a set see PARA 334.

5 *Glyn, Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591, 4 Asp MLC 580, HL.

6 *Barber v Meyerstein* (1870) LR 4 HL 317.

7 *The Stettin* (1889) 14 PD 142, 6 Asp MLC 395 (where the goods were made deliverable by the bill of lading to the named consignee or his assigns); *Pirie & Sons v Warden* (1871) 9 M 523; *London Joint Stock Bank Ltd v British Amsterdam Maritime Agency Ltd* (1910) 11 Asp MLC 571; cf *Erichsen v Barkworth* (1858) 3 H & N 894, Ex Ch, per Willes J.

8 *London Joint Stock Bank Ltd v British Amsterdam Maritime Agency Ltd* (1910) 11 Asp MLC 571 at 572, 573 per Channell J.

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### **530. Delivery of goods where no bill of lading is issued.**

Where there is no bill of lading, and the mate's receipt mentions a consignee to whom it is intended that the property is to pass, delivery of the goods on arrival at their destination must be made to that consignee, and not to the original shipper<sup>1</sup>.

1 *Evans v Nichol* (1841) 3 Man & G 614.

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### **531. When carrier's liability for delivery ceases.**

The shipowner remains liable under his contract until he has made delivery to a person entitled to it<sup>1</sup>. A delivery to a wharfinger or to a dock authority is not, in itself, sufficient<sup>2</sup>, unless the contract provides for such delivery<sup>3</sup> or there is a custom to that effect<sup>4</sup>. If, however, no person comes forward to claim the goods, such a delivery may exempt the shipowner from further liability in respect of the goods actually delivered<sup>5</sup>.

A provision in a bill of lading to the effect that the responsibility of the carrier 'shall be deemed to cease absolutely after the goods are discharged' does not enable the carrier to disregard deliberately one of the prime obligations of the contract, namely the obligation to deliver the goods to, or to the order of, the consignee and to no other person<sup>6</sup>.

1 *Abbott's Law of Merchant Ships and Seamen* (14th Edn, 1901) 564. Hence a loss occurring during the discharge, but before the delivery to the consignee is complete, falls on the shipowner: *Avon Steamship Co v Leask & Co* (1890) 18 R 280. The carrier remains liable for any loss arising from the misdelivery of the cargo on the production of forged bills of lading: *Motis Exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 All ER (Comm) 91, [2000] 1 Lloyd's Rep 211, CA. Where the goods are discharged and received into lighters alongside, the master may be bound by custom to take care of the lighters until they are fully laden (*Catley v Wintringham* (1792) Peake 150; and see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 692), but not afterwards (*Robinson v Turpin* (1805) Peake 151n).

2 *Wardell v Mourillyan* (1798) 2 Esp 693; *Bourne v Gatliff* (1844) 11 Cl & Fin 45, HL.

3 *Oliver v Colven* (1879) 27 WR 822, DC; *Borrowman, Phillips & Co v Wilson & Co* (1891) 7 TLR 416, DC; *Pacific Milk Industries (M) Bhd v Koninklijke Java (Royal Interocean Lines) and Federal Shipping and Forwarding Agency, The Straat Cumberland* [1973] 2 Lloyd's Rep 492 (State of Selangor, Kuala Lumpur Sess Ct) (where the clause in the bill of lading stated 'wherever it is compulsory or customary at any port to deliver the cargo to the custom or port authorities ..., delivery so made shall be considered as final delivery').

4 *Petrocochino v Bott* (1874) LR 9 CP 355, 2 Asp MLC 310; *Grange & Co v Taylor* (1904) 9 Asp MLC 559. See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 692.

5 *Meyerstein v Barber* (1866) LR 2 CP 38 at 54 per Willes J (affd (1867) LR 2 CP 661, Ex Ch; on appeal sub nom *Barber v Meyerstein* (1870) LR 4 HL 317); *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL (affg *Hick v Rodocanachi* [1891] 2 QB 626, 7 Asp MLC 97, CA); *Howard v Shepherd* (1850) 9 CB 297; *Chartered Bank of India, Australia and China v British India Steam Navigation Co Ltd* [1909] AC 369, 11 Asp MLC 245, PC (distinguished in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, [1959] 2 Lloyd's Rep 114, PC).

6 *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, [1959] 2 Lloyd's Rep 114, PC.

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### *(b) Method of Discharging the Cargo*

#### **532. Discharge a joint act.**

The discharge of the cargo from the ship is the joint act of the shipowner and the consignee<sup>1</sup>. The shipowner's duty is to get the cargo out of the holds<sup>2</sup> and to deliver it to the consignee<sup>3</sup>, whereas it is the consignee's duty to take delivery of it<sup>4</sup>.

In the absence of any special contract<sup>5</sup>, the extent of their respective obligations in any particular case is regulated by the custom, if any, of the port of discharge<sup>6</sup>.

1 *Petersen v Freebody & Co* [1895] 2 QB 294 at 297, 8 Asp MLC 55 at 56, CA, per Lord Esher MR; *Ford v Cotesworth* (1868) LR 4 QB 127 at 134 per Blackburn J (affd (1870) LR 5 QB 544, Ex Ch); *Budgett & Co v Binnington & Co* [1891] 1 QB 35 at 38, 6 Asp MLC 592 at 594, CA, per Lord Esher MR; *Helios Akt v Ekman & Co* [1897] 2 QB 83 at 86, 8 Asp MLC 244 at 247, CA, per Lord Esher MR; *Langham Steamship Co Ltd v Gallagher* (1911) 12 Asp MLC 109.

2 Cf *The Jaederen* [1892] P 351, 7 Asp MLC 260. On general principles a request, express or implied, made by the shipowner to the charterer for help in getting the cargo out of the hold imports an indemnity against the natural and direct consequences of doing the particular act requested to be done, provided that it was done in good faith and without negligence and was not manifestly unlawful. The indemnity does not, however, include liabilities merely arising from the manner in which the act was done, so that a shipowner who has sought the help of the charterer is not bound to reimburse to the charterer any statutory compensation paid by him to his employee who had been accidentally injured in consequence of the manner in which the help was given: *W Cory & Son Ltd v Lambton and Hetton Collieries Ltd* (1916) 13 Asp MLC 530, CA. Conversely, payments properly made by a shipowner in respect of the charterer's or receiver's share of the work may be recovered as money paid on a request implied by law: *Transoceanica Societa Italiana di Navigazione v HS Shipton & Sons* [1923] 1 KB 31, 16 Asp MLC 85.

3 *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA.

4 *Fowler v Knoop* (1878) 4 QBD 299, 4 Asp MLC 68, CA; *The Clan Macdonald* (1883) 8 PD 178 at 184, 5 Asp MLC 148 at 155 per Hannen P; cf *Houlder v General Steam Navigation Co* (1862) 3 F & F 170. See also PARA 526.

5 *Brenda Steamship Co v Green* [1900] 1 QB 518, 9 Asp MLC 55, CA; and see PARA 534. As to the position where the Hague-Visby Rules apply see PARA 377.

6 *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 613, 4 Asp MLC 302 at 305, HL, per Lord Blackburn; *Norden Steamship Co v Dempsey* (1876) 1 CPD 654, DC; *Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA; *The Jaederen* [1892] P 351 at 359, 7 Asp MLC 260 at 261 per Gorell Barnes J; *Helios Akt v Ekman & Co* [1897] 2 QB 83, 8 Asp MLC 244, CA; *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC (HL) 134. See also PARA 534. As to the liability to pay quay dues for discharge of cargo see *SA Ungherese di Armamenti*

*Marittimo v Hamburg South American Steamship Co* (1912) 12 Asp MLC 228. Cf PARA 474. As to usages of particular ports see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694.

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### 533. Duties apart from term in contract.

For the purpose of performing his part of the discharge, the shipowner must provide suitable tackle and a sufficient number of men<sup>1</sup>. As a general rule the ship's tackle is used<sup>2</sup> and the work is done by the ship's crew<sup>3</sup>. The shipowner is not bound to employ any additional labourers unless the contract fixes the time within which the cargo is to be discharged and the crew cannot complete the discharge in time<sup>4</sup>. The delivery takes place from the ship's tackle over the side of the ship<sup>5</sup>; and the shipowner has performed his obligation when he has put the goods in such a position that the consignee can take delivery of them<sup>6</sup>.

The consignee's part in the joint operation begins when the goods are brought to the ship's rail and placed within his reach; and he, in his turn, must provide the proper appliances and labour for the purpose of performing it<sup>7</sup>. If, therefore, the ship is discharging her cargo afloat, he must provide the necessary lighters and lightermen<sup>8</sup>; if she is discharging onto a quay, he must employ a sufficient number of labourers<sup>9</sup>; and any stowing or stacking which may be required must be done by him, and not by the shipowner<sup>10</sup>.

1 *Hansen v Donaldson & Sons* (1874) 1 R 1066. The shipowner must, therefore, bear any expense necessary for the proper discharge of the cargo, eg the expense of repairing torn bags to prevent leakage of contents: *Leach & Co Ltd v Royal Mail Steam Packet Co* (1910) 11 Asp MLC 587.

2 *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA; *Knight Steamship Co Ltd v Fleming Douglas & Co* (1898) 25 R 1070; cf *Rederi Akt Transatlantic v Board of Trade* (1925) 30 Com Cas 117 (where, owing to the insufficiency of the ship's masts and derricks, it was found necessary to tranship heavy cases of machinery in order to effect delivery).

3 *Ford v Cotesworth* (1868) LR 4 QB 127 at 137 per Blackburn (affd (1870) LR 5 QB 544, Ex Ch); *Hansen v Donaldson & Sons* (1874) 1 R 1066. The regulations of the port of discharge may, however, provide for the discharge being carried out by the employees of the port or dock authority at the shipowner's expense: *The Emilien Marie* (1875) 2 Asp MLC 514; *The Jaederen* [1892] P 351, 7 Asp MLC 260; cf *Dick v Badart* (1883) 10 QBD 387, 5 Asp MLC 49.

4 *Hansen v Donaldson & Sons* (1874) 1 R 1066.

5 *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA.

6 *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA; *British Shipowners' Co v Grimond* (1876) 3 R 668 (followed in *Knight Steamship Co v Fleming Douglas & Co* (1898) 25 R 1070); *Langham Steamship Co Ltd v Gallagher* (1911) 12 Asp MLC 109. Cf *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134 at 161; *Waugh v Morris* (1873) LR 8 QB 202 at 207, 1 Asp MLC 573 at 577 per Blackburn J. The contract may provide that the whole of the discharge is to be at the consignee's risk (*Smackman v General Steam Navigation Co* (1908) 11 Asp MLC 14, DC), or that the shipowner's liability is to cease when the goods are free from the ship's tackle, even though the goods are then handed over to the shipowner's landing agent (*Chartered Bank of India, Australia and China v British India Steam Navigation Co Ltd* [1909] AC 369, 11 Asp MLC 245, PC).

7 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 43, 4 Asp MLC 392 at 394, HL, per Lord Blackburn; *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA; *Budgett & Co v Binnington & Co* [1891] 1 QB 35 at 38, 6 Asp MLC 592 at 594, CA, per Lord Esher MR; *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n at 169n, 4 Asp MLC 118 at 121, CA, per Cotton LJ.

8 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL; *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA; *Helios Akt v Ekman & Co* [1897] 2 QB 83 at 86, 8 Asp MLC 244 at 247, CA, per Lord Esher MR.

9 *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA. The same principles apply where the ship is unable to reach the destination specified in the contract and discharges the cargo as near to it as she can safely get: *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 43, 4 Asp MLC 392 at 394, HL, per Lord Blackburn.

10 Cf *Fletcher v Gillespie* (1826) 3 Bing 635. As to the duties of consignees and stevedores in unloading cargo which may be dangerous to other cargo unless special care is taken see *McKay Massey Harris Pty Ltd v Imperial Chemical Industries of Australia and New Zealand Ltd and United Stevedoring Pty Ltd, The Mahia* (No 2) [1960] 1 Lloyd's Rep 191 (Vict).

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### 534. Special terms or custom as to method of delivery.

The position of the parties may be materially modified by the terms of the contract<sup>1</sup> or by the custom of the port of discharge<sup>2</sup>. Thus, by contract or custom, goods may be delivered to the consignee on the deck of the ship or in the holds<sup>3</sup>; he may be required to do the whole of the unloading, including the discharge of the holds<sup>4</sup>, or, when the cargo is in bulk, such as a grain cargo, he may be required to supply sacks and to provide the necessary labour for filling them, the shipowner's ordinary duty of delivering over the ship's side being resumed after the sacks are filled<sup>5</sup>.

The shipowner's duty may not, however, cease at the ship's side; he may be required to place the goods in the lighter alongside the ship<sup>6</sup> or to deliver them onto the quay<sup>7</sup> without any assistance from the consignee<sup>8</sup>. Where the goods have to be delivered onto the quay, the shipowner must provide, at his own expense, any lighters which may be necessary<sup>9</sup>. He may also be bound to stack the goods, and is not necessarily released by delivering them at the nearest available part of the quay<sup>10</sup>.

1 *Brenda Steamship Co v Green* [1900] 1 QB 518, 9 Asp MLC 55, CA; *Northmoore Steamship Co v Harland and Wolff Ltd* [1903] 2 IR 657; *Kearon v Radford & Co* (1895) 11 TLR 226; *Moore v Harris* (1876) 1 App Cas 318, 3 Asp MLC 173, PC; *Smackman v General Steam Navigation Co* (1908) 11 Asp MLC 14. A stipulation that the ship is to be entitled to commence discharging immediately after arrival does not import a warranty that facilities will be available: *The Coahoma County* [1924] P 95, 16 Asp MLC 342. If the consignee is entitled by the terms of the bill of lading to select the method of discharge, a method must be selected which is available on the arrival of the ship: *The Varing* [1931] P 79, 39 Ll L Rep 205, CA. If the selected method ceases to be available, the consignee's right to insist on discharge by this method also ceases and his right is limited to discharge by a method in fact available: *Fitzgerald v Lona (Owners)* (1932) 18 Asp MLC 364; and see 44 Ll L Rep 212 at 217 per Roche J.

2 *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA; *Petrocochino v Bott* (1874) LR 9 CP 355, 2 Asp MLC 310; *Marzetti v Smith & Son* (1883) 5 Asp MLC 166, CA; *Stephens v Wintringham* (1898) 3 Com Cas 169; cf *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA (where no custom was proved). See also *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC (HL) 134; *Palgrave, Brown & Son Ltd v SS Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL (overruling *Stephens v Wintringham* (1898) 3 Com Cas 169 (where the customary method of discharge at Great Yarmouth was held to be inconsistent with the terms of the contract)); cf *Rederi Aktiebolaget Acolus v WN Hillas & Co* (1926) 96 LjKB 186, 26 Ll L Rep 89; *The Rensfjell* (1924) 18 Ll L Rep 195 (which was applied in *Aktieselskabet Dampskibs Steinstad v Wm Pearson & Co* (1927) 17 Asp MLC 305); *Marcelino Gonzalez y Compania S en C v James Nourse Ltd* [1936] 1 KB 565, 18 Asp MLC 590 (where a well-known practice to land cargo by means of lighters when no berth was available was held consistent with a stipulation in the bill of lading that the cargo should be discharged at a wharf). As to a custom of the port of Hull with regard to delivery up of loose grain or sweepings

by consignees who had received more than their due to consignees who have received less see *Peninsular and Oriental Steam Navigation Co Ltd v H Leetham & Sons Ltd and Keighley, Maxsted & Co* (1915) 32 TLR 153, DC. See also *Samelling A/S v Grain Importers (Eire) Ltd* [1952] 2 All ER 315, [1952] 1 Lloyd's Rep 313 (where a custom of the port relating to the bagging of bulk cargo was held to be supplemental to, and not inconsistent with, the shipowners' normal obligations regarding discharge). As to the position where the Hague-Visby Rules apply see PARA 377.

3 *Kearon v Radford & Co* (1895) 11 TLR 226 (where a custom to that effect was rejected as inconsistent with the contract). In any case he may be given the right to have a representative on board to check the delivery.

4 *Ballantyre & Co v Paton and Hendry* 1912 SC 246 (where the cargo was to be discharged free of expense to the ship, with use of the ship's winch and machinery, if required, and it was held that this provision did not render the charterer responsible for damage caused to the ship during the discharge).

5 *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA; *White v Williams* [1912] AC 814, 12 Asp MLC 208, PC; cf *Dunnage v Jolliffe* (1789) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 565. In *The Aldington Court* [1932] P 21, 41 Ll L Rep 11, the point at issue was whether receivers who had slit bags of wheat to facilitate the discharge might charge shipowners for their share of the stevedoring operations at the rate appropriate to bag cargoes which was higher than the rate for bulk cargoes, and it was held that the cargo came within the meaning of a bag cargo. As to the basis on which the extra expense of discharging optional cargo is calculated see *Woodfield Steam Shipping Co Ltd v Bunge y Born Industrial of Buenos Ayres* (1933) 49 TLR 188, 45 Ll L Rep 14; *Lykiardopulo v Bunge y Born Ltd* [1934] 1 KB 680, 18 Asp MLC 399.

6 *Helios Akt v Ekman & Co* [1897] 2 QB 83, 8 Asp MLC 244, CA; *Glasgow Navigation Co Ltd v Howard Bros & Co* (1910) 11 Asp MLC 376; *Kearon v Radford & Co* (1895) 11 TLR 226; cf *Thiis v Byers* (1876) 1 QBD 244, 3 Asp MLC 147. In *Friedlander v Shaw, Savill and Albion Co* (1897) 2 Com Cas 124, it was held that the shipowner had no right to demand from the lighterman, as a condition of allowing him to take the goods away, a receipt showing that the goods delivered corresponded to marks and numbers with those specified in the bill of lading. In *JH Vavasour & Co Ltd v Port of London Authority* (1921) 6 Ll L Rep 192, CA, it was held that the consignee had no claim for substantial damages against the Port of London Authority as employers of the lighterman by reason of his having given a receipt which was inaccurate as to marks.

7 *The Anna* (1901) 18 TLR 25, DC; cf *Eastern Counties Farmers' Co-operative Association Ltd v Newhouse & Co* (1916) 13 Asp MLC 449.

8 By the custom of the Port of London the shipowner, in the case of a cargo of lumber, is under an obligation to do the whole work of discharging and stowing in craft sent alongside by the receiver: *Smith, Hogg & Co Ltd v Louis Bamberger & Sons* [1929] 1 KB 150, 31 Ll L Rep 203, CA; *Brewster & Co (Woking) Ltd v Beckett* (1929) 34 Ll L Rep 337.

9 *Scrutton v Childs* (1877) 3 Asp MLC 373, DC. If the goods have to be removed from the quay in lighters, the shipowner may be bound to put them into the lighters: *Marzetti v Smith & Son* (1883) 5 Asp MLC 166, CA. As to the liability of the lighterman see *Tamvaco & Co v Timothy and Green* (1882) Cab & El 1. Where the shipowner is authorised to discharge into 'craft' in the Thames, he may put the cargo into sailing barges if lighters and dumb barges are not available: *United States Shipping Board v Vigers Bros* (1924) 41 TLR 26, 20 Ll L Rep 62.

10 *Cardiff Steamship Co Ltd v Jameson* (1903) 9 Asp MLC 367; *Stephens v Wintringham* (1898) 3 Com Cas 169; *Palgrave, Brown & Sons Ltd v Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL.

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### **535. Delivery alongside ship at consignee's risk and expense.**

It is often an express term of the contract that the consignee is to take the goods from 'alongside' the ship at his own risk and expense. This term merely puts into words what would otherwise be implied, namely that the goods are to be delivered from the ship's tackle at the side of the ship<sup>1</sup>, but its effect is to exclude any custom of the port which is inconsistent with

delivery at the side of the ship<sup>2</sup>, as the parties have defined their intention in the contract<sup>3</sup>. Any such contradictory custom is equally excluded by such an express term, even though the contract further provides that the cargo is to be discharged in accordance with the custom of the port<sup>4</sup>. If, therefore, the ship is to be 'unloaded afloat', a custom requiring the shipowner to pay for lightering the goods to the shore must be rejected<sup>5</sup>; and, if through lack of water the ship is unable to come alongside the quay, the shipowner cannot be required, in accordance with the custom of the port in such cases, to provide labourers to carry the goods ashore and deliver them onto the quay<sup>6</sup>, or to construct staging to bridge the gap between the ship's rail and the quay<sup>7</sup>. Similarly, he is not bound by a custom which imposes on the shipowner other duties in addition to the delivery; thus, where there is a timber cargo, and, by the custom, delivery does not take place when the logs are placed in the water alongside but after they have been chained together into rafts and officially measured, an express term as to delivery 'alongside' excludes the custom, and the consignee must, therefore, bear the expense of rafting<sup>8</sup>.

A custom which merely regulates the manner of delivery, and which does not impose on the shipowner any fresh obligation but defines the extent of his share in the joint operation of discharging the cargo, binds the shipowner, however, if it is not inconsistent with delivery alongside<sup>9</sup>. Thus, if the goods have to be delivered into lighters, the shipowner may be bound, by the custom, to place them in the lighters and not merely to put them within reach of the consignee's men<sup>10</sup>; if the goods have to be delivered onto a quay, he may be bound to place them on the quay and to stack them there<sup>11</sup>. A custom of this kind does not, however, bind the shipowner where the contract by its terms expressly excludes the customs of the port<sup>12</sup>.

1 *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134 at 161; *The Nifa* [1892] P 411, 7 Asp MLC 324; and see PARA 533.

2 *The Nifa* [1892] P 411, 7 Asp MLC 324 (doubting *Scrutton v Childs* (1877) 3 Asp MLC 373, DC); *Northmoore Steamship Co v Harland and Wolff Ltd* [1903] 2 IR 657; *Knight Steamship Co Ltd v Fleming Douglas & Co* (1898) 25 R 1070; *Palgrave, Brown & Son Ltd v Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL. As to usages of particular ports see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694.

3 See PARA 225.

4 *The Nifa* [1892] P 411, 7 Asp MLC 324; *Northmoore Steamship Co v Harland and Wolff Ltd* [1903] 2 IR 657 (where the charterparty provided that the custom of each port was to be observed in all cases where not specially expressed). See also *Holman v Wade* (1877) Times, 11 May, CA; *The Rensfjell* (1924) 18 LI L Rep 195.

5 *Hayton v Irwin* (1879) 5 CPD 130, 4 Asp MLC 212, CA.

6 *The Nifa* [1892] P 411, 7 Asp MLC 324.

7 *Palgrave, Brown & Son Ltd v Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL. The test is whether the customary incident sought to be introduced would, if expressed in the written contract, make it meaningless or inconsistent: *Palgrave, Brown & Son Ltd v Turid (Owners)*; and see *Humfrey v Dale* (1857) 7 E & B 266. See also eg *Smith, Hogg & Co Ltd v Louis Bamberger & Sons* [1929] 1 KB 150, 31 LI L Rep 203, CA (where a customary duty to stack timber on the quay was held consistent with a receiver's obligation to take delivery from 'alongside'); *Dampskip Selskab Svendborg v London Midland and Scottish Rly Co* [1930] 1 KB 83, 18 Asp MLC 27, CA (where a provision that any work done by the ship beyond delivery within reach of shore crane tackle should be paid for by the consignee limited the area within which an obligation to discharge into wagons was operative, but did not cast on the consignee the cost of manoeuvring the cargo into the wagon and releasing the sling). See also *Aktieselskabet Dampsskibsselskabet Primula v George Horsley & Co Ltd* (1923) 40 TLR 11; *Dalglish Steam Shipping Co Ltd v James Williamson & Son* (1935) 52 LI L Rep 87, CA.

8 *Northmoore Steamship Co v Harland and Wolff* [1903] 2 IR 657.

9 *The Nifa* [1892] P 411 at 417, 7 Asp MLC 324 at 325 per Jeune P; *Helios Akt v Ekman & Co* [1897] 2 QB 83 at 89, 8 Asp MLC 244 at 247, CA, per Lord Esher MR.

10 *Helios Akt v Ekman & Co* [1897] 2 QB 83, 8 Asp MLC 244, CA; *Glasgow Navigation Co Ltd v Howard Bros & Co* (1910) 11 Asp MLC 376; *Smith, Hogg & Co Ltd v Louis Bamberger & Sons* [1929] 1 KB 150, 31 LI L Rep 203, CA.

11 *Stephens v Wintringham* (1898) 3 Com Cas 169; cf *Cardiff Steamship Co Ltd v Jameson* (1903) 9 Asp MLC 367, DC. See also *Palgrave, Brown & Son Ltd v Turid (Owners)* [1922] 1 AC 397, sub nom *The Turid* 15 Asp MLC 538, HL, overruling *Stephens v Wintringham*.

12 *Brenda Steamship Co v Green* [1900] 1 QB 518, 9 Asp MLC 55, CA.

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### 536. Alternative methods of delivery.

Where alternative methods of delivery are available, as, for example, where the goods may either be landed on a wharf or be delivered into lighters alongside without first landing them on the wharf, the consignee is, apart from custom<sup>1</sup>, entitled to select whichever method he pleases<sup>2</sup>, and the shipowner may not decline to comply with his wishes on the ground that another method of delivery would be less expensive<sup>3</sup> or more convenient<sup>4</sup> to himself. If, therefore, the consignee asks for his goods to be delivered into lighters, they must be so delivered<sup>5</sup>. The shipowner is not entitled to require, as a condition of delivering the goods into lighters, that the consignee contribute towards the wharfage dues payable by the ship<sup>6</sup>; and, if they are actually landed on the wharf against the wish of the consignee, the shipowner must indemnify him against any wharfage dues to which the goods may have become liable in consequence of being so landed<sup>7</sup>.

There may, however, be a custom of the port of discharge by which goods are not directly discharged into lighters, but are first landed on the wharf and thence removed into the lighters<sup>8</sup>. In such circumstances the custom may require the wharfage dues payable in respect of the goods to be paid by the shipowner<sup>9</sup>. If, however, the custom requires the consignee to pay them, he cannot claim to be indemnified against them by the shipowner, and it is immaterial that he had insisted on his goods being discharged direct into lighters<sup>10</sup>.

1 See PARAS 545-547.

2 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 564, 565.

3 *Bishop v Ware* (1813) 3 Camp 360.

4 *Syeds v Hay* (1791) 4 Term Rep 260.

5 *Bishop v Ware* (1813) 3 Camp 360; *Syeds v Hay* (1791) 4 Term Rep 260. As to quay dues and port charges see *SA Ungherese di Armamenti Marittimo v Hamburg South American Steamship Co* (1912) 12 Asp MLC 228.

6 *Bishop v Ware* (1813) 3 Camp 360.

7 *Syeds v Hay* (1791) 4 Term Rep 260.

8 *Petrocochino v Bott* (1874) LR 9 CP 355, 2 Asp MLC 310; *Marzetti v Smith & Son* (1883) 5 Asp MLC 166, CA. See also **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694.

9 *Petrocochino v Bott* (1874) LR 9 CP 355, 2 Asp MLC 310. By the terms of his contract, the shipowner may require the consignee to pay them: see eg the clause known as 'the London clause', which was held in *Produce Brokers Co Ltd v Furness, Withy & Co Ltd* (1912) 12 Asp MLC 188 not to apply when the ship discharged at a riverside wharf and not in dock.

10 *Marzetti v Smith & Son* (1883) 5 Asp MLC 166, CA.

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### 537. Sorting different consignments.

Where the cargo is composed of goods consigned to different consignees, it is the shipowner's duty to deliver to each his proper goods<sup>1</sup>. Thus, where goods of the same description are shipped under different bills of lading, the shipowner must appropriate the correct quantity to be delivered under each bill of lading<sup>2</sup>; and, if the various consignments are distinguished by different marks, he must sort them accordingly<sup>3</sup>. Where the marks become obliterated during the voyage so that it is no longer possible to identify the several consignments, either wholly or in part, the shipowner must deliver to each consignee such portion of the goods as may remain identifiable and, therefore, specifically deliverable; but he is not entitled, as of right, to apportion the mass which cannot be identified between the different consignees<sup>4</sup>; and, in so far as he is not in a position to deliver to each his proper goods, he is guilty of a breach of contract, for which he is liable in damages unless excused by the terms of the contract<sup>5</sup>. The consignees may, however, elect to accept delivery, although the goods are incapable of identification; they then become tenants in common of the unidentified goods, the share of each being in the proportion which the quantity shipped by his consignor bears to the whole quantity shipped, and the shipowner is relieved pro tanto from his liability<sup>6</sup>.

Where, however, the goods are shipped in bulk, and not in separate parcels, different bills of lading being given for undivided portions of the bulk, the shipowner is not bound, if the cargo arrives in a damaged condition, to apportion the damaged goods between the different bills of lading so as to deliver to each consignee the correct amount of sound and damaged goods falling to his share<sup>7</sup>.

Where goods of different kinds are shipped in one parcel under a general description and one bill of lading is given for them all, then, in the absence of any custom to that effect at the port of discharge, the shipowner is not bound to sort the various items making up the parcel, but may deliver them in a mass as they come to hand<sup>8</sup>.

1 *Grange & Co v Taylor* (1904) 9 Asp MLC 559 per Bigham J; cf *Hogarth & Sons v Leith Cotton Seed Oil Co* 1909 SC 955. As to the effect of the description in the bill of lading see PARA 257.

2 *Bradley v Dunipace* (1862) 1 H & C 521, Ex Ch; *The Emilian Marie* (1875) 2 Asp MLC 514; *Montgomery v Hutchins* (1905) 10 Asp MLC 223. As to the effect of a statement as to quantity in the bill of lading see PARAS 316-317.

3 Cf *Elder, Dempster & Co v Dunn & Co* (1909) 11 Asp MLC 337, HL. A delivery of goods wrongly marked is, however, a good delivery where their identity is clear: *Parsons v New Zealand Shipping Co* [1901] 1 KB 548, 9 Asp MLC 170, CA (where no goods were shipped under the marks described in the bill of lading).

4 *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680, 12 Asp MLC 437, HL (distinguishing *Spence v Union Marine Insurance Co Ltd* (1868) LR 3 CP 427, and *Smurthwaite v Hannay* [1894] AC 494 at 505, 7 Asp MLC 485 at 489, HL). In *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* the whole of the goods shipped did not arrive, and it was impossible to say whether the goods of any particular consignee were amongst the unidentifiable portion which arrived or amongst those which were lost. Different considerations may perhaps apply when the whole of the goods shipped arrive, since they all clearly belong to one or other of the consignees, though identification is impossible (see at 689 and at 439 per Lord Loreburn and at 691 and at 440 per Lord Shaw of Dunfermline); but no definite opinion was expressed, except by Lord Moulton (see at 696, 697 and at 442) who held that the shipowner did not perform his duty unless he delivered the specific goods to which each consignee is entitled.

5 *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680, 12 Asp MLC 437, HL (where it was held that a condition exempting the shipowner from responsibility for obliteration of marks did not apply, as the whole of the goods shipped had not arrived). This decision was applied in *Spalding and Valentine Ltd v British India Steam Navigation Co Ltd* 1927 SC 103 (where a bill of lading holder claimed for short delivery of three bales of jute; the ship had discharged 73 bales on which the marks were unidentifiable owing to sweat damage and 15 bales which bore marks which did not appear on any bill of lading; the shipowners, relying on an exception of 'obliteration of marks' and 'sweat', contended that the pursuers were bound to accept delivery of three of the unidentifiable bales; it was held that this contention failed as the shipowners had not negated the possibility that three bales had been misdelivered to other consignees in lieu of three of the 15 bales). See also *Indian Oil Corp'n Ltd v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345, [1987] 3 All ER 893, [1987] 2 Lloyd's Rep 286 (cargoes of oil wrongfully mixed; plaintiffs entitled to quantity equal to their contribution and damages for loss in quality or otherwise).

6 *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680, 12 Asp MLC 437, HL; explaining *Spence v Union Marine Insurance Co Ltd* (1868) LR 3 CP 427 and *Smurthwaite v Hannay* [1894] AC 494 at 505, 7 Asp MLC 485 at 488, HL, per Lord Russell of Killowen; *Indian Oil Corp'n Ltd v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345, [1987] 3 All ER 893, [1987] 2 Lloyd's Rep 286 (cargoes of oil wrongfully mixed). See also *Gill and Duffus (Liverpool) Ltd v Scruttons Ltd* [1953] 2 All ER 977, [1953] 1 WLR 1047, [1953] 2 Lloyd's Rep 545 (master porter's duty to apportion unidentifiable cargo). See further **BAILMENT** vol 3(1) (2005 Reissue) PARA 38.

7 *Grange & Co v Taylor* (1904) 9 Asp MLC 559 (where a provision in the various bills of lading that each bill of lading was to bear its proportion of shortage and damage was held only to regulate the rights of the bill of lading holders among themselves).

8 *Clacevich v Hutcheson & Co* (1887) 15 R 11; cf *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245; *Hogarth & Sons v Leith Cotton Seed Oil Co* 1909 SC 955.

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### *(c) Time within which Delivery must Take Place*

#### **538. Consignee's duties.**

The consignee is not entitled to keep the ship waiting for an indefinite period until he chooses to come forward and claim his cargo; he must take delivery within the period fixed by the terms of the contract<sup>1</sup> or ascertainable by reference to those terms and the surrounding circumstances<sup>2</sup>. If the consignee fails or refuses to take delivery within that period, the shipowner is entitled to land and warehouse the cargo, or to deal with it otherwise, as may seem most expedient<sup>3</sup>; and, if owing to the rate at which the consignee takes delivery the ship is detained for a further period, the shipowner acquires the right to claim demurrage or damages for detention, as the case may be<sup>4</sup>. The shipowner must, however, himself be in a position to perform his own part of the obligation; otherwise his rights against the consignee do not arise until he is in a position to do so<sup>5</sup>.

1 See PARA 539.

2 See PARA 542.

3 See PARA 548.

4 See PARA 289 et seq.

5 *Tharsis Sulphur and Copper Co Ltd v Morel Bros & Co* [1891] 2 QB 647, 7 Asp MLC 106, CA; *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL. See also PARA 515.

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### **539. When time is fixed by the contract.**

Where the contract fixes the time within which the discharge of the cargo is to take place<sup>1</sup>, the consignee's obligation to accept delivery within that time is absolute and unconditional<sup>2</sup>. If, therefore, the unloading of the ship is delayed, he has failed to perform this obligation, and, except where he has some lawful excuse, he is liable to pay demurrage or damages for detention in respect of the period during which the ship is thereby delayed<sup>3</sup>.

1 The time may be fixed either by express terms or by reference to a given rate of discharge: see PARA 285. Where the contract entitles the consignee to choose between alternative methods of discharge and, after discharge has begun by the method chosen, it becomes impossible to continue discharge by this method, he must complete the discharge by any of the other methods which is practicable and will be liable for demurrage if he fails to do so: *Rederiaktiebolaget Macedonia v Slaughter* (1935) 52 Ll L Rep 4, CA, explaining *Fitzgerald v Lona (Owners)* (1932) 44 Ll L Rep 212. It is no answer to a claim for demurrage in such a case that by a custom of the port the shipowner might himself have discharged by a method other than that chosen by the receiver: *Rederiaktiebolaget Macedonia v Slaughter*. Any such stipulation applies only to the ports to which it relates and not to any others: *Marshall v De la Torre* (1795) 1 Esp 367; *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch.

2 *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 608, 4 Asp MLC 302 at 304, HL, per Lord Selborne LC; *Ford v Cotesworth* (1868) LR 4 QB 127 at 136 per Blackburn J (citing *Randall v Lynch* (1810) 12 East 179; and Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 372); *Porteus v Watney* (1878) 3 QBD 534, 4 Asp MLC 34, CA; *Thiis v Byers* (1876) 1 QBD 244, 3 Asp MLC 147; *Leer v Yates* (1811) 3 Taunt 387; *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA; *Bessey v Evans* (1815) 4 Camp 131; *The Anna* (1901) 18 TLR 25, DC.

3 See PARA 289 et seq.

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### **540. Where consignee is excused for delay.**

The consignee is excused for his failure to take delivery of his cargo within the time fixed by the contract in two cases only.

The consignee may be so excused where the delay is attributable to the negligence or default of the shipowner or of persons for whom he is responsible<sup>1</sup>. Thus, the shipowner has no claim against the consignee where the shipowner wrongfully refuses to deliver the cargo<sup>2</sup>, or where the delay is occasioned by his failure to provide a sufficient number of men<sup>3</sup>, and his consequent inability to perform his part of the unloading within the required time<sup>4</sup>, or by some other cause for which he is responsible<sup>5</sup>. There must, however, be some default on the part of the shipowner<sup>6</sup>; if the cause of the delay is beyond the shipowner's control, the consignee is responsible, even if the delay is attributable to the shipowner's inability to perform his part of the contract<sup>7</sup>. The consignee's obligation is absolute, whereas the shipowner's obligation is merely that he will not by his default prevent the consignee from performing his own part of the contract<sup>8</sup>. It is, therefore, immaterial whether the shipowner's inability is due to some

physical misfortune, such as bad weather interrupting the discharge<sup>9</sup>, or to the act of third persons over whom he has no control, such as a strike of dock labourers<sup>10</sup>. In accordance with the same principle there is no default on the part of a shipowner who lawfully withholds delivery in the rightful exercise of his lien<sup>11</sup>, and the consignee is responsible for any delay occasioned by it<sup>12</sup>.

The consignee may also be excused for delay where the cause of the delay is covered by an exception in the contract<sup>13</sup>. The effect of an exception is merely to suspend the consignee's obligation whilst the excepted cause is in operation<sup>14</sup>; it does not protect him against the consequences of his own default<sup>15</sup>. Thus, where the contract contains a strike clause<sup>16</sup>, and a strike breaks out during the unloading, the consignee is excused in so far as the unloading is delayed by the strike, but no further<sup>17</sup>; but the clause may be so framed as to apply only if the strike arose before the ship came on demurrage<sup>18</sup>, or may apply only if the strike did not arise while the ship was on demurrage<sup>19</sup>.

1 *Straker v Kidd & Co* (1878) 3 QBD 223 at 226, 4 Asp MLC 34n at 35n per Lush J; *Porteus v Watney* (1878) 3 QBD 534 at 543, 4 Asp MLC 34 at 38, CA, per Brett LJ; *Budgett & Co v Binnington & Co* [1891] 1 QB 35 at 38, 6 Asp MLC 592 at 594, CA, per Lord Esher MR (applied in *Jenneson, Taylor & Co v Secretary of State for India in Council* [1916] 2 KB 702, 14 Asp MLC 4).

2 *Budgett & Co v Binnington & Co* [1891] 1 QB 35 at 38, 6 Asp MLC 592 at 594, CA, per Lord Esher MR (doubting whether the shipowner would be responsible if the crew refused to work); *Benson v Blunt* (1841) 1 QB 870; cf *Helios Akt v Ekman & Co* [1897] 2 QB 83, 8 Asp MLC 244, CA.

3 *Petersen v Freebody & Co* [1895] 2 QB 294, 8 Asp MLC 55, CA.

4 *Hansen v Donaldson & Sons* (1874) 1 R 1066 (where the consignee also was held liable for a portion of the delay).

5 *Bradley v Goddard* (1863) 3 F & F 638 (where the shipowner failed to address the ship to the charterer's agent, as required by the contract, and the consignee, in consequence, did not receive notice of the ship's arrival).

6 The consignee cannot rely on any default of the shipowner if he himself caused it: *Furnell v Thomas* (1828) 5 Bing 188, DC. Delay caused through the necessity of taking in ballast during the discharge to stiffen the ship is not attributable to the shipowner as a default: *Houlder v Weir* [1905] 2 KB 267, 10 Asp MLC 81. The fact that one bill of lading gives a longer time for discharge than another does not of itself justify the consignee under the latter in contending that he has been prevented from taking delivery in due time by the default of the shipowner. To make good this contention he must show that he would have completed delivery in due time but for the provisions in the former bill of lading: *United States Shipping Board v R Durrell & Co Ltd* [1923] 2 KB 739, 16 Asp MLC 216, CA; after further hearing (1924) 29 Com Cas 157, CA.

7 *Thiis v Byers* (1876) 1 QBD 244, 3 Asp MLC 147; *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA; *Northfield Steamship Co v Compagnie l'Union des Gaz* [1912] 1 KB 434, 12 Asp MLC 87, CA.

8 *Budgett & Co v Binnington & Co* [1891] 1 QB 35 at 40, 6 Asp MLC 592 at 595, CA, per Lindley LJ.

9 *Thiis v Byers* (1876) 1 QBD 244, 3 Asp MLC 147.

10 *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA. Where the contract provides for discharge at a fixed rate (which is equivalent to a fixed time) 'always provided that the ship can load and discharge at this rate', the proviso refers to the capacity and equipment of the ship and not to matters such as shortage of labour over which the shipowner has no control: *William Alexander & Sons v Aktieselskabet Dampskibet Hansa* [1920] AC 88, 14 Asp MLC 493, HL (approving *Northfield Steamship Co v Compagnie l'Union des Gaz* [1912] 1 KB 434, 12 Asp MLC 87, CA, and distinguishing *Hansen v Donaldson & Sons* (1874) 1 R 1066). Cf *Castlegate Steamship Co Ltd v Dempsey* [1892] 1 QB 854, 7 Asp MLC 186, CA (where no time was fixed and consequently the consignee was excused).

11 *Lyle Shipping Co v Cardiff Corpn* [1900] 2 QB 638, 9 Asp MLC 128, CA. See, however, *Thorsen v McDavall and Neilson, The Theodor Korner* (1892) 19 R 743 (where it was held that the cargo might have been landed subject to the lien).

12 *Lyle Shipping Co v Cardiff Corpn* [1900] 2 QB 638, 9 Asp MLC 128, CA.

13 The exception equally applies where it operates only at the particular berth to which the ship is ordered, although she might have been ordered elsewhere: *Bulman and Dickson v Fenwick & Co* [1894] 1 QB 179, 7 Asp MLC 388, CA.

14 Effect must be given to the exception, even if framed in wide terms; it cannot be struck out of the contract as inconsistent with the obligation to discharge within a fixed time: *Aktieselskabet Argentina v Von Laer* (1903) 20 TLR 9, CA.

15 *Elswick Steamship Co Ltd v Montaldi* [1907] 1 KB 626, 10 Asp MLC 456; *Turnbull, Scott & Co v Cruickshank & Co* (1904) 7 F 265; cf *Milverton Sailing Ship Co Ltd v Cape Town and District Gas Light and Coke Co* (1897) 2 Com Cas 281.

16 As to the scope of a strike clause see *Granite City Steamship Co v Ireland & Son* (1891) 19 R 124; *Mudie & Co v Strick* (1909) 11 Asp MLC 235; *Horsley Line Ltd v Roechling Bros* 1908 SC 866; *France, Fenwick & Co Ltd v Philip Spackman & Sons* (1912) 12 Asp MLC 289. See also PARA 299.

17 *Elswick Steamship Co Ltd v Montaldi* [1907] 1 KB 626, 10 Asp MLC 456; *Moor Line Ltd v Distillers Co Ltd* 1912 SC 514; *London and Northern Steamship Co Ltd v Central Argentine Rly Ltd* (1913) 12 Asp MLC 303, approved and applied in *Central Argentine Rly Ltd v Marwood* [1915] AC 981, 13 Asp MLC 153, HL (where all berths were occupied by other ships which were only able to discharge at much less than the usual rate owing to a strike; but they did succeed in discharging an amount of cargo equivalent to six and a quarter days' normal working; it was held that those six and a quarter days must be reckoned as part of the lay days, although the plaintiff's ship could not get a berth during them, on the ground that during those days the ship's entry into berth was being brought nearer and time was, therefore, being gained, not lost, notwithstanding the strike); cf *Westoll v Lindsay* 1916 SC 782 (where the strike had ended before the ship's arrival, but owing to the congestion caused by the strike she could not get a berth; it was held that the days during which she was waiting for a berth counted against the consignee notwithstanding the strike clause); *Moor Line Ltd v Distillers Co Ltd* 1912 SC 514, was distinguished on the ground that in that case the ship was in berth during the material time. Lord Johnston seems to have thought that the last-named decision was overruled by *Central Argentine Rly Ltd v Marwood* [1915] AC 981, 13 Asp MLC 153, HL, but it was accepted as good law in *Compania Naviera Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, [1962] 2 Lloyd's Rep 175, HL.

18 *Mudie & Co v Strick* (1909) 11 Asp MLC 235; *London and Northern Steamship Co Ltd v Central Argentine Rly Ltd* (1913) 12 Asp MLC 303.

19 *Compania Naviera Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, sub nom *Union of India v Compania Naviera Aeolus SA* [1962] 2 Lloyd's Rep 175, HL; and see PARAS 431-432.

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#### **541. Consignee's duty otherwise absolute.**

Except where the consignee is excused from liability for delay<sup>1</sup>, the cause of the delay may be disregarded<sup>2</sup>, and the consignee is equally liable whether the delay is attributable to his own act or default<sup>3</sup> or is attributable wholly to circumstances beyond his control<sup>4</sup>. He cannot, therefore, escape liability on the ground that he was unable to procure a discharging berth owing to the other shipping already awaiting discharge<sup>5</sup>; or that he was prevented by a strike from engaging labourers to discharge the ship<sup>6</sup>, or from obtaining railway wagons into which to discharge the cargo<sup>7</sup>; or that it was impossible to unload the cargo in time on account of bad weather<sup>8</sup>; or that the landing of the cargo was prohibited by the orders, lawful<sup>9</sup> or unlawful<sup>10</sup>, of the port authorities; nor can the absolute nature of the consignee's engagement be modified in any way by a custom of the port of discharge which is not consistent with the terms in which the obligation is expressed<sup>11</sup>. If, however, the cargo to which the contractual obligation of discharging applies is overstowed with other cargo, it seems that lay time will not begin to run until all the underlying cargo is accessible<sup>12</sup>.

- 1 See PARA 540.
- 2 See *Houlder v Weir* [1905] 2 KB 267, 10 Asp MLC 81 (where the delay was due to the necessity for stiffening the ship during the discharge).
- 3 *Helios Akt v Ekman & Co* [1897] 2 QB 83 at 86, 8 Asp MLC 244 at 247, CA, per Lord Esher MR; cf *Hansen v Donaldson & Sons* (1874) 1 R 1066 (where the shipowner and the consignee were each held responsible for different periods of delay); *Struck v Tenant* (1806) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 372.
- 4 See the cases cited in notes 5-10.
- 5 *Randall v Lynch* (1809) 2 Camp 352; *Watson Bros v Mysore Manganese Co Ltd* (1910) 11 Asp MLC 364.
- 6 *Hick v Raymond and Reid* [1893] AC 22 at 28, 7 Asp MLC 233 at 234, HL, per Lord Herschell LC; *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA; cf *The Fox, Thomas Walker & Co v Horlock* (1913) 30 TLR 58. See also *Hibernian Steamship Co Ltd v Suttons Ltd* (1912) 47 ILT 39.
- 7 *Granite City Steamship Co Ltd v Ireland & Son* (1891) 19 R 124.
- 8 *Thiis v Byers* (1876) 1 QBD 244, 3 Asp MLC 147; *Holman v Peruvian Nitrate Co* (1878) 5 R 657.
- 9 *Waugh v Morris* (1873) LR 8 QB 202, 1 Asp MLC 573 (where the cargo was ultimately discharged without a violation of the law); cf *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519 (where no demurrage was incurred); *Hill v Idle* (1815) 4 Camp 327.
- 10 *Bessey v Evans* (1815) 4 Camp 131.
- 11 *Bennetts & Co v Brown* [1908] 1 KB 490, 11 Asp MLC 10; *Holman v Peruvian Nitrate Co* (1878) 5 R 657.
- 12 *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis* [1962] 2 QB 416, [1960] 3 All ER 797, sub nom *Government of Ceylon v Société Franco-Tunisienne d'Armement-Tunis, The Massalia (No 2)* [1960] 2 Lloyd's Rep 352 (cited in PARA 526 note 6), where Diplock J at 425, 426, 802 and 357 declined to follow obiter dicta of Lush J in *Straker v Kidd* (1878) 3 QBD 223 at 225 and regarded that case and *Porteus v Watney* (1878) 3 QBD 223 (affd 3 QBD 534, 4 Asp MLC 34, CA) as cases of the proper construction of the bills of lading, which laid down no general principle of law, and held that, on the true construction of the charterparty in the case before him, readiness to discharge the cargo meant the particular cargo concerned and not a cargo overstowed over that cargo. See also *Leer v Yates* (1811) 3 Taunt 387; *Rogers v Hunter* (1827) Mood & M 63; *Harman v Gandolph* (1815) Holt NP 35; contra *Dobson v Droop* (1830) Mood & M 441. Cf *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482.

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#### 542. Where no time is fixed.

Where the contract does not fix any particular time within which the discharge is to take place<sup>1</sup>, the consignee's obligation is to take delivery of the cargo within a reasonable time<sup>2</sup>. In considering the question what is a reasonable time, all the circumstances of the particular case, from the arrival of the ship to the completion of the unloading, must be taken into account<sup>3</sup>; it is not sufficient to ascertain what would be a reasonable time in ordinary circumstances<sup>4</sup>, as there is no such thing as a reasonable time in the abstract, and the answer to the question must necessarily depend on the particular circumstances<sup>5</sup>. The extent of the consignee's obligation is, therefore, to be measured not by reference only to the usual time according to the practice of the port<sup>6</sup>, but by reference to the time which is reasonable in the circumstances which actually exist<sup>7</sup>, and he fulfils his obligation, however protracted the delay may be, so long as the delay is attributable to causes beyond his control and he has acted neither negligently nor unreasonably<sup>8</sup>.

He is not, however, entitled to detain the ship even for the usual time if by reasonable diligence on his part the cargo might have been taken away sooner<sup>9</sup>. Thus, where he is bound to discharge at a definite rate per day and has been able to accelerate the rate of discharge beyond that rate, he may not rely on the fact that he has accomplished the whole discharge with reasonable dispatch at the average rate of discharge if he is responsible for an undue falling off in the rate of discharge towards the end<sup>10</sup>.

1 It is immaterial whether the charterparty is silent (*Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL), or whether it uses some such phrase as 'as fast as steamer can deliver' (*Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA; *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL; *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292). A provision in a bill of lading that the ship is to be entitled to commence discharging immediately on arrival into lighters or at a wharf, and that the goods are to be taken from the ship's tackle directly on their coming to hand in discharge of the ship does not import a warranty by the consignee that facilities are to be available at the port of discharge to enable the ship to discharge in the time and manner specified. Where, therefore, owing to the absence of a deep-water berth and lighters, a timber cargo had to be discharged into the sea and formed into rafts, and the consignee took delivery as rapidly as practicable in the existing conditions, he was held to have fulfilled his obligations under the clause, even though, owing to bad weather, he failed to take delivery during certain periods when the ship was ready to continue discharge: *The Coahoma County* [1924] P 95, 16 Asp MLC 342. A provision that the master's certificate is to be conclusive as to the extent of the delay in the receipt of the cargo, and the amount payable by the consignees in respect of such delay, only empowers the master to certify as to delay due to causes for which the consignee is liable under the bill of lading: *The Coahoma County*. As to discharge 'with all dispatch according to the custom of the port' see PARA 545.

2 *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *Sweeting v Darthez* (1854) 14 CB 538; *Fowler v Knoop* (1878) 4 QBD 299, 4 Asp MLC 68, CA; *Zillah Shipping Co v Midland Rly Co* (1902) 19 TLR 63, CA.

3 *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch; *Budgett & Co v Binnington & Co* [1891] 1 QB 35, 6 Asp MLC 592, CA; *Castlegate Steamship Co Ltd v Dempsey* [1892] 1 QB 854, 7 Asp MLC 186, CA; cf *Rodgers v Forresters* (1810) 2 Camp 483.

4 *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; cf *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38 at 59, 4 Asp MLC 392 at 398, HL, per Lord Watson.

5 *Hick v Raymond and Reid* [1893] AC 22 at 29, 7 Asp MLC 233 at 235, HL, per Lord Herschell LC; *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486 at 491, 8 Asp MLC 402 at 403, HL, per Lord Herschell.

6 Accordingly, the dicta in *Burmester v Hodgson* (1810) 2 Camp 488 and *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n, 4 Asp MLC 118, CA, are correct.

7 *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL (approving *Ford v Cotesworth* (1868) LR 4 QB 127 at 137 per Blackburn J); *Castlegate Steamship Co Ltd v Dempsey* [1892] 1 QB 854, 7 Asp MLC 186, CA; *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292.

8 *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, 4 Asp MLC 392, HL; *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; cf *Rodgers v Forresters* (1810) 2 Camp 483. The time during which the discharge is suspended owing to the shipowner's lawful exercise of his lien counts as against the consignee: *Lyle Shipping Co v Cardiff Corpn* [1900] 2 QB 638, 9 Asp MLC 128, CA.

9 *Ford v Cotesworth* (1868) LR 4 QB 127 at 134 per Blackburn J; cf *Carali v Xenos* (1862) 2 F & F 740; *Smailes & Son v Hans Dessen & Co* (1906) 10 Asp MLC 319.

10 *Aberdeen Glen Line Steamship Co v Macken, The Gairloch* [1899] 2 IR 1, CA.

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#### **543. Factors to be considered in the ascertainment of reasonable time.**

For the purpose of ascertaining what is a reasonable time in any particular case the principal factors to be taken into consideration are:

- 155 (1) the natural conditions of the port<sup>1</sup>;
- 156 (2) the custom of the port<sup>2</sup>;
- 157 (3) the actual state of affairs existing at the port<sup>3</sup>; and
- 158 (4) the conduct of the consignee<sup>4</sup>.

1 See PARA 544.

2 See PARA 545.

3 See PARA 546.

4 See PARA 547.

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#### **544. Natural conditions of the port.**

The physical nature of the port may necessarily lead to delay<sup>1</sup>. Thus, the port may be tidal, and the ship may be compelled through fear of grounding at neap tide to leave her berth during the discharge and lie outside until the next spring tides<sup>2</sup>; or she may be discharging in a roadstead and the lighters may be prevented by bad weather from continuing the discharge<sup>3</sup>. The causes of delay need not, however, be physical<sup>4</sup>. Thus, the customs authorities and the persons employed at the port may be habitually dilatory so that the ordinary discharge is very slow<sup>5</sup>. The equipment and facilities for discharge and the methods usually employed at the port must also be taken into consideration<sup>6</sup>. The means of discharging cargoes at the port may be under the control of one person who imposes his own terms and conditions on all ships arriving at the port<sup>7</sup>, or the port may have a shortage of labour or few facilities for discharge<sup>8</sup>.

1 *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n at 169n, 4 Asp MLC 118 at 120, CA, per Cotton LJ.

2 *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486, 8 Asp MLC 402, HL.

3 *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n at 169n, 4 Asp MLC 118 at 120, CA, per Cotton LJ.

4 Cf PARA 521.

5 *Ford v Cotesworth* (1868) LR 4 QB 127 at 132 per Blackburn J (affd (1870) LR 5 QB 544, Ex Ch); cf *Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA.

6 *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292; *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n at 169n, 4 Asp MLC 118 at 121, CA, per Cotton LJ.

7 *Castlegate Steamship Co Ltd v Dempsey* [1892] 1 QB 854, 7 Asp MLC 186, CA; *Weir & Co v Richardson* (1897) 3 Com Cas 20; *Harrowing v Dupré* (1902) 7 Com Cas 157 (harbour regulations); *The Kingsland* [1911] P 17, 12 Asp MLC 38, DC (harbour regulations).

8 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; cf *The Alne Holme* [1893] P 173, 7 Asp MLC 344, DC; *The Coahoma County* [1924] P 95, 16 Asp MLC 342.

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#### 545. Custom of the port.

It is not unusual for the contract to provide expressly that the discharge is to be effected according to the custom of the port<sup>1</sup>. This provision does not, however, appear to be necessary<sup>2</sup>, since any provision as to unloading is always construed as made with reference to the custom of the port of discharge<sup>3</sup>. Thus, it may be the custom of the port to discharge ships in a certain order<sup>4</sup> or subject to certain regulations<sup>5</sup> or at a certain rate<sup>6</sup>, or that work may only be carried on at certain times<sup>7</sup> or in accordance with a particular method<sup>8</sup>. The ship may be required to discharge a portion of her cargo in one part of the port and to shift to another place for the purpose of discharging the rest; and it may be the custom of the port not to count the time occupied in shifting<sup>9</sup>.

The contract may, however, expressly exclude the custom of the port or any particular custom, which cannot then be taken into account<sup>10</sup>.

1 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *The Alne Holme* [1893] P 173, 7 Asp MLC 344, DC; *Lyle Shipping Co v Cardiff Corp'n* [1900] 2 QB 638, 9 Asp MLC 128, CA; *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL; *Gilbert J McCaul & Co Ltd v JR Moodie & Co Ltd* [1961] 1 Lloyd's Rep 308 ('vessel to discharge according to the custom of the port', in a London Corn Trade Association Ltd contract (Form 14), related to matters arising after the vessel had become an arrived ship; buyers not entitled to indemnity from sellers for amount paid for waiting time). As to the effect of customs generally see PARA 225. So-called 'customs of the port' are strictly usages. As to the usages of various ports see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 692-694. Where the contract provides for discharge with customary steamship dispatch, as fast as the steamship can deliver during ordinary working hours but according to the custom of the port, the consignee is not liable for delay in performing his obligations under the custom if the delay was due to causes beyond his control: *Van Liewen v Hollis Bros & Co Ltd* [1920] AC 239, 14 Asp MLC 596, HL. Cf *Dampskibsselskabet Svendborg v Love and Stewart Ltd* 1915 SC 543 (affd on other grounds 1916 SC (HL) 187) (where the alleged cause of the delay was that the railway company would not allow their wagons to be used for the conveyance of the timber cargo to the consignee's yard to be sorted there, owing to the fact that there was a strike at the yard; this was held to be an impediment to the disposal but not to the discharge of the cargo and the consignees were liable for the delay); *The Varing* [1931] P 79, 18 Asp MLC 231, CA (cited in PARA 534 note 1) (where the consignee was held liable for delay caused by the dock authorities refusing to accept the ship for discharge owing to the consignee's insisting on the cargo being sorted and stored on the dock estate after discharge).

2 *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 613, 4 Asp MLC 302 at 305, HL, per Lord Blackburn; *The Jaederen* [1892] P 351 at 359, 7 Asp MLC 260 at 261 per Gorell Barnes J; *Lyle Shipping Co v Cardiff Corp'n* [1900] 2 QB 638 at 643, 9 Asp MLC 128 at 132, 133, CA, per AL Smith LJ; *Temple, Thomson and Clarke v Runnalls* (1902) 18 TLR 822 at 823, CA, per Collins MR. See, however, the view expressed in *Hick v Raymond and Reid* [1893] AC 22 at 30, 7 Asp MLC 233 at 235, HL, per Lord Herschell LC, that 'with all dispatch according to the custom of the port' is not necessarily the same as within a reasonable time.

3 *Petrocochino v Bott* (1874) LR 9 CP 355, 2 Asp MLC 310; *Marzetti v Smith & Son* (1883) 5 Asp MLC 166, CA. As to the effect of a custom in extending the consignee's obligation see PARA 547.

4 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *The Cordelia* [1909] P 27, 11 Asp MLC 202. See further PARA 295.

5 *Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA; *The Kingsland* [1911] P 17, 12 Asp MLC 38, DC. The contract may make the consignee liable for the risk of delay arising from the necessity of complying with such regulations: *Cobridge Steamship Co Ltd v Bucknall Steamship Lines Ltd* (1909) 14 Com Cas 141.

6 *Clydesdale Shipowners Co Ltd v Gallagher* [1907] 2 IR 578, CA (affd [1908] 2 IR 482, HL) (where the alleged rate was not proved). Such a custom does not bind a shipowner whose ship is, owing to changed circumstances, capable of discharging at a substantially greater rate: *Ropner & Co v Stoate, Hosegood & Co* (1905) 10 Asp MLC 32, following *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292.

7 *Cochran v Retberg* (1800) 3 Esp 121; *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n at 169n, 4 Asp MLC 118 at 120, CA, per Cotton LJ; *Nielsen v Wait* (1885) 16 QBD 67, 5 Asp MLC 553, CA; *Bennetts & Co v Brown* [1908] 1 KB 490, 11 Asp MLC 10; *British and Mexican Shipping Co Ltd v Lockett Bros & Co Ltd* [1911] 1 KB 264, 11 Asp MLC 565, CA.

8 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA; *Lyle Shipping Co v Cardiff Corp*n [1900] 2 QB 638, 9 Asp MLC 128, CA; *Fawcett & Co v Baird & Co* (1900) 16 TLR 198; *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL; *The Kingsland* [1911] P 17, 12 Asp MLC 38, DC (following *Weir & Co v Richardson* (1897) 3 Com Cas 20); cf *Rodgers v Forresters* (1810) 2 Camp 483; *Pollitzer v Steamship Casapedia* (1886) 2 TLR 413 (where two contradictory customs were alleged by the shipowner and consignee respectively, but neither was proved). Where it is clear from the rest of the contract that the parties intended to stipulate for discharge in a fixed time, such a phrase as 'according to the custom of the port' will be held to refer to the method of discharge and not to incorporate a custom not to count wet days or Saturdays half-holidays: *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL.

9 *Nielson v Wait* (1885) 16 QBD 67, 5 Asp MLC 553, CA.

10 *Maclay v Spiller and Baker* (1901) 6 Com Cas 217, CA (where the delivery had to be continuous notwithstanding any custom of the port); *Crown Steamship Co Ltd v Leitch* 1908 SC 506; *Bennetts & Co v Brown* [1908] 1 KB 490, 11 Asp MLC 10; *Holman v Peruvian Nitrate Co* (1878) 5 R 657; cf *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292; *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, 13 Asp MLC 500, HL.

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#### 546. Congestion in ports.

Owing to the port being crowded with shipping awaiting discharge the ship may be compelled to wait for a considerable time until a berth is vacant<sup>1</sup>; the available means of discharge, such as lighters<sup>2</sup> or cranes<sup>3</sup>, may be insufficient; the railway wagons necessary for the removal of the cargo may not be procurable<sup>4</sup>; or the warehouses in which the cargo is by the custom of the port to be placed may already be filled<sup>5</sup>. There may be a shortage of labour in consequence of a strike<sup>6</sup>. In addition, the progress of the discharge may be interrupted by the port authorities ordering the ship to leave her discharging berth<sup>7</sup>, or by any other external cause beyond the consignee's control<sup>8</sup>.

1 *Rodgers v Forresters* (1810) 2 Camp 483; *Watson v H Borner & Co Ltd* (1900) 5 Com Cas 377, CA; *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL; *The Jaederen* [1892] P 351, 7 Asp MLC 260; cf *Burmester v Hodgson* (1810) 2 Camp 488 (as explained in *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch); *Bargate Steam Shipping Co v Penlee and St Ives Stone Quarries Ltd* (1921) 15 Asp MLC 189. See, however, *Smailes & Son v Hans Dessen & Co* (1906) 10 Asp MLC 319, CA (where the ship was ultimately discharged at an unusual place, and the consignee was held liable for the delay, although for nominal damages only). See also *Northfield Steamship Co v Compagnie l'Union des Gaz* [1912] 1 KB 434, 12 Asp MLC 87, CA.

2 *Postlethwaite v Freeland* (1880) 5 App Cas 599, 4 Asp MLC 302, HL; *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL; *Reid v Lee & Sons* (1901) 17 TLR 771.

3 *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL.

4 *Wyllie v Harrison & Co* (1885) 13 R 92 (distinguished in *Kruuse v Drynan & Co* (1891) 18 R 1110); *Lyle Shipping Co v Cardiff Corp*n [1900] 2 QB 638, 9 Asp MLC 128, CA; *Fawcett & Co v Baird & Co* (1900) 16 TLR 198;

*Turnbull, Scott & Co v Cruickshank & Co* (1904) 7 F 265. If, however, another method of discharge is available, the consignee must adopt it (*Rodenacker v May and Hassell Ltd* (1901) 6 Com Cas 37; cf *Dampskibsselskabet Svendborg v Love and Stewart Ltd* 1915 SC 543 (affd on other grounds 1916 SC (HL) 187)), although he is excused if all available methods are equally affected (*Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL).

5 *Good & Co v Isaacs* [1892] 2 QB 555, 7 Asp MLC 212, CA.

6 *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL; *The Alne Holme* [1893] P 173, 7 Asp MLC 344; *Castlegate Steamship Co Ltd v Dempsey* [1892] 1 QB 854, 7 Asp MLC 186, CA; *Reid v Lee & Sons* (1901) 17 TLR 771.

7 *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch.

8 Cf *Watson v H Borner & Co Ltd* (1900) 5 Com Cas 377, CA; *The Deerhound* (1901) 9 Asp MLC 189, DC.

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#### **547. Conduct of the consignee.**

It is the duty of the consignee to use reasonable diligence in receiving the cargo<sup>1</sup>. It is, therefore, his duty to do everything which he can reasonably be expected to do in the circumstances<sup>2</sup>. If there is a shortage of lighters<sup>3</sup> or road or railway vehicles<sup>4</sup>, he must procure them if possible; if he is the port authority, he is not excused for delay occasioned by his acts in that capacity<sup>5</sup>; nor is he excused where the delay is attributable to his own previous engagements<sup>6</sup>, except in so far as such delay is reasonably incurred in the ordinary course of business within the contemplation of the parties<sup>7</sup>. In the same way he is responsible for any delay arising in consequence of his failure to discharge a lien lawfully exercised over his cargo<sup>8</sup>.

Where, however, the contract provides for discharge according to the custom of the port, as opposed to discharge in a fixed time, he cannot be required to do more than the custom demands<sup>9</sup>. Further, under a contract to discharge not in a fixed time, but in a reasonable time or with customary dispatch, even if there were a custom of the port which by itself would impose an absolute obligation on the consignee not merely to use his best endeavours to discharge the ship by providing a suitable berth and quay space or other facilities for discharge, but actually to provide them, whatever the existing circumstances of the port may be, the charterer will not be liable for delay due to his unavoidable failure to provide the necessary facilities<sup>10</sup>.

1 *Alexiadi v Robinson* (1861) 2 F & F 679; *Ford v Cotesworth* (1870) LR 5 QB 544, Ex Ch.

2 *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL; *Lyle Shipping Co v Cardiff Corp'n* [1900] 2 QB 638, 9 Asp MLC 128, CA; *Hill v Idle* (1815) 4 Camp 327 (where the consignee had failed to procure the necessary permit); *Milverton Sailing Ship Co Ltd v Cape Town and District Gas Light and Coke Co* (1897) 2 Com Cas 281; cf *Smailes & Son v Hans Dessen & Co* (1906) 10 Asp MLC 319, CA (where he was held liable for nominal damages only).

3 *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n, 4 Asp MLC 118, CA (as explained in *Hick v Raymond and Reid* [1893] AC 22 at 32, 7 Asp MLC 233 at 235, HL, per Lord Herschell LC); *Reid v Lee & Sons* (1901) 17 TLR 771; cf *Hulthen v Stewart & Co* [1903] AC 389, 9 Asp MLC 403, HL.

4 *Turnbull, Scott & Co v Cruickshank & Co* (1904) 7 F 265 (where no attempts had been made to procure wagons for discharging by night). The consignee is not, however, bound to procure them elsewhere than from the customary source of supply; *Lyle Shipping Co v Cardiff Corp'n* [1900] 2 QB 638, 9 Asp MLC 128, CA. Cf *Rodenacker v May and Hassell Ltd* (1901) 6 Com Cas 37 (where another method of discharge was practicable).

5 *Zillah Shipping Co v Midland Rly Co* (1902) 19 TLR 63, CA.

6 *Wright v New Zealand Shipping Co Ltd* (1878) 4 Ex D 165n, 4 Asp MLC 118, CA, as explained in *Hick v Raymond and Reid* [1893] AC 22 at 31, 7 Asp MLC 233 at 235, HL, per Lord Herschell LC. An exception to the cause of the delay may, however, be applicable, even if brought into operation through the consignee's previous engagements: *Letricheux and David v James Dunlop & Co* (1891) 19 R 209. The charterer is not responsible where the delay is caused by the consignee's engagements: *Watson v H Borner & Co Ltd* (1900) 5 Com Cas 377, CA; *The Deerhound* (1901) 9 Asp MLC 189; *Glasgow Navigation Co Ltd v Iron Ore Co Ltd* 1909 SC 1414.

7 *Barque Quilpué Ltd v Brown* [1904] 2 KB 264, 9 Asp MLC 596, CA; *Harrowing v Dupré* (1902) 7 Com Cas 157; *The Cordelia* [1909] P 27, 11 Asp MLC 202.

8 *Lyle Shipping Co v Cardiff Corpn* (1899) 5 Com Cas 87; *Smailes & Son v Hans Dessen & Co* (1906) 10 Asp MLC 319, CA.

9 See PARA 545; cf *Rodgers v Forresters* (1810) 2 Camp 483.

10 *Van Liewen v Hollis Bros & Co Ltd* [1920] AC 239, 14 Asp MLC 596, HL, overruling *Beatley v Bryson, Jameson & Co* (1897) cited in 25 TLR at 168, and *Aktieselskabet Hekla v Bryson, Jameson & Co* (1908) 11 Asp MLC 186.

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## (C) WAREHOUSING OF THE CARGO

### **548. Power to land and warehouse cargo.**

If the consignee fails to come forward to take delivery of his cargo, the master may be expressly empowered, by the terms of the contract<sup>1</sup> or by the custom of the port of discharge<sup>2</sup>, to land and warehouse the cargo at the consignee's risk and expense. This power need not be exercised as soon as the consignee makes default. If he thinks fit, the master may keep the cargo on board for a reasonable time before landing it; and, provided that he has acted reasonably, he is not precluded from claiming demurrage by the fact that he might, without any breach of duty, have landed the cargo sooner<sup>3</sup>.

Where the contract is silent on the matter and there is no custom applicable to the case, the master is not entitled to land the cargo at once; he must retain it on board for a reasonable period to give the consignee every opportunity of taking delivery<sup>4</sup>. Moreover, he has the right to retain the cargo on board as long as may be reasonably necessary for his protection<sup>5</sup>.

It is his duty, however, to deal with the cargo in a reasonable manner, having regard to his lien for freight<sup>6</sup>, and, although he may retain the cargo on demurrage, he must not act vexatiously in so doing<sup>7</sup>, or detain the ship beyond a reasonable time<sup>8</sup>. He is, therefore, allowed to take a different course, and he may land and warehouse the cargo on giving notice to the consignee that the cargo is at his disposal on payment of the freight<sup>9</sup>. If, however, it is impossible for him to land the cargo, either because there is no warehouse accommodation or because the landing is prohibited, he may take any other reasonable course which may be open to him, and, if the most prudent course is to bring the cargo back to the port of loading, he is entitled to do so, and may then claim freight in respect of both the outward and the homeward voyage<sup>10</sup>.

- 1 *Alexiadi v Robinson* (1861) 2 F & F 679; *Wilson v London, Italian and Adriatic Steam Navigation Co* (1865) LR 1 CP 61; *Oliver v Colven* (1879) 27 WR 822, DC; *Borrowman, Phillips & Co v Wilson* (1891) 7 TLR 416, DC; *Major and Field v Grant* (1902) 7 Com Cas 231; *The Arne* [1904] P 154, 9 Asp MLC 565, DC; *W Dennis & Sons Ltd v Cork Steamship Co Ltd* [1913] 2 KB 393, 12 Asp MLC 337.
- 2 *Marzetti v Smith & Son* (1883) 49 LT 580, 5 Asp MLC 166, CA; *Aste, Son and Kercheval v Stumore, Weston & Co* (1884) Cab & El 319.
- 3 *Hick v Rodocanachi* [1891] 2 QB 626 at 632, 7 Asp MLC 97 at 100, CA, per Lindley LJ (affd sub nom *Hick v Raymond and Reid* [1893] AC 22, 7 Asp MLC 233, HL); *The Arne* [1904] P 154, 9 Asp MLC 565, DC. He will not be entitled to claim demurrage, however, if he unreasonably refuses to discharge without production of the bills of lading: *Carlberg v Wemyss Coal Co Ltd* 1915 SC 616. Discharge must be distinguished from delivery of the goods to the consignee, and, where the bills of lading cannot be produced at once, it may be the shipowner's duty to discharge the goods while preserving a lien on them: *Carlberg v Wemyss Coal Co Ltd*.
- 4 *Howard v Shepherd* (1850) 9 CB 297; *Erichsen v Barkworth* (1858) 3 H & N 894, Ex Ch; cf *Carlberg v Wemyss Coal Co Ltd* 1915 SC 616.
- 5 *Erichsen v Barkworth* (1858) 3 H & N 894, Ex Ch; *Meyerstein v Barber* (1866) LR 2 CP 38 at 53 per Willes J (affd (1867) LR 2 CP 661, Ex Ch; sub nom *Barber v Meyerstein* (1870) LR 4 HL 317).
- 6 *Meyerstein v Barber* (1866) LR 2 CP 38 (affd (1867) LR 2 CP 661; sub nom *Barber v Meyerstein* (1870) LR 4 HL 317).
- 7 *Erichsen v Barkworth* (1858) 3 H & N 894 at 899, Ex Ch, per Crompton J.
- 8 *Meyerstein v Barber* (1866) LR 2 CP 38 (affd (1867) LR 2 CP 661; sub nom *Barber v Meyerstein* (1870) LR 4 HL 317).
- 9 *Meyerstein v Barber* (1866) LR 2 CP 38 (affd (1867) LR 2 CP 661, sub nom *Barber v Meyerstein* (1870) LR 4 HL 317); *Mors-le-Blanch v Wilson* (1873) LR 8 CP 227 at 239, 1 Asp MLC 605 at 608 per Brett J. Cf Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 563, 564.
- 10 *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519.

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#### **549. Consignee subsequently coming forward.**

If the master begins to land the cargo in the absence of the consignee, and the consignee afterwards comes forward before the discharge is completed and demands his cargo, the master must deliver the portion of the cargo remaining undischarged in accordance with the consignee's instructions, and he is not entitled to continue discharging as before<sup>1</sup> unless it would cause expense or loss of time to the shipowner to change the mode of delivery<sup>2</sup>.

- 1 *Wilson v London, Italian and Adriatic Steam Navigation Co* (1865) LR 1 CP 61.
- 2 *Wilson v London, Italian and Adriatic Steam Navigation Co* (1865) LR 1 CP 61 at 68 per Willes J.

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#### **550. Effect of landing cargo.**

Apart from contract or special custom, the shipowner's liability does not cease on the landing of the cargo. Although he is no longer liable as a carrier, he incurs a new liability as a warehouseman<sup>1</sup>, which is the liability of a bailee, not of a common carrier<sup>2</sup>. Moreover, it seems that, if he places the cargo not into a warehouse belonging to himself but into a warehouse belonging to a third person, he does not retain his lien<sup>3</sup>, although he may give a lien to the warehouseman<sup>4</sup>.

1 *Meyerstein v Barber* (1866) LR 2 CP 38 (affd (1867) LR 2 CP 661; sub nom *Barber v Meyerstein* (1870) LR 4 HL 317).

2 See **BAILMENT** vol 3(1) (2005 Reissue) PARAS 22-23.

3 *Mors-le-Blanch v Wilson* (1873) LR 8 CP 227 at 239, 1 Asp MLC 605 at 608 per Brett J; *Meyerstein v Barber* (1866) LR 2 CP 38 (affd (1867) LR 2 CP 661; sub nom *Barber v Meyerstein* (1870) LR 4 HL 317); Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 563, 564.

4 *Mors-le-Blanch v Wilson* (1873) LR 8 CP 227, 1 Asp MLC 605.

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## (D) LIEN

### 551. Shipowner's lien.

The shipowner is entitled to withhold delivery of the cargo until all existing liens on it have been discharged<sup>1</sup>. If in the lawful exercise of a lien the ship is detained beyond the time allowed for discharge, the shipowner is not precluded from recovering demurrage or damages for detention by reason of the fact that the detention is caused by his own act<sup>2</sup>. A lien may arise either at common law<sup>3</sup> or by express contract<sup>4</sup>.

1 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 563; *Miedbrodt v Fitzsimon, The Energie* (1875) LR 6 PC 306, 2 Asp MLC 555. As to lien where the shipowner is also an unpaid seller see *Swan v Barber* (1879) 5 Ex D 130, 4 Asp MLC 264, CA. As to maritime lien see further **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1014 et seq. A charterer has no lien on the ship for the due performance of the contract: Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 346.

2 *Lyle Shipping Co v Cardiff Corpn* (1899) 5 Com Cas 87; *Smailes & Son v Hans Dessen & Co* (1906) 10 Asp MLC 319, CA; and see PARA 547.

3 See PARAS 552-554.

4 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 346; *Kirchner v Venus* (1859) 12 Moo PCC 361 at 390. See also PARA 555.

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### 552. Common law lien for freight.

At common law there is a lien for freight if payable contemporaneously with the delivery of the goods<sup>1</sup>, but not, in the absence of contract, if the freight is payable at any other time, whether before delivery, as in the case of advance freight<sup>2</sup>, or after delivery<sup>3</sup>, because the lien depends on possession. There is, therefore, no lien if the payment of freight does not depend on delivery, as, for example, where it is made payable 'lost or not lost'<sup>4</sup>.

1 See PARA 590. It is immaterial whether the ship is a general ship (see PARA 264 note 2) or whether she is chartered (Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 563; *Anon* (1701) 12 Mod Rep 447; *Tate v Meek* (1818) 8 Taunt 280; *Yates v Meynell* (1818) 8 Taunt 302; *Black v Rose* (1864) 2 Moo PCCNS 277). However, the shipowner has no lien for the hire under a charterparty by demise: *Hutton v Bragg* (1816) 7 Taunt 14; *Marquand v Banner* (1856) 6 E & B 232. As to when the lien should be exercised see *Miedbrodt v Fitzsimon*, *The Energie* (1875) LR 6 PC 306 at 314, 2 Asp MLC 555 at 564, 565. There is also a lien on the baggage of a passenger for his passage money: *Wolf v Summers* (1811) 2 Camp 631.

2 *How v Kirchner* (1857) 11 Moo PCC 21; *Kirchner v Venus* (1859) 12 Moo PCC 361 (dissenting from *Gilkison v Middleton* (1857) 2 CBNS 134); *Neish v Graham* (1857) 8 E & B 505; *Re Child, ex p Nyholm* (1873) 2 Asp MLC 165; *Nelson v Protection of Wrecked etc Property Association* (1874) 43 LJCP 218 at 221 per Brett J. Cf *Tamvaco v Simpson* (1866) LR 1 CP 363, Ex Ch (where the shipper had given a bill for the advance freight and became insolvent before it fell due). Nor is there any lien as against consignees in good faith where the bill of lading states the freight as paid in advance: *Howard v Tucker* (1831) 1 B & Ad 712.

3 *Saville v Campion* (1819) 2 B & Ald 503; *Lucas v Nockells* (1828) 4 Bing 729, Ex Ch; *Alsager v St Katherine's Dock Co* (1845) 14 M & W 794; *Luard v Butcher* (1846) 2 Car & Kir 29; *Foster v Colby* (1858) 3 H & N 705; *Thorsen v McDavall and Neilson, The Theodor Korner* (1892) 19 R 743. It is immaterial that the consignee is insolvent: *Alsager v St Katherine's Dock Co*; *Thompson v Small* (1845) 1 CB 328. Where freight is payable after discharge is completed, no contractual lien for freight may be exercised over cargo remaining on board: *Canadian Pacific (Bermuda) Ltd v Lagon Maritime Overseas, The Fort Kipp* [1985] 2 Lloyd's Rep 168.

4 *Nelson v Protection of Wrecked etc Property Association* (1874) 43 LJCP 218; *Kirchner v Venus* (1859) 12 Moo PCC 361. The lien is not lost merely by transshipment (*The Blenheim* (1885) 10 PD 167, 5 Asp MLC 522); but it is otherwise if the goods are forwarded by another person (*Nelson v Protection of Wrecked etc Property Association*).

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### 553. Extent of lien for freight.

The common law lien for freight extends over all goods consigned in the same ship on the same voyage<sup>1</sup> to the same consignee<sup>2</sup>, and exists as long as any of the freight payable in respect of them remains unpaid<sup>3</sup>. The shipowner need not, however, retain the whole of the goods; he may deliver them by instalments on payment of the freight due on each instalment<sup>4</sup>; or, if he has already delivered some instalments without requiring payment, he may retain the balance until the whole freight is paid<sup>5</sup>. It is immaterial that the goods are comprised in several bills of lading<sup>6</sup>, unless the goods are being carried to different destinations<sup>7</sup>, or unless the bills of lading have been indorsed to different persons<sup>8</sup>.

1 *Bernal v Pim* (1835) 1 Gale 17 (where different goods were being carried to different destinations); *Matthews v Gibbs* (1860) 3 E & E 282 (where, on transshipment, it was held that the first shipowner could not transfer to the second shipowner a lien for the whole freight); cf *The Hibernian* [1907] P 277, 10 Asp MLC 501, CA (where such a lien was given by express contract).

2 As to the effect of indorsing the bill of lading see below.

3 *Sodergren v Flight and Jennings* (1796) cited in 6 East at 622; *Bernal v Pim* (1835) 1 Gale 17; *Perez v Alsop* (1862) 3 F & F 188; *The Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482. Where a portion of the freight has been paid in advance, there is a lien for the

balance: *Yates v Railston* (1818) 2 Moore CP 294. This lien has priority over an unpaid seller's lien (*Oppenheim v Russell* (1802) 3 Bos & P 42) and, in the case of transshipment, over a previous respondentia bond (*Cleary v M'Andrew (Cargo ex), The Galam* (1863) 2 Moo PCCNS 216).

An unpaid seller who stops in transit (see PARA 495) must take delivery, or give instructions for delivery, of the goods and pay any freight due in respect of them. If he does not do so, he is liable to the shipowner for damages, which, in the case of a solvent seller, will be the full amount of this freight. Further, he must pay all charges, eg customs duty, which must be incurred in order to land the goods and which under the contract of affreightment fall on the consignee, and, if he refuses to do so, the shipowner can claim the freight from him notwithstanding that the shipowner has not discharged the goods at the place specified in the contract of affreightment, provided that he was ready to do this if the seller had refused to fulfil the consignee's obligations: *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570, 13 Asp MLC 451, CA.

4 *Black v Rose* (1864) 2 Moo PCCNS 277; *Perez v Alsop* (1862) 3 F & F 188.

5 *Sodergren v Flight and Jennings* (1796) cited in 6 East at 622; *Paynter v James* (1867) LR 2 CP 348 (affd (1868) 18 LT 449, Ex Ch). A lien 'for freight and all other charges whatsoever' includes a lien for the expense of warehousing cargo to preserve the lien for freight and save demurrage: *Harley v Gardner* (1933) 43 Ll L Rep 104, following *Anglo-Polish Steamship Line Ltd v Vickers Ltd* (1924) 19 Ll L Rep 121 at 125.

6 *Sodergren v Flight and Jennings* (1796) cited in 6 East at 622.

7 *Bernal v Pim* (1835) 1 Gale 17.

8 *Sodergren v Flight and Jennings* (1796) cited in 6 East at 622.

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#### **554. Common law lien for general average.**

The shipowner has a lien at common law for general average contributions<sup>1</sup>, and for the expenses incurred on behalf of the cargo owner at a port of refuge in the interests of the cargo<sup>2</sup>.

1 See PARA 618.

2 See PARA 492.

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#### **555. Lien created by express contract.**

There is no lien at common law for any charges other than those already mentioned<sup>1</sup>. The shipowner has, therefore, at common law no lien for freight not payable on delivery<sup>2</sup>, for dead freight<sup>3</sup>, for demurrage<sup>4</sup> or damages for detention<sup>5</sup>, for pilotage or any other charges which the shipper has agreed to pay<sup>6</sup>, for freight due on previous voyages<sup>7</sup> or for any other debts due to the shipowner<sup>8</sup>. Any such lien must be created by special contract<sup>9</sup>, and is then valid and enforceable<sup>10</sup>. Thus, there may be a lien by agreement for advance freight<sup>11</sup>, dead freight or demurrage at the port of loading<sup>12</sup> or discharge<sup>13</sup>, or for any other charges<sup>14</sup>, including unpaid freight due in respect of previous voyages<sup>15</sup> and strike expenses.

1     le those mentioned in PARAS 552-554. The holder of a bill of exchange drawn by the shipper on the consignee expressly on account of the cargo has no lien on the cargo as against the consignee, even though he has dishonoured the bill (*Robey & Co's Perseverance Ironworks v Ollier* (1872) 7 Ch App 695, 1 Asp MLC 413; *Phelps, Stokes & Co v Comber* (1885) 29 ChD 813, 5 Asp MLC 428, CA), unless the cargo has been appropriated to meet the bill (*Frith v Forbes* (1862) 4 De GF & J 409, doubted in *Phelps, Stokes & Co v Comber*).

2     See PARA 552.

3     *Phillips v Rodie* (1812) 15 East 547; *Birley v Gladstone* (1814) 3 M & S 205; *Gladstone v Birley* (1817) 2 Mer 401; cf *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115.

4     *Birley v Gladstone* (1814) 3 M & S 205.

5     *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115; *Lockhart v Falk* (1875) LR 10 Exch 132; *Clink v Radford & Co* [1891] 1 QB 625, 7 Asp MLC 10, CA; *Dunlop & Sons v Balfour, Williamson & Co* [1892] 1 QB 507, 7 Asp MLC 181, CA.

6     *Faith v East India Co* (1821) 4 B & Ald 630; cf *Bishop v Ware* (1813) 3 Camp 360.

7     Cf *Rushforth v Hadfield* (1806) 7 East 224.

8     *Oppenheim v Russell* (1802) 3 Bos & P 42.

9     *Birley v Gladstone* (1814) 3 M & S 205; *Gladstone v Birley* (1817) 2 Mer 401; *Canadian Pacific (Bermuda) Ltd v Lagon Maritime Overseas, The Fort Kipp* [1985] 2 Lloyd's Rep 168; *Samsun Logix Corp v Oceantrade Corp* [2007] EWHC 2372 (Comm), [2008] 1 All ER (Comm) 673, [2008] 1 Lloyd's Rep 450.

10    *McLean and Hope v Fleming* (1871) LR 2 Sc & Div 128, 1 Asp MLC 160, followed in *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL.

11    See PARA 306. There is no lien if the voyage is never begun, even if the goods are put on board: *Re Child, ex p Nyholm* (1873) 2 Asp MLC 165.

12    See PARA 306.

13    *Maritime Transport Operators GmbH v Louis Dreyfus et Cie, The Tropwave* [1981] 2 Lloyd's Rep 159.

14    *Rederiactieselskabet Superior v Dewar and Webb* [1909] 2 KB 998, 11 Asp MLC 295, CA. Where the lien is for 'freight and all other charges whatsoever', 'charges' include expenses of warehousing the cargo to preserve the lien for freight and save demurrage: *Harley v Gardner* (1933) 43 Ll L Rep 104, following *Anglo-Polish Steamship Line Ltd v Vickers Ltd* (1924) 19 Ll L Rep 121 at 125 per Bailhache J.

15    *Moss Steamship Co Ltd v Whinney* [1912] AC 254, 12 Asp MLC 25, HL (where the lien was held not to attach in the circumstances); cf *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL (where it was held that the general lien conferred by the contract of affreightment did not affect the unpaid seller's right to stop in transit).

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### **556. How far liens are enforceable against holders of bills of lading.**

Where express liens are conferred on the shipowner by the terms of a charterparty, the holder of the bill of lading, if he is not the charterer<sup>1</sup>, is not subject to such liens, unless they are incorporated in the bill of lading<sup>2</sup>. Mere notice of the charterparty is not sufficient<sup>3</sup>. Moreover, any reference in the bill of lading to the charterparty is strictly construed<sup>4</sup>.

Unless, therefore, the language used in the bill of lading is wide enough to extend the shipowner's rights, the holder of the bill of lading is entitled to have his goods delivered to him

on payment of the freight reserved by the bill of lading<sup>5</sup>; as against him there is no lien for freight payable under the charterparty in respect of the same<sup>6</sup> or other goods<sup>7</sup>, or for the difference, if any, between the bill of lading freight and the chartered freight<sup>8</sup>, or for dead freight<sup>9</sup>, or for demurrage at the port of loading<sup>10</sup>. This rule does not, however, apply where the consignee is merely an agent of the charterer<sup>11</sup>, or is his real principal<sup>12</sup>, or where the bill of lading holder had reason to suspect, when he took the bill of lading, that the master had no authority to sign bills of lading on the terms as to freight contained in the bill of lading issued to him<sup>13</sup>.

1 As to the effect of a cesser clause see PARA 304.

2 See PARA 361. As to the position when the shipowner is not a party to the bill of lading contract see PARA 355. See also *Molthes Rederi Aktieselskabet v Ellerman's Wilson Line Ltd* [1927] 1 KB 710 at 716, 17 Asp MLC 219 at 221, explaining *Tagart, Beaton & Co v James Fisher & Sons* [1903] 1 KB 391, 9 Asp MLC 381, CA.

3 *Chappel v Comfort* (1861) 10 CBNS 802; *Turner v Haji Goolam Mahomed Azam* [1904] AC 826, 9 Asp MLC 588, PC (where the holder of the bill of lading was a sub-charterer and had prescribed the form to be used).

4 *The Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245; *Rederiactieselskabet Superior v Dewar and Webb* [1909] 2 KB 998, 11 Asp MLC 295, CA (where it was held that the words 'all other charges whatsoever' could not be taken to include charges arising outside the charterparty); *Red R Steamship Co Ltd v Allatini Bros* (1910) 11 Asp MLC 434, HL.

5 *Mitchell v Scaife* (1815) 4 Camp 298; *Foster v Colby* (1858) 3 H & N 705; *Shand v Sanderson* (1859) 4 H & N 381; *Chappel v Comfort* (1861) 10 CBNS 802; *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689; *Abbott's Law of Merchant Ships and Seamen* (14th Edn, 1901) 352; cf *Gilkison v Middleton* (1857) 2 CBNS 134; *Christie v Lewis* (1821) 2 Brod & Bing 410.

6 *Mitchell v Scaife* (1815) 4 Camp 298; *Foster v Colby* (1858) 3 H & N 705.

7 *Fry v Chartered Mercantile Bank of India* (1866) LR 1 CP 689. The same principle apparently applies where the charterer gives his own bill of lading to the shippers and takes one for the whole cargo from the master: *Paul v Birch* (1743) 2 Atk 621; *Tharsis Sulphur and Copper Mining Co v Culliford* (1873) 22 WR 46; *The Stornoway* (1882) 4 Asp MLC 529. The charterparty may, however, give the shipowner a lien over all sub-freights, in which case the lien must be exercised before the sub-freight is paid over to the charterer: *Tagart, Beaton & Co v James Fisher & Sons* [1903] 1 KB 391, 9 Asp MLC 381, CA, explained in *Molthes Rederi Aktieselskabet v Ellerman's Wilson Line Ltd* [1927] 1 KB 710, 17 Asp MLC 219. As to the extent of the lien see *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92; *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115. Cf *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1907) 12 Com Cas 203 (equitable assignment of sub-freight).

8 *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA.

9 *Red R Steamship Co Ltd v Allatini Bros* (1910) 11 Asp MLC 434, HL; *Rederiactieselskabet Superior v Dewar and Webb* [1909] 2 KB 998, 11 Asp MLC 295, CA; cf *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL; *Peek v Larsen* (1871) LR 12 Eq 378, 1 Asp MLC 163.

10 *Smith v Sieveking* (1855) 4 E & B 945; *Chappel v Comfort* (1861) 10 CBNS 802; *Rederiactieselskabet Superior v Dewar and Webb* [1909] 2 KB 998, 11 Asp MLC 295, CA. Such a lien may be given by the terms of the bill of lading: *Gray v Carr* (1871) LR 6 QB 522, 1 Asp MLC 115 (where it was held that the lien applied only to demurrage and did not extend to unliquidated damages for the further detention of the ship); but see *McLean and Hope v Fleming* (1871) LR 2 Sc & Div 128, 1 Asp MLC 160; *Kish v Taylor* [1912] AC 604, 12 Asp MLC 217, HL. The consignee may also be liable under his own contract with the charterer, in which case his liability is measured by that contract, and not by the charterparty, even though incorporated into the bill of lading: *Houlder Bros & Co Ltd v Public Works Comr, Public Works Comr v Houlder Bros & Co Ltd* [1908] AC 276, 11 Asp MLC 61, PC.

11 *Gledstanes v Allen* (1852) 12 CB 202; *Kern v Deslandes* (1861) 10 CBNS 205; *West Hartlepool Steam Navigation Co Ltd v Tagart, Beaton & Co* (1903) 19 TLR 251, CA. Cf *Small v Moates* (1833) 9 Bing 574; *Campion v Colvin* (1836) 3 Bing NC 17. If, however, he is holding the bill of lading as security for the price of goods which he has shipped on account of the charterer, he is entitled to receive the goods on payment of the bill of lading freight: *Shand v Sanderson* (1859) 4 H & N 381.

12 *McLean and Hope v Fleming* (1871) LR 2 Sc & Div 128, 1 Asp MLC 160; *Pearson v Göschen* (1864) 17 CBNS 352.

13 *Faith v East India Co* (1821) 4 B & Ald 630; *Mitchell v Scaife* (1815) 4 Camp 298; *Reynolds v Jex* (1865) 7 B & S 86; cf *West Hartlepool Steam Navigation Co Ltd v Tagart, Beaton & Co* (1903) 19 TLR 251, CA; *Small v Moates* (1833) 9 Bing 574; *The Canada* (1897) 13 TLR 238.

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### 557. Duration of and loss of lien.

The lien remains as long as the shipowner continues in possession of the goods. If, however, he lands and warehouses them<sup>1</sup>, he risks losing his lien<sup>2</sup>, although it revives if he resumes possession<sup>3</sup>.

The shipowner's lien is lost when he parts with the possession of the goods, unless he is induced to do so by fraud<sup>4</sup>, in which case it revives if he recovers possession. It is also lost when he agrees to take a bill of exchange for the amount<sup>5</sup>, unless the bill of exchange is afterwards dishonoured before the goods are actually delivered<sup>6</sup>; but he is entitled to exercise his lien until the bill is given<sup>7</sup>.

1 He unless the warehouse belongs to him or is hired by him: *Mors-le-Blanch v Wilson* (1873) LR 8 CP 227, 1 Asp MLC 605; and see PARA 550.

2 *Mors-le-Blanch v Wilson* (1873) LR 8 CP 227 at 230, 1 Asp MLC 605 at 608 per Brett J; *Meyerstein v Barber* (1866) LR 2 CP 38 at 54 per Willes J (affd (1867) LR 2 CP 661, Ex Ch; sub nom *Barber v Meyerstein* (1870) LR 4 HL 317). Cf *Sweet v Pym* (1800) 1 East 4. See, however, *Belfast Harbour Comrs v Lawther and Manne Investment Society, The Edward Cardwell* (1865) 12 LT 677. See also *Z Steamship Co Ltd v Amtorg New York* (1938) 61 Ll L Rep 97.

3 *Levy v Barnard* (1818) 8 Taunt 149; cf *Re Welfitt, ex p Cheesman* (1763) 2 Eden 181 (recapture); *Crawshay v Eades* (1823) 2 Dow & Ry KB 288.

4 See **LIEN** vol 68 (2008) PARA 854.

5 *Horncastle v Farran* (1820) 3 B & Ald 497; *Tamvaco v Simpson* (1866) LR 1 CP 363, Ex Ch. Where the agreement is for 'approved bills', the shipowner cannot object to a bill of exchange after he has negotiated it: *Horncastle v Farran*.

6 *Tamvaco v Simpson* (1866) LR 1 CP 363 at 372, Ex Ch, per Blackburn J; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491; cf *Gilkison v Middleton* (1857) 2 CBNS 134.

7 *Yates v Railston* (1818) 2 Moore CP 294; *Tate v Meek* (1818) 2 Moore CP 278.

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### 558. Discharge of lien.

The lien for freight is discharged by payment<sup>1</sup>, or tender of payment<sup>2</sup>, of the amount due.

1 *Miedbrodt v Fitzsimon, The Energie* (1875) LR 6 PC 306, 2 Asp MLC 555.

2 *Kerford v Mondel* (1859) 28 LJ Ex 303. See generally **LIEN** vol 68 (2008) PARA 851.

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### **559. Agent's lien.**

An agent to whom the bill of lading is handed for the purpose of enabling him to obtain possession of the goods has an implied authority to bind his principal by agreeing on his behalf to pay any charges in respect of which a lien over the goods exists<sup>1</sup>, and any such agent has himself a lien over the bill of lading for his charges<sup>2</sup>.

1 *Hingston v Wendt* (1876) 1 QBD 367, 3 Asp MLC 126.

2 *Edwards v Southgate* (1862) 10 WR 528.

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## **(E) MEASURE OF DAMAGES**

### **560. What constitutes a breach of contract.**

It is the duty of the shipowner to deliver at the port of discharge all the goods entrusted to him<sup>1</sup> in accordance with the terms of his contract<sup>2</sup>. In the absence of any lawful excuse<sup>3</sup>, he is guilty of a breach of duty, and liable to pay damages<sup>4</sup>:

- 159 (1) where he fails to arrive at the port of discharge within the time contemplated by the contract<sup>5</sup>;
- 160 (2) where he fails, wholly or in part, to deliver the goods<sup>6</sup>; and
- 161 (3) where he delivers the goods, but, owing to some cause for which he is responsible, they are in a damaged condition<sup>7</sup>.

1 As to the bill of lading as conclusive evidence see PARA 317.

2 As to the extent of a shipowner's liability see PARA 264; and as to the effect of exceptions see PARA 265 et seq.

3 As to when the shipowner is excused see PARAS 265 et seq, 478 et seq, 493.

4 As to damages generally see **DAMAGES** vol 12(1) (Reissue) PARA 801 et seq.

5 See PARA 561.

6 See PARA 562.

7 See PARA 566.

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### **561. Delay on voyage.**

Where a shipowner and a charterer enter into a charterparty for the carriage of goods which the shipowner knows or can reasonably be assumed to know are marketable goods to a destination at which the shipowner knows or can reasonably be assumed to know that there exists a market for goods of that kind, on a voyage the duration of which is reasonably predictable, then, if the market price has fallen between the date at which the goods should have arrived and the date at which they did arrive, the measure of damages for breach of contract by the shipowner for late delivery is *prima facie* the difference in market price<sup>1</sup>. Moreover, if the ship arrives at the port of destination but delivery is refused, and the goods are overcarried and returned later, the fall in the market price is recoverable from the shipowner<sup>2</sup>.

1 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, [1967] 3 All ER 686, [1967] 2 Lloyd's Rep 457, HL (applying *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA, and *Dunn v Bucknall Bros* [1902] 2 KB 614, CA). The court refused to follow *The Parana* (1877) 2 PD 118, 3 Asp MLC 399, CA (decided in the days of sail when no reasonably accurate prediction of the length of a voyage could be made).

2 *Sargant & Sons v East Asiatic Co Ltd* (1915) 85 LJKB 277 (where an exemption from liability for overcarriage afforded the shipowner no protection inasmuch as the ship had called at the port of destination and delivery there had been refused after demand duly made by the person entitled to delivery); cf *Broken Hill Pty Co Ltd v Peninsular and Oriental Steam Navigation Co* [1917] 1 KB 688, 14 Asp MLC 116 (where, the ship being a mail steamer, the shipowner was not under an obligation to delay unduly for the purpose of delivery of cargo but was entitled to avail himself of the express liberty reserved in the bill of lading to overcarry the goods beyond the port of destination).

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### **562. Non-delivery of cargo.**

Where the goods are not delivered at all, owing to their loss on the way<sup>1</sup>, the measure of damages is the value of the goods at the port of destination at the time when they should have been delivered<sup>2</sup>.

If there is an available market, their market value at that time must be taken; but a deduction must be made for the freight and other charges which, if the goods had arrived safely, the consignee would have had to pay in order to obtain them<sup>3</sup>. As, however, the damages are measured by the difference between the consignee's position according as the goods are safely delivered or lost, no deduction is to be made for any advance freight already paid; in respect of such freight his position is the same whether the goods are delivered or not, and it cannot, therefore, be taken into account<sup>4</sup>.

If there is no available market, the value of the goods to the consignee at the port of discharge must be arrived at by an estimate<sup>5</sup>; and the consignee will be allowed to recover the cost price of the goods, together with any advance freight or other charges already paid in connection with their carriage<sup>6</sup>, and the estimated profit which would have been made if they had arrived safely at their destination<sup>7</sup>.

Where a chartered ship wholly fails to load the contract cargo, assuming no market price exists at the port of loading, the measure of damages is the difference between the price agreed to

be paid by the charterers for the cargo and its market price at the expected date of arrival in the place of delivery, less the amount of the insurance premium and expenses<sup>8</sup>.

A clause in a charterparty which purports to stipulate that a penalty, being the proved damages not exceeding the estimated amount of freight, is to be paid in the event of non-performance will be read as a penalty clause and be disregarded by the court<sup>9</sup>.

1 The same principles apply whether the whole or only part of the cargo is lost.

2 *Rodocanachi v Milburn* (1886) 18 QBD 67, 6 Asp MLC 100, CA. Where the action is brought in the Admiralty Court, interest from the date of the loss is, by the practice of that court, allowed on the amount awarded: *The Gertrude, The Baron Aberdare* (1888) 13 PD 105, 6 Asp MLC 315, CA. As to the general power of courts to award interest see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1303 et seq; and as to the jurisdiction of the Admiralty Court over claims for damage to cargo see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 110.

3 *Rodocanachi v Milburn* (1886) 18 QBD 67 at 76, 6 Asp MLC 100 at 103, CA, per Lord Esher MR; *Smith, Edwards & Co v Tregarthen* (1887) 6 Asp MLC 137, DC.

4 *Rodocanachi v Milburn* (1886) 18 QBD 67, 6 Asp MLC 100, CA.

5 Where there is no market at the port of discharge, a contract of sale at a relevant date may be used as evidence of the value of the goods, but circumstances peculiar to the consignee, eg a sub-contract entered into by him, and not communicated to the shipowner at the time when the contract of affreightment was concluded, are not directly relevant to the question of quantum: *The Arpad* [1934] P 189, 18 Asp MLC 510, CA.

6 *Great Indian Peninsula Rly Co v Turnbull* (1885) 5 Asp MLC 465; *Dufourcet v Bishop* (1886) 18 QBD 373, 6 Asp MLC 109; *Ewbank v Nutting* (1849) 7 CB 797 (where there had been a wrongful sale at an intermediate port); cf *The Thyatira* (1883) 8 PD 155, 5 Asp MLC 147.

7 *O'Hanlan v Great Western Rly Co* (1865) 6 B & S 484 at 491 per Blackburn J; *Rodocanachi v Milburn* (1886) 18 QBD 67 at 76, 6 Asp MLC 100 at 103, CA, per Lord Esher MR.

8 *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, 13 Asp MLC 580, HL.

9 *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, 13 Asp MLC 580, HL; *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66, 13 Asp MLC 271. As to penalties see further **DAMAGES** vol 12(1) (Reissue) PARA 1065 et seq.

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### 563. Special damage.

Whether there is an available market or not<sup>1</sup>, the value of the goods is to be taken independently of any circumstances peculiar to the consignee<sup>2</sup>. If, therefore, he has already contracted to sell the goods, the contract price must be disregarded, whether it is higher<sup>3</sup> or lower<sup>4</sup> than the market price; but, for the purpose of estimating the value of the goods where there is no market, any contract of sale at a relevant date may be used as evidence of value<sup>5</sup>.

Similarly, where the loss of the goods prevents him from making use of other goods, as, for example, where the loss of a piece of machinery delays the erection of a building, he is not entitled to add to his damages the loss of the profit which he would otherwise have earned<sup>6</sup>. The shipowner may, however, be liable for loss or damage which may be fairly presumed to have been within the contemplation of the parties at the time of entering into the contract; but it must have been loss or damage which could have been foreseen or reasonably expected and the liability in respect of which the shipowner has assented to undertake, expressly or impliedly, by entering into the contract<sup>7</sup>.

1 See PARA 540.

2 *Rodocanachi v Milburn* (1886) 18 QBD 67 at 77, 6 Asp MLC 100 at 103, CA, per Lord Esher MR.

3 *The St Cloud* (1863) 8 LT 54; cf *Scaramanga Manoussin & Co v English & Co* (1895) 1 Com Cas 99.

4 *Rodocanachi v Milburn* (1886) 18 QBD 67 at 77, 6 Asp MLC 100 at 103, CA, per Lord Esher MR.

5 *The Arpad* [1934] P 189, 18 Asp MLC 510, CA.

6 *British Columbia Saw-Mill Co v Nettleship* (1868) LR 3 CP 499; cf *Hadley v Baxendale* (1854) 9 Exch 341; and see PARAS 775-777; **DAMAGES** vol 12 para 1175.

7 *British Columbia Saw-Mill Co v Nettleship* (1868) LR 3 CP 499 at 506 per Bovill CJ; cf *Monte Video Gas and Dry Dock Co Ltd v Clan Line Steamers Ltd* (1921) 37 TLR 866, CA. See further **DAMAGES** vol 12(1) (Reissue) PARA 1015 et seq.

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#### 564. Damage limited by contract.

The contract may by its terms define the basis upon which the damages are to be measured, as, for example, where it provides that the shipowner is not to be liable beyond the net invoice cost of the goods<sup>1</sup>. In addition, his liability may be limited to a specified sum<sup>2</sup>. In the absence of clear words such limitation will not apply to a breach by the shipowner of his implied duty to provide a seaworthy vessel<sup>3</sup>. Nor will it, on an orthodox view, apply where the carrier has committed an unjustifiable deviation<sup>4</sup>, although this view must now be suspect given the modern interpretation in the general law of contract on the doctrine of fundamental breach<sup>5</sup>. Similarly, a clause to the effect that claims will be absolutely barred unless made within a given time will not defeat a claim arising out of a breach of the implied undertaking of seaworthiness<sup>6</sup>; but a clause of limitation of liability applies to loss occasioned by any other cause, including negligence<sup>7</sup>, and, where such an intention is clearly expressed in the contract of affreightment, may extend even to loss occasioned by unseaworthiness<sup>8</sup>. The contract may also entitle the consignee, in the case of short delivery, to deduct the value of the goods short delivered from the freight payable on delivery of the balance<sup>9</sup>; but, in the absence of any provision to that effect, he is not entitled to do so<sup>10</sup>.

1 For a form of contract to this effect see *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd (No 2)* [1906] 2 KB 804, 10 Asp MLC 265.

2 For examples see the cases cited in notes 3-6. This must be distinguished from the statutory limitation of liability: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042 et seq. A clause purporting to limit liability may be in the nature of a penalty and, therefore, void: see *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, 13 Asp MLC 580, HL. See also PARA 307. As to the carrier's right to limit his liability where the Hague-Visby Rules apply see PARA 396.

3 *Tattersall v National Steamship Co* (1884) 12 QBD 297, 5 Asp MLC 206.

4 *Balian & Sons v Joly, Victoria & Co Ltd* (1890) 6 TLR 345, CA; *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660 at 668, 10 Asp MLC 431 at 434, CA; cf *Kish v Taylor* [1912] AC 604 at 618, 12 Asp MLC 217 at 220, HL, per Lord Atkinson.

5 See PARA 248 (in particular note 8).

6 *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 AC 250, 15 Asp MLC 566, HL.

7 *Baxter's Leather Co v Royal Mail Steam Packet Co* [1908] 2 KB 626, 11 Asp MLC 98, CA; cf *Pyman Steamship Co v Hull and Barnsley Rly Co* [1914] 2 KB 788, 12 Asp MLC 511; affd [1915] 2 KB 729, 13 Asp MLC 64, CA.

8 *Morris and Morris v Oceanic Steam Navigation Co Ltd* (1900) 16 TLR 533; *Wiener & Co v Wilsons and Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413, CA; *Bank of Australasia v Clan Line Steamers Ltd* [1916] 1 KB 39, 13 Asp MLC 99, CA.

9 *Garston Sailing Ship Co v Hickie, Borman & Co* (1886) 18 QBD 17, 6 Asp MLC 71, CA (where it was held that the deduction could be made, even though the shipowner was not in default); cf *Den of Airlie Steamship Co Ltd v Mitsui & Co Ltd and British Oil and Cake Mills Ltd* (1912) 12 Asp MLC 169, CA.

10 *Meyer v Dresser* (1864) 16 CBNS 646.

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### 565. Indemnification by third parties.

Upon whatever basis the damages are calculated, the consignee is not entitled to recover more than he has actually lost<sup>1</sup>. He must, therefore, give the shipowner credit for all sums received from other persons by way of indemnification for his loss<sup>2</sup>. This principle does not, however, apply to sums received by the consignee from insurers<sup>3</sup>. The shipowner is not entitled to have the existence of any insurance on the goods taken into account; and, if they have already paid the consignee, the insurers succeed by subrogation to his rights against the shipowner<sup>4</sup>.

1 See **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq. Accidental circumstances peculiar to the charterer, eg the price at which he has contracted to sell the cargo, will not be taken into account in estimating its value at the port of discharge: *Rodocanachi v Milburn* (1886) 18 QBD 67 at 78, 6 Asp MLC 100 at 104, CA, per Lindley LJ. See also *The Arpad* [1934] P 189, 18 Asp MLC 510, CA.

2 *Montgomery v Hutchins* (1905) 10 Asp MLC 223.

3 *Yates v Whyte* (1838) 4 Bing NC 272; cf *Scaramanga v Marquand & Co* (1885) 5 Asp MLC 506, CA.

4 See **INSURANCE** vol 25 (2003 Reissue) PARA 490 et seq.

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### 566. Delivery of damaged goods.

Where the goods are delivered in a damaged condition, then, in the absence of any provision to the contrary<sup>1</sup>, the measure of damages is the difference between the value which the goods would have had if they had been delivered undamaged<sup>2</sup> and the price for which they were or could have been sold on the day of arrival in their actual condition<sup>3</sup>.

The shipowner is not, as a general rule, responsible for such deterioration as necessarily follows from the nature of the goods and the duration of the transit<sup>4</sup>; but, where the voyage is unreasonably delayed, he may be responsible for the deterioration during the period of delay<sup>5</sup>.

The contract often provides that all claims against the shipowner in respect of damaged goods are to be made within a specified time<sup>6</sup>.

1 See PARA 564.

2 As to the calculation of such value see PARA 561.

3 Cf the Marine Insurance Act 1906 s 71(3); and **INSURANCE** vol 25 (2003 Reissue) PARA 444.

4 *Martineaus Ltd v Royal Mail Steam Packet Co Ltd* (1912) 12 Asp MLC 190; cf *Bull v Robison* (1854) 10 Exch 342.

5 *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co* [1909] 2 KB 360, 11 Asp MLC 271; *The Renée Hyaffil* (1916) 32 TLR 660, CA (cited in PARA 280 note 17).

6 *Wiener & Co v Wilsons and Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413 at 416, CA. As to the carrier's right to limit his liability where the Hague-Visby Rules apply see PARA 396.

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## **D. PAYMENT OF FREIGHT**

### **(A) MEANING OF 'FREIGHT'**

#### **567. In general.**

Under a voyage charterparty the remuneration payable by the voyage charterer or by the shipper or consignee under a bill of lading for the carriage of goods by sea is called 'freight'<sup>1</sup>; and, where there is no provision to the contrary, freight is payable on the delivery of the goods<sup>2</sup>. In addition, the following types of freight may be payable:

- 162 (1) lump freight<sup>3</sup>;
- 163 (2) advance freight<sup>4</sup>;
- 164 (3) pro rata freight<sup>5</sup>;
- 165 (4) back freight<sup>6</sup>; and
- 166 (5) dead freight<sup>7</sup>.

Under a time charterparty the remuneration payable to the shipowner is called 'hire'<sup>8</sup>.

1 See PARAS 255, 568 et seq.

2 See PARA 590.

3 See PARA 599.

4 See PARAS 600-602.

5 See PARA 603.

6 See PARA 604.

7 See PARA 460.

8 See PARA 256.

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## (B) PERSON BY WHOM PAYMENT IS TO BE MADE

### 568. Primary liability of shipper.

The person who is primarily liable for the payment of freight is the shipper of the goods<sup>1</sup>. His liability exists independently of any charterparty<sup>2</sup> or bill of lading<sup>3</sup>, as, in the absence of anything to show the contrary<sup>4</sup>, a contract to pay freight is to be implied from the mere fact that he has placed the goods on another person's ship for the purpose of being carried to their destination<sup>5</sup>. It is, therefore, unnecessary to take into consideration the actual ownership of the goods<sup>6</sup>. The shipper is equally liable to pay freight, although he never owned the goods at all but shipped them solely on behalf of a third person<sup>7</sup>, unless the facts of the case show that he acted to the knowledge of the shipowner as agent only, in which case the person on whose behalf he acted is in reality the shipper and liable for the freight accordingly<sup>8</sup>, although the agent may be personally liable to the shipowner if there is a trade usage to that effect<sup>9</sup>.

Similarly, where, at the time of shipment, the shipper is the owner of the goods, he cannot, by subsequently transferring the ownership of them before any freight has become payable, discharge himself from the liability to pay it when due<sup>10</sup>.

1 *Domett v Beckford* (1833) 5 B & Ad 521 (following *Shepard v De Bernales* (1811) 13 East 565, and disapproving *Drew v Bird* (1828) Mood & M 156); *Fox v Nott* (1861) 6 H & N 630 at 637; *Dickenson v Lano* (1860) 2 F & F 188; *Sewell v Burdick* (1884) 10 App Cas 74 at 91, 5 Asp MLC 376 at 381, HL, per Lord Blackburn.

2 See PARA 570.

3 See PARA 571.

4 See eg *Dickenson v Lano* (1860) 2 F & F 188.

5 *Fox v Nott* (1861) 6 H & N 630; *Domett v Beckford* (1833) 5 B & Ad 521. The shipper's liability may be modified by the terms of the charterparty (see PARA 299 et seq) or of the bill of lading (*Lewis v M'Kee* (1868) LR 4 Exch 58 (where, however, an indorsement of a bill of lading 'without recourse' was held not to be sufficient, such an indorsement being unusual and not having been brought to the master's attention)).

6 *Lidgett v Perrin* (1862) 2 F & F 763.

7 *Fox v Nott* (1861) 6 H & N 630 (where the shipper was described as agent in the bill of lading); *Kennedy v Gouveia* (1823) 3 Dow & Ry KB 503 (where the agent was not so described). The real owner is also liable as undisclosed principal: *Sewell v Burdick* (1884) 10 App Cas 74 at 91, 5 Asp MLC 376 at 381, HL, per Lord Blackburn. Cf *King-Hall v Standard Bank of South Africa Ltd* [1919] 2 KB 52 at 67, 14 Asp MLC 415 at 423 per Bailhache J (where a claim for freight for the carriage of bullion in a ship of the Royal Navy made by an admiral and captain against persons with whom the shipment was arranged and from whom the bullion came failed because no Order in Council issued under the Freight for Treasure Act 1819 (repealed) authorising payment of freight was in force).

8 *Dickenson v Lano* (1860) 2 F & F 188.

9 *Anglo Overseas Transport Co Ltd v Titan Industrial Corp'n (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152. See AGENCY vol 1 (2008) PARAS 44, 112.

10 See the Carriage of Goods by Sea Act 1924 s 3(3); and PARA 342.

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### **569. Shipment in own ship.**

Where a person ships goods in his own ship, no contract to pay freight can be implied<sup>1</sup>, as he is at the same time both shipowner and shipper<sup>2</sup>. A person to whom he has, as shipowner, transferred the ship during the course of the voyage cannot, therefore, call on him, in his capacity as shipper<sup>3</sup>, to pay freight when his goods have reached their destination<sup>4</sup>.

- 1 Freight may, however, be reserved by the bill of lading: *Weguelin v Cellier* (1873) LR 6 HL 286.
- 2 It is immaterial that he is not the owner of the goods: *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233.
- 3 *Miller v Woodfall* (1857) 8 E & B 493.
- 4 *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233.

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### **570. Effect of charterparty.**

Where the shipper is not the charterer, the existence of a charterparty, by which an obligation to pay freight is imposed on the charterer<sup>1</sup>, does not take away the shipper's liability in respect of freight<sup>2</sup> unless it is clear, from the circumstances, that the shipper has contracted solely with the charterer<sup>3</sup>.

- 1 See PARAS 255, 256, 572.
- 2 The shipper is, however, liable only for the freight due under his own contract, unless the charterparty is incorporated: see PARA 355.
- 3 *Smidt v Tiden* (1874) LR 9 QB 446, 2 Asp MLC 307 (where the defendant had paid freight to the charterer in ignorance of the plaintiff's rights). See also *Tradigrain SA v King Diamond Marine Ltd* [2000] 2 All ER (Comm) 542, CA (where owner contracted that freight was payable as per the charterparty, the manner or mode of the collection of freight was delegated to the time charterer and the owner could not claim freight from the shipper).

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### **571. Effect of bill of lading.**

It is immaterial whether under the bill of lading the goods are made deliverable to the shipper himself<sup>1</sup> or to a third person<sup>2</sup>, as in both cases the contract of carriage is made with the shipper alone<sup>3</sup>. The shipper cannot, therefore, by any subsequent dealings with the bill of lading, defeat the shipowner's right as against himself to demand payment of the freight<sup>4</sup>. The effect of such dealings may be to give the shipowner an additional right to demand payment from a third person<sup>5</sup>, but the shipper's liability remains unchanged<sup>6</sup>; nor is his liability taken away by the insertion of a term in the bill of lading expressly providing for payment of the freight by the person who takes delivery of the goods<sup>7</sup>.

Such a term is inserted for the benefit of the shipowner, who is thereby entitled to withhold delivery until payment; it is not intended to exonerate the shipper from liability. Its effect is merely to give the shipowner an option to demand payment from the person to whom he delivers the goods<sup>8</sup>. As against the shipper, he is not bound to exercise his option, and the shipper remains liable, notwithstanding that the shipowner has delivered the goods without demanding payment of the freight from the consignee<sup>9</sup>. Payment of the freight by the consignee, however, discharges the shipper from any further liability<sup>10</sup>; and he is equally discharged where the shipowner or master on his behalf voluntarily takes a bill of exchange from the consignee in lieu of cash for his own convenience<sup>11</sup>.

1 *Penrose v Wilkes* (1790) cited in *Abbott's Law of Merchant Ships and Seamen* (14th Edn, 1901) 683, 684; *Fox v Nott* (1861) 6 H & N 630 at 637.

2 *Shepard v De Bernales* (1811) 13 East 565; *Sanders v Vanzeller* (1843) 4 QB 260 at 288, Ex Ch, per Parke B (disapproving *Drew v Bird* (1828) Mood & M 156 and *Moorsom v Kymer* (1814) 2 M & S 303); cf *Tapley v Martens* (1800) 8 Term Rep 451; *Christy v Row* (1808) 1 Taunt 300.

3 *Domett v Beckford* (1833) 5 B & Ad 521.

4 *Fox v Nott* (1861) 6 H & N 630.

5 See PARA 575.

6 *Fox v Nott* (1861) 6 H & N 630.

7 *Domett v Beckford* (1833) 5 B & Ad 521, following *Shepard v De Bernales* (1811) 13 East 565 and disapproving *Drew v Bird* (1828) Mood & M 156. See also *Tradigrain SA v King Diamond Marine Ltd* [2000] 2 All ER (Comm) 542, CA (where owner contracted that freight was payable as per the charterparty, the manner or mode of the collection of freight was delegated to the time charterer and the owner could not claim freight from the shipper).

8 *Domett v Beckford* (1833) 5 B & Ad 521.

9 *Shepard v De Bernales* (1811) 13 East 565; *Domett v Beckford* (1833) 5 B & Ad 521.

10 *Anderson v Hillies* (1852) 12 CB 499.

11 *Strong v Hart* (1827) 6 B & C 160; *Marsh v Pedder* (1815) 4 Camp 257. As to the liability for freight of an indorsee of a bill of lading who takes delivery through an agent to whom the bill has been indorsed in blank see *Tobin v Crawford* (1842) 9 M & W 716, Ex Ch.

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## **572. Liability of charterer.**

Where the ship in which the goods are carried is operating under a charterparty, the liability to pay the freight reserved by the charterparty<sup>1</sup> falls in the first instance on the charterer<sup>2</sup>. This liability depends on the contract contained in the charterparty, by the terms of which it is regulated<sup>3</sup>, and is personal to the charterer<sup>4</sup>. An assignment of the benefit of a charterparty to a third person<sup>5</sup> does not of itself, therefore, defeat the shipowner's right to claim payment of the chartered freight from the charterer<sup>6</sup>. To have this effect the assignment must be assented to by the shipowner<sup>7</sup>; and, in addition, it must be clear from the terms of his assent that he has accepted the substitution of liability, and not merely agreed to the performance of the charterer's obligations by the assignee<sup>8</sup>.

Similarly, the charterer's liability to pay the chartered freight does not depend on his relation to the goods in respect of which it is claimed<sup>9</sup>. The fact that he shipped them as agent only on behalf of their owner is immaterial<sup>10</sup> if his liability under the charterparty is otherwise clear<sup>11</sup>. It is equally immaterial that the goods were shipped by a third person and not by the charterer himself<sup>12</sup>. It follows, therefore, that the existence of an alternative liability in a third person to pay freight equivalent to that reserved by the charterparty, as, for example, where such person is the actual shipper<sup>13</sup> or the holder of the bill of lading<sup>14</sup>, must be disregarded. The charterer is not entitled to insist on the shipowner enforcing the alternative liability of the third person rather than that of the charterer<sup>15</sup>, and is not discharged by the shipowner's failure to do so<sup>16</sup>. He is, however, entitled to the benefit of any payment made to the shipowner by any other person liable to pay for the carriage of the goods<sup>17</sup>.

1 As to the liability of the shipper see PARA 568.

2 *Shepard v De Bernales* (1811) 13 East 565; *Christy v Row* (1808) 1 Taunt 300; and see PARAS 255-256. For a case where the shipowners were unable to recover freight from the charterers, and alleged that the brokers had negligently misstated the financial standing and reliability of the charterers, and the shipowners claimed damages from the brokers, see *Markappa Inc v NW Spratt & Son Ltd, The Arta* [1985] 1 Lloyd's Rep 534, CA.

3 As to the effect of a cesser clause see *Hansen v Harrold Bros* [1894] 1 QB 612, 7 Asp MLC 464, CA; and PARA 304.

4 As to when the holder of the bill of lading is to pay freight as per the charterparty see PARA 360; and the text to notes 9-16.

5 As to the assignment of charterparties see *Dimech v Corlett* (1858) 12 Moo PCC 199.

6 *Dimech v Corlett* (1858) 12 Moo PCC 199 at 223. As to the effect of a sale of the ship with the benefit of a current charterparty see *Sorrentino Fratelli v Buerger* [1915] 3 KB 367, 13 Asp MLC 164, CA (cited in PARA 207 note 1).

7 *Dimech v Corlett* (1858) 12 Moo PCC 199 at 223.

8 See **CONTRACT** vol 9(1) (Reissue) PARA 757.

9 See the cases in which it is contemplated that the ship is to be sub-chartered, eg *London Transport Co Ltd v Trechmann Bros* [1904] 1 KB 635, 9 Asp MLC 518, CA; *Ralli Bros v Paddington Steamship Co Ltd (Mackintosh & Co, Third Parties)* (1900) 5 Com Cas 124.

10 Cf *Cooke v Wilson* (1856) 1 CBNS 153.

11 As to agents entering into charterparties see further PARA 214.

12 *Christy v Row* (1808) 1 Taunt 300.

13 *Penrose v Wilkes* (1790) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 683, 684.

14 *Shepard v De Bernales* (1811) 13 East 565.

15 *Shepard v De Bernales* (1811) 13 East 565.

16 *Domett v Beckford* (1833) 5 B & Ad 521.

17 *Tapley v Martens* (1800) 8 Term Rep 451.

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### **573. Cesser clause.**

Where the charterparty contains a cesser clause, the charterer's liability to pay chartered freight is intended to cease when the specified cargo has been shipped<sup>1</sup>. The charterer is not, however, necessarily discharged wholly from his liability, as the extent of his discharge depends on the scope of the cesser clause and the manner in which its terms have been fulfilled<sup>2</sup>. Moreover, the effect of a cesser clause, when fully operative, is only to discharge the charterer from his liability as such. If at the same time he is liable in another capacity, as, for example, where he holds the bill of lading, his liability in that capacity remains unchanged<sup>3</sup>.

<sup>1</sup> See PARA 304.

<sup>2</sup> *Jenneson, Taylor & Co v Secretary of State for India in Council* [1916] 2 KB 702, 14 Asp MLC 41; and see PARA 304. For example, his discharge may be conditional on payment of advance freight, dead freight and demurrage. As to waiver by the charterer of his rights under a cesser clause by conduct evincing an intention to continue to be liable for freight see *Rederi Akt Transatlantic v Board of Trade* (1925) 30 Com Cas 117.

<sup>3</sup> Cf *Gullischen v Stewart Bros* (1884) 13 QBD 317, 5 Asp MLC 200, CA; *A Coker & Co Ltd v Limerick Steamship Co Ltd* (1918) 14 Asp MLC 287 (liability for advance or estimated freight expressed to be payable on signature of bills of lading may fall due distributively on shipment of cargo). See also PARA 600.

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### **574. Liability for freight and shipping documents.**

A person who becomes the lawful holder of a bill of lading or in whom rights of suit under a sea waybill or ship's delivery order become vested<sup>1</sup> and who takes or demands delivery of, or makes a claim in respect of, any of the goods to which the document relates<sup>2</sup> will thereby render himself liable for payment of freight<sup>3</sup>.

<sup>1</sup> I.e. under the Carriage of Goods by Sea Act 1924 s 2(1): see PARAS 338, 364-365.

<sup>2</sup> I.e. under the Carriage of Goods by Sea Act 1924 s 3(1): see PARAS 342, 364-365.

<sup>3</sup> See the Carriage of Goods by Sea Act 1924 s 3; and PARAS 342, 364-365.

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### 575. Where the consignee is liable.

Any other person<sup>1</sup> may, by reason of the circumstances surrounding his receipt of the goods, render himself liable under a new contract in the same way as a consignee<sup>2</sup>. Since the shipowner has a right to withhold delivery until the freight has been paid<sup>3</sup>, the receipt of the goods in such a case, although it does not of itself create any obligation to pay freight<sup>4</sup>, may amount to evidence of a new contract, distinct from the contract of carriage, by which the receiver, in consideration of the shipowner giving up his lien, agrees to pay the freight<sup>5</sup>. Whether this new contract exists or not is a question of fact, to be determined by reference to the circumstances<sup>6</sup>. The conduct of the receiver, and, in particular, his previous dealings with the shipowner<sup>7</sup>, and perhaps, his usual course of business<sup>8</sup>, must be such as to lead to the inference that his receipt of the goods was in pursuance of a new contract. Although, in the absence of any explanation, the receipt of the goods may be sufficient<sup>9</sup>, no such inference may be drawn where, at the time when the receiver received the goods, he was known by the shipowner to be acting as agent for their owner and the delivery was made to him in that capacity<sup>10</sup>. Where the bill of lading has been indorsed to pledgees who pay the freight and take delivery of the goods under it, a contract may be inferred as between themselves and the shipowner to deliver and accept the goods on the terms of the bill of lading<sup>11</sup>.

<sup>1</sup> ie any person other than those mentioned in PARA 574.

<sup>2</sup> *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, 16 Asp MLC 262, CA. See also PARA 352.

<sup>3</sup> See PARAS 551-552.

<sup>4</sup> *Moorsom v Kymer* (1814) 2 M & S 303; *Pinder v Wilks* (1814) 5 Taunt 612; *White & Co v Furness, Withy & Co* [1895] AC 40, 7 Asp MLC 574, HL.

<sup>5</sup> *Cock v Taylor* (1811) 13 East 399; *Dobbin v Thornton* (1806) 6 Esp 16; *Dougal v Kemble* (1826) 3 Bing 383; *Renteria v Ruding* (1830) Mood & M 511; *Sanders v Vanzeller* (1843) 4 QB 260, Ex Ch (followed in *Young v Moeller* (1855) 5 E & B 755, Ex Ch); *Kemp v Clark* (1848) 12 QB 647; *Allen v Coltart* (1883) 11 QBD 782, 5 Asp MLC 104. Cf *Roberts v Holt* (1685) 2 Show 443; *Artaza v Smallpiece* (1793) 1 Esp 23; *Smurthwaite v Wilkins* (1862) 11 CBNS 842 at 847, 849 per Erle CJ; *Brandt v Liverpool, Brazil, and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, 16 Asp MLC 262, CA. The same principle applies to demurrage: *Stindt v Roberts* (1848) 5 Dow & L 460. Cf *Scotson v Pegg* (1861) 6 H & N 295.

<sup>6</sup> *Allen v Coltart* (1883) 11 QBD 782, 5 Asp MLC 104; *Palmer v Zarifi Bros* (1877) 3 Asp MLC 540. As to the effect of delivery of the goods being taken, not under the bill of lading, but under an order addressed to the shipowner, see *Wilson v Kymer* (1813) 1 M & S 157.

<sup>7</sup> *Wilson v Kymer* (1813) 1 M & S 157; *Coleman v Lambert* (1839) 5 M & W 502.

<sup>8</sup> *Dickenson v Lano* (1860) 2 F & F 188.

<sup>9</sup> *Sanders v Vanzeller* (1843) 4 QB 260, Ex Ch.

<sup>10</sup> *Ward v Felton* (1801) 1 East 507; *Amos v Temperley* (1841) 8 M & W 798; cf *White & Co v Furness, Withy & Co* [1895] AC 40, 7 Asp MLC 574, HL.

<sup>11</sup> *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, 16 Asp MLC 262, CA.

Carriage/D. PAYMENT OF FREIGHT/(C) Person to whom Payment should be Made/576. Shipowner primarily entitled.

## (C) PERSON TO WHOM PAYMENT SHOULD BE MADE

### 576. Shipowner primarily entitled.

The shipowner is the person who is primarily entitled to receive the freight, as the goods have been carried in his ship<sup>1</sup>, the right to receive freight being one of the incidents of ownership<sup>2</sup>. Payment need not be made to the shipowner himself; it is sufficient if it is made to an agent authorised to receive it<sup>3</sup>.

The master has an implied authority to receive payment of the freight<sup>4</sup>, and, when the contract under which it is payable is contained in a bill of lading signed by him<sup>5</sup>, he may, as a party to the contract<sup>6</sup>, sue the person liable to pay it<sup>7</sup>; but he cannot claim to receive it as against the shipowner<sup>8</sup>, who may at any time revoke his authority to receive it, either expressly<sup>9</sup> or impliedly, by appointing another person as his agent in that behalf<sup>10</sup>.

1 *Atkinson v Cotesworth* (1825) 3 B & C 647; *Walshe v Provan* (1853) 8 Exch 843. If the freight is expressly made payable to a third person, and not to the shipowner, and an action to recover it is brought by the third person in the name of the shipowner, payment to the shipowner or master is no defence: *Kirchner v Venus* (1859) 12 Moo PCC 361 at 398. The receipt of freight by the obligee of a bottomry bond is in law a receipt by the shipowner: *Benson v Chapman* (1849) 2 HL Cas 696.

2 A part owner may sue for the freight on behalf of himself and the other part owners: *De Hart v Stevenson* (1876) 1 QBD 313. It has never been necessary, it seems, to name as parties to an action for freight part owners who had disagreed as to the voyage: *Boson v Sandford* (1690) Carth 58.

3 *The Edmond* (1861) Lush 211. As against the shipowner a ship's husband who is authorised to receive freight may deduct his disbursements (*Harris v Reynolds* (1856) 4 WR 278), but an agent of the ship's husband cannot, as against the shipowner, deduct a debt due to himself from the ship's husband (*Walshe v Provan* (1853) 8 Exch 843). As to the meaning of 'ship's husband' see PARA 215 note 1.

4 *Shields v Davis* (1815) 6 Taunt 65.

5 As to the master signing bills of lading see PARA 329 et seq.

6 It is otherwise where he signs the bill of lading in pursuance of a term in the charterparty, as he is in the position of an agent only: *Repetto v Millar's Karri and Jarrah Forests Ltd* [1901] 2 KB 306, 9 Asp MLC 215; cf *Zwischenbart v Henderson* (1854) 9 Exch 722.

7 *Brouncker v Scott* (1811) 4 Taunt 1; *Isberg v Bowden* (1853) 8 Exch 852; *Seeger v Duthie* (1860) 8 CBNS 45 (affd 8 CBNS 45 at 72); cf *Shepard v De Bernales* (1811) 13 East 565.

8 *Atkinson v Cotesworth* (1825) 3 B & C 647. As to the master's right to a lien against the freight see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1020.

9 *Atkinson v Cotesworth* (1825) 3 B & C 647; *Wilkins v Mure* (1784) 1 Cox Eq Cas 150 (where the notice was given by the shipowner's assignees in bankruptcy).

10 *The Edmond* (1861) Lush 211.

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### 577. Where ship is chartered.

Where the ship in which the goods are carried has been chartered from the shipowner, there are two kinds of freight which call for consideration, namely the freight reserved under the charterparty and the freight payable under the bill of lading<sup>1</sup>. As regards the shipowner's right to receive from the charterer the chartered freight, no question arises<sup>2</sup>.

Where, however, the bill of lading is in the hands of a third person who is liable, as holder, to pay freight<sup>3</sup>, payment of the bill of lading freight may be claimed both by the charterer and by the shipowner. As against the holder of the bill of lading, the shipowner's right depends on whether he can establish the existence of a contract between himself and the holder of the bill of lading, under which he is entitled to receive the bill of lading freight<sup>4</sup>.

If the charterparty amounts to a demise<sup>5</sup>, the contract under the bill of lading is made with the charterer, and the shipowner cannot, therefore, claim the freight<sup>6</sup>.

In any other case the bill of lading is usually sufficient evidence of a contract with the shipowner, as, notwithstanding the existence of the charterparty, the contract of carriage must be regarded, as a general rule, so far as the holder of the bill of lading is concerned, as made between the shipowner and himself<sup>7</sup>.

At the same time, as between the shipowner and the charterer, their respective rights depend on the terms of the charterparty<sup>8</sup>. Therefore, according to the circumstances of the case, the shipowner may be entitled to retain the whole of the bill of lading freight for his own benefit<sup>9</sup>, or he may be bound to account to the charterer for at least some portion of it<sup>10</sup>. In this second case, the charterer may give notice to the holder of the bill of lading not to pay the shipowner the portion due to himself and thus deprive the shipowner of his right to claim it from the holder of the bill of lading<sup>11</sup>.

1 See PARA 355.

2 See PARAS 255-256.

3 See PARA 342.

4 *Compania Commercial y Naviera San Martin SA v China National Foreign Trade Transportation Corp'n, The Constanza M* [1981] 2 Lloyd's Rep 147, CA. See also PARA 354.

5 See PARA 354.

6 *Marquand v Banner* (1856) 6 E & B 232, as explained in *Gilkison v Middleton* (1857) 2 CBNS 134 and *Wehner v Dene Steam Shipping Co* [1905] 2 KB 92. As to the exercise of a lien by the shipowner in such cases see PARA 553 et seq.

7 *Wastwater Steamship Co Ltd v TB Neale & Co* (1902) 9 Asp MLC 282. See also PARA 354. As to when the bill of lading is a contract with the charterer see PARA 578; and as to the amount of freight payable by the bill of lading holder, where there is a difference between the bill of lading freight and the chartered freight, see PARA 355.

8 Cf *Marquand v Banner* (1856) 6 E & B 232 and *Janentzky v Henry Langridge & Co* (1895) 1 Com Cas 90 with *Christie v Lewis* (1821) 2 Brod & Bing 410 and *The Canada* (1897) 13 TLR 238.

9 *Broadhead v Yule* (1871) 9 M 921.

10 *Marquand v Banner* (1856) 6 E & B 232. Where the charterparty does not apply to goods carried on deck, the freight due in respect of such goods belongs to the shipowner and not to the charterer: *Neill v Ridley* (1854) 9 Exch 677. See also *Hoyland & Co v Graham & Co* (1896) 1 Com Cas 274 (where the shipowner and shipper entered into a new contract at a higher rate of freight than that agreed between charterer and shipper, and it was held that the shipowner was bound to account only for the difference between the chartered freight and the freight originally agreed between the charterer and the shipper).

11 *Michenson v Begbie* (1829) 6 Bing 190.

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### **578. Rights of charterer against consignee.**

Where goods are carried in a chartered ship under a bill of lading, the charterer is not entitled to claim payment of the freight due under the bill of lading from the person who may be liable to pay it as consignee or holder of the bill of lading<sup>1</sup>, unless the charterparty is by demise, or it appears from the form of the bill of lading that the contract of carriage contained in it was made with the charterer and not with the shipowner<sup>2</sup>, or unless the existence of a special contract to pay the freight to the charterer is established<sup>3</sup>.

<sup>1</sup> See PARA 577.

<sup>2</sup> *Michenson v Begbie* (1829) 6 Bing 190; *Zwilchenbart v Henderson* (1854) 9 Exch 722; *Marquand v Banner* (1856) 6 E & B 232; *Mitchell v Burn* (1874) 1 R 900.

<sup>3</sup> *Samuel, Samuel & Co v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115; *Harrison v Huddersfield Steamship Co Ltd* (1903) 19 TLR 386.

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### **579. Sale of ship.**

Where, after entering into a contract of carriage, the shipowner sells the ship in which the goods are being carried, then, in the absence of an express contract, the purchaser becomes entitled, as from the date of the sale<sup>1</sup>, to receive all freight which is then in course of being earned by the ship and which does not become payable until afterwards<sup>2</sup>. At the time when the freight falls due the purchaser is the owner of the ship and takes the freight as being incidental to the property in the ship<sup>3</sup>. Payment of the freight to the purchaser by the person liable is, therefore, a valid payment<sup>4</sup>, although the contract under which it is payable does not, strictly speaking, pass with the property in the ship<sup>5</sup>, but requires to be expressly assigned<sup>6</sup>.

<sup>1</sup> *Lindsay v Gibbs* (1856) 22 Beav 522; *Sorrentino Fratelli v Buerger* [1915] 3 KB 367, 13 Asp MLC 164, CA; *Omnium d'Enterprises v Sutherland* [1919] 1 KB 618, 14 Asp MLC 402, CA (cited in PARA 207 note 1); cf *M Isaacs & Sons Ltd v William McAllum & Co Ltd* [1921] 3 KB 377, 15 Asp MLC 411.

<sup>2</sup> *Morrison v Parsons* (1810) 2 Taunt 407 (right to freight accruing subsequent to sale belongs to the assignee of the ship as incident to it). As to the position where a person ships goods on his own ship and transfers the ship in the course of the voyage see PARA 569.

<sup>3</sup> *Case v Davidson* (1816) 5 M & S 79 at 82 per Lord Ellenborough.

<sup>4</sup> *Morrison v Parsons* (1810) 2 Taunt 407.

<sup>5</sup> *Splidt v Bowles* (1808) 10 East 279.

<sup>6</sup> Ie under the Law of Property Act 1925 s 136: see **CHOSER IN ACTION** vol 13 (2009) PARAS 72, 80-85.

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### 580. Mortgage of ship.

A transfer of the ship by way of mortgage<sup>1</sup> does not of itself entitle the mortgagee, as against the mortgagor, to claim the freight earned by the employment of the ship<sup>2</sup>. As long as the mortgagor remains in possession, he is not divested of his right as owner, and, therefore, his right to control the employment of the ship and to receive the freight to be earned by it continues<sup>3</sup>. By the mortgage, however, the mortgagee is empowered to take possession if, for example, the mortgagor defaults<sup>4</sup>. On taking possession, he becomes owner of the ship to the exclusion of the mortgagor, and is entitled as such to claim payment of the freight<sup>5</sup>. His right to the freight depends not on the existence of the mortgage<sup>6</sup> but solely on the fact that he is in possession as owner at the time when the freight becomes payable<sup>7</sup>. Any payment of freight made to the mortgagor by the person liable to pay it is valid as against the mortgagee, if made before the mortgagee takes possession<sup>8</sup>. Therefore, for the purpose of acquiring a right to the freight, it is necessary that the mortgagee should actually take possession<sup>9</sup>, or, at least, that he should do some act equivalent to it<sup>10</sup>. Where the ship is at sea, notice to the consignee, as holder of the bill of lading, that the mortgagee intends to take possession and to collect the freight himself is sufficient, provided that the mortgagee completes his right by taking possession as soon as possible<sup>11</sup>.

1 As to mortgages of ships see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 318 et seq. A mortgagee of shares in a ship has no right to the freight but only to his mortgagor's share of the profit: *Alexander v Simms* (1854) 5 De GM & G 57.

2 See the cases cited in notes 3-8; and PARAS 581, 582.

3 *Keith v Burrows* (1877) 2 App Cas 636, 3 Asp MLC 481, HL; *Wilson v Wilson* (1872) LR 14 Eq 32, 1 Asp MLC 265.

4 See **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 330. As to the right to repudiate a charterparty which impairs his security see *Law Guarantee and Trust Society v Russian Bank for Foreign Trade* [1905] 1 KB 815, 10 Asp MLC 41, CA.

5 *Gumm v Tyrie* (1865) 6 B & S 298, Ex Ch; *Japp v Campbell* (1887) 57 LJQB 79; *Gibson v Ingo* (1847) 6 Hare 112; cf *Dean v M'Ghie* (1826) 4 Bing 45; *Kerswill v Bishop* (1832) 2 Cr & J 529.

6 *Willis v Palmer* (1860) 7 CBNS 340.

7 *Keith v Burrows* (1877) 2 App Cas 636 at 646, 3 Asp MLC 481 at 482, HL, per Lord Cairns LC.

8 *Willis v Palmer* (1860) 7 CBNS 340; *Essarts v Whinney* (1903) 9 Asp MLC 363, CA; *Wilson v Wilson* (1872) LR 14 Eq 32, 1 Asp MLC 265; *The Benwell Tower* (1895) 8 Asp MLC 13; cf *Belfast Harbour Comrs v Lawther* (1865) 17 I Ch R 54.

9 As to what is meant by 'taking possession' see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 331.

10 *Gardner v Cazenove* (1856) 1 H & N 423; *Beynon v Godden* (1878) 3 Ex D 263, 4 Asp MLC 10, CA (where the mortgagor, who was part owner and ship's husband, was removed from his office as ship's husband by the mortgagee and the other part owners in concurrence).

11 *Rusden v Pope* (1868) LR 3 Exch 269; *Wilson v Wilson* (1872) LR 14 Eq 32, 1 Asp MLC 265.

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### **581. What freight passes to the mortgagee.**

The freight to which the mortgagee becomes entitled is the freight which is payable in respect of the goods on board the ship at the time when he takes possession<sup>1</sup>. He does not succeed to the contractual rights of the mortgagor, but only to his rights as shipowner<sup>2</sup>. Any freight which may still be owing in respect of goods carried on a former voyage does not, therefore, pass to the mortgagee in possession<sup>3</sup>. Even the freight which has been earned on the voyage in the course of which he takes possession does not pass to him if, before he does so, the goods have been delivered to the consignee<sup>4</sup>. Where, however, he takes possession before the delivery is complete, he may be entitled to receive the whole freight, including the freight for the portion already delivered, if, on the construction of the charterparty or bill of lading, the court is of the opinion that no freight is payable until the whole of the goods has been delivered<sup>5</sup>.

1 *Chinnery v Blackman* (1784) 1 Hy BI 117n; *Gumm v Tyrie* (1865) 6 B & S 298, Ex Ch. The mortgagee has priority over a creditor for necessities: *Johnson v Black, The Two Ellens* (1872) LR 4 PC 161, 1 Asp MLC 208. As to 'necessaries' see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1033. As to priorities see PARA 582 et seq.

2 *Keith v Burrows* (1877) 2 App Cas 636, 3 Asp MLC 481, HL.

3 *Shillito v Biggart* [1903] 1 KB 683, 9 Asp MLC 396.

4 *Chinnery v Blackman* (1784) 1 Hy BI 117n.

5 *Brown v Tanner* (1868) 3 Ch App 597.

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### **582. Amount payable to mortgagee.**

Although, on taking possession, the mortgagee may not avail himself of the contractual rights of the mortgagor against the consignee, but must rely on his lien over the goods, nevertheless, as against the consignee, he is bound by the terms of the contract of carriage<sup>1</sup>. He cannot, therefore, claim to be paid freight at a higher rate than that which the consignee agreed to pay<sup>2</sup>, and must allow the consignee credit for all payments made on account of freight, whether by way of advance freight<sup>3</sup> or otherwise<sup>4</sup>. Such payments must, however, have been made in accordance with the terms of the contract of carriage; no credit need be given for payments which fall outside its terms and are made in pursuance of a separate arrangement with the mortgagor<sup>5</sup>.

1 *Keith v Burrows* (1877) 2 App Cas 636, 3 Asp MLC 481, HL.

2 *Keith v Burrows* (1877) 2 App Cas 636, 3 Asp MLC 481, HL (where the rate of freight was nominal); *Brown v North* (1852) 8 Exch 1.

3 *Tanner v Phillips* (1872) 1 Asp MLC 448.

4 *The Salacia* (1862) Lush 545.

5 *Tanner v Phillips* (1872) 1 Asp MLC 448 (where the charterer advanced a greater sum than that allowed by the charterparty, and was held entitled to deduct from freight the amount allowed by the charterparty and no more).

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### **583. Subsequent mortgages.**

The right of a first mortgagee to take possession of the ship and claim payment of the freight is paramount<sup>1</sup>; but, subject to that and to the rights of any prior incumbrancers<sup>1</sup>, any subsequent mortgagee has, as between himself and the mortgagor, an equitable right to take possession, which he may enforce, if necessary, by obtaining the appointment of a receiver<sup>2</sup>.

1 *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507 at 511, 1 Asp MLC 323 at 325, CA, per James LJ.

2 *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507, 1 Asp MLC 323, CA; *Burn v Herlofson and Siemenssen, The Faust* (1887) 6 Asp MLC 126, CA.

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### **584. When insurers are entitled to freight.**

If, during the course of the voyage, the ship in which the goods are being carried becomes a constructive total loss and is abandoned to the insurers on ship<sup>1</sup>, any freight which may become payable by reason of the ship being able to carry the goods to their destination<sup>2</sup> belongs to the insurers<sup>3</sup>, as the effect of the abandonment is to place them, to this extent at least, in the position of the shipowner<sup>4</sup>.

If, however, the freight cannot be earned owing to the extent to which the ship is damaged, the shipowner's rights against the persons who may be responsible for the loss of freight do not pass to the insurers on ship, but to the insurers on freight, if any<sup>5</sup>; nor may the insurers on ship claim the freight if it is earned by the shipowner exercising his right of transhipment and forwarding the goods by another ship to their destination<sup>6</sup>.

As regards their claim for freight, like other transferees of the ship, the insurers are bound by the shipowner's contracts<sup>7</sup>. Where, however, the goods which are being carried in the ship belong to the shipowner, and after the abandonment are carried to their destination in the same ship, then, although they cannot claim freight on the whole voyage, the insurers are entitled to be paid at the usual rate for the use of the ship from the place where she was abandoned to her destination<sup>8</sup>.

1 As to abandonment see **INSURANCE** vol 25 (2003 Reissue) PARA 478.

- 2 As to the position if the ship is unable to proceed see PARA 500.
- 3 *Case v Davidson* (1816) 5 M & S 79; *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159; and see *Keith v Burrows* (1877) 2 App Cas 636 at 657, 3 Asp MLC 481 at 484, HL, per Lord Blackburn.
- 4 As to the position of the insurers on abandonment see the Marine Insurance Act 1906 s 63; *Elgood v Harris* [1896] 2 QB 491 at 494, 8 Asp MLC 206 at 207 per Collins J; and **INSURANCE** vol 25 (2003 Reissue) PARA 486 et seq.
- 5 *Sea Insurance Co v Hadden* (1884) 13 QBD 706, 5 Asp MLC 230, CA.
- 6 *Hickie and Borman v Rodocanachi* (1859) 4 H & N 455.
- 7 An abandonment is equivalent to the sale of the ship: *Case v Davidson* (1816) 5 M & S 79 at 87 per Abbott J.
- 8 *Miller v Woodfall* (1857) 8 E & B 493.

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### **585. Assignment of freight.**

Where the freight has been legally assigned<sup>1</sup> by the shipowner, it is payable to the assignee<sup>2</sup>. The shipowner is entitled to assign the freight at any time during the subsistence of the contract under which it is payable, whether before<sup>3</sup> or after<sup>4</sup> it has become due. He may also make an equitable assignment of future freight, that is to say the freight which the ship may earn on future voyages as to which no contracts have been made at the date of the assignment<sup>5</sup>.

- 1 As to legal assignments see the Law of Property Act 1925 s 136; and **CHoses IN ACTION** vol 13 (2009) PARAS 72, 80-85.
- 2 *Boyd v Mangles* (1849) 3 Exch 387; *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, [1989] 1 Lloyd's Rep 431, HL, revsg [1989] AC 1056, sub nom *Colonial Bank v European Grain and Shipping Ltd, The Dominique* [1988] 3 All ER 233, [1988] 1 Lloyd's Rep 215, CA. As to the rights of assignor and assignee among themselves see *Curtis v Auber* (1820) 1 Jac & W 526.
- 3 *Douglas v Russell* (1831) 4 Sim 524 (affd (1833) 1 My & K 488) (where it was held that the subsequent bankruptcy of the shipowner did not affect the position of an assignee who had perfected his assignment by notice); *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507, 1 Asp MLC 323, CA.
- 4 See the Law of Property Act 1925 s 136(1); and **CHoses IN ACTION** vol 13 (2009) PARAS 72, 80-85.
- 5 *Leslie v Guthrie* (1835) 1 Bing NC 697; *Lindsay v Gibbs* (1856) 22 Beav 522; cf *Robinson v Macdonnell* (1816) 5 M & S 228.

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### **586. Assignee subject to debtor's rights of set-off.**

As a legal assignment is subject to equities having priority over the right of the assignee<sup>1</sup>, the assignee takes the freight subject to the right of the person liable to pay it to set off any debts due from the shipowner to himself at the time when notice of the assignment was given<sup>2</sup>.

Where, however, the assignee is in a position to exercise a lien for the freight<sup>3</sup>, the set-off is not available<sup>4</sup>; nor is it available where the debt in respect of which it is claimed did not accrue until after the date of the notice<sup>5</sup>.

1 See the Law of Property Act 1925 s 136(1); and **CHOSSES IN ACTION** vol 13 (2009) PARAS 72, 80-85.

2 *Wilson v Gabriel* (1863) 4 B & S 243; cf *The Salacia* (1862) Lush 545; *The Standard* (1857) Sw 267. See also *Boyd v Mangles* (1849) 3 Exch 387 (where the freight was payable in full, the agreement between the shipowner and the cargo owner as to sharing of profits and losses not coming into operation until after payment of freight). As to set-off generally see **SET-OFF AND COUNTERCLAIM** vol 42 (Reissue) PARA 401 et seq.

3 See PARA 552.

4 *Weguelin v Cellier* (1873) LR 6 HL 286.

5 Cf *De Pothonier v De Mattos* (1858) EB & E 461.

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### 587. Equitable assignments.

If the assignment is equitable only<sup>1</sup>, the assignee, although entitled to call on the shipowner to account for any freight which he may have received<sup>2</sup>, cannot sue the person liable for the payment of freight in his own name but must join the assignor as a party to the proceedings<sup>3</sup>.

An equitable assignee should give notice of the assignment to the person liable for freight, as equitable assignees rank according to the date upon which notice is given, assuming the subsequent assignee did not know of the prior assignment when he took his security<sup>4</sup>.

Such notice is, however, ineffectual against a subsequent legal assignee<sup>5</sup>, or against a person who claims the freight by notice of a subsequent sale<sup>6</sup> or legal mortgage<sup>7</sup> of the ship. However, as against a second mortgagee of the ship, an equitable assignee of the freight who has perfected his title by notice before the second mortgagee has done so takes priority, as the interests of both are equitable<sup>8</sup>.

1 A mere authority to collect freight on behalf of the shipowner does not amount to an equitable assignment: *HG Harper & Co v J Bland & Co Ltd* (1914) 13 Asp MLC 49; cf *Smith v Zigurds (Owners) and EA Casper, Edgar & Co Ltd* [1934] AC 209, 18 Asp MLC 475, HL. See also **CHOSSES IN ACTION** vol 13 (2009) PARA 47.

2 *Willis v Palmer* (1860) 7 CBNS 340.

3 *HG Harper & Co v J Bland & Co Ltd* (1914) 13 Asp MLC 49. See also **CHOSSES IN ACTION** vol 13 (2009) PARA 24 et seq. An equitable assignee of an equitable chose in action may, however, sue in his own name if his assignment is absolute: see **CHOSSES IN ACTION** vol 13 (2009) PARA 68.

4 See **CHOSSES IN ACTION** vol 13 (2009) PARA 43 et seq; cf *Re Mortgagees of The Pride of Wales and The Annie Lisle* (1867) 15 LT 606.

5 I.e. unless the legal assignee also has notice of the assignment: see the Law of Property Act 1925 s 136(1); and **CHOSSES IN ACTION** vol 13 (2009) PARAS 72, 80-85, 43.

6 *Lindsay v Gibbs* (1856) 22 Beav 522.

7 *Brown v Tanner* (1868) 3 Ch App 597; *Wilson v Wilson* (1872) LR 14 Eq 32, 1 Asp MLC 265; *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507, 1 Asp MLC 323 (where the legal mortgagee was given priority in respect of further advances made after the assignee of freight had given notice). The mortgagee must, however, have taken possession: see *The Benwell Tower* (1895) 72 LT 664, 8 Asp MLC 13 (where the first mortgagee became assignee of the freight after the second mortgage, and was held entitled to retain the freight paid to him under the assignment, neither mortgagee having taken possession).

8 *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507 at 511, 1 Asp MLC 323 at 325 per James LJ. Cf *Lindsay v Gibbs* (1856) 22 Beav 522 (where 24 shares in the ship were sold to one person and the remaining 40 to another person before the date when the freight was assigned, and it was held that the assignee of freight, although postponed to the transferee of the 24 shares, who had registered before the assignment of freight, had priority over the transferee of the 40 shares, who did not register until afterwards).

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### **588. Effect on assignment of sale or mortgage of ship.**

Although a legal assignee of the freight is not deprived of his right to receive the freight by a subsequent sale or mortgage of the ship<sup>1</sup>, he may not claim it when the assignment was made after the sale of the ship, as the assignor has no right to receive the freight, and, therefore, nothing passes by the assignment<sup>2</sup>. If, however, the ship only is mortgaged, a subsequent legal assignment is not wholly inoperative, as it entitles the assignee to the freight, unless the mortgagee takes possession<sup>3</sup>. As soon as the mortgagee takes possession, any freight remaining due becomes payable to him and the assignment is, therefore, to that extent defeated<sup>4</sup>.

1 *The Benwell Tower* (1895) 8 Asp MLC 13.

2 *Morrison v Parsons* (1810) 2 Taunt 407.

3 See PARA 580.

4 *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507, 1 Asp MLC 323, CA.

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### **589. Maritime lien.**

A person who has a maritime lien on a ship, such as a lien for damage arising out of collision<sup>1</sup> or for wages<sup>2</sup>, has the same lien on the freight. Similarly, the obligee of a bottomry bond which includes the freight has a lien on the freight, and payment to him discharges the person liable as against the shipowner<sup>3</sup>.

1 *The Leo* (1862) Lush 444; *The Flora* (1866) LR 1 A & E 45; *The Orpheus* (1871) LR 3 A & E 308 (where the cargo was not on board at the time of the collision, although it had already been contracted for); cf *The Roecliff* (1869) LR 2 A & E 363.

2 *The Andalina* (1886) 12 PD 1, 6 Asp MLC 62 (where it was held that a maritime lien for wages extended to freight payable not to the shipowner, but to the charterer).

3 *Benson v Chapman* (1849) 2 HL Cas 696. Payment of freight into court by direction of the court in an action brought by the obligee against the ship and freight has the same effect: *Place v Potts* (1855) 5 HL Cas 383. As to maritime liens see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1014 et seq; and as to bottomry bonds see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 437.

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## (D) WHEN FREIGHT IS PAYABLE

### 590. Payable on delivery.

The bill of lading often provides that the freight is to be paid on delivery of the goods to which it relates<sup>1</sup>. This provision is unnecessary, as, in the absence of any term to the contrary<sup>2</sup>, freight is by law payable on delivery<sup>3</sup>. The shipowner is not, however, bound to deliver before payment, as payment and delivery are concurrent acts<sup>4</sup>. The consignee must, therefore, be prepared to pay the freight, if the shipowner so requires, at the time of delivery<sup>5</sup>, and is not entitled to insist on delivery without tendering the freight<sup>6</sup>. A delivery of a portion of the goods comprised in the bill of lading without requiring payment of the freight does not preclude the shipowner from refusing to deliver the balance until the freight is paid, even if the unpaid freight is expressed to be payable on right delivery of the goods<sup>7</sup>.

Where the charterparty provides that freight is payable immediately after completion of discharge, freight is not due in instalments as each part of the cargo is discharged<sup>8</sup>.

Even where the goods have been delivered to the consignee, no freight is payable if the voyage was illegal<sup>9</sup>. Freight is, however, payable if the vessel has been overloaded in breach of the statutory provisions relating to load lines<sup>10</sup>, for the contract of carriage is not rendered illegal by such overloading<sup>11</sup>.

1 See PARA 323.

2 See PARA 600 et seq.

3 *Kirchner v Venus* (1859) 12 Moo PCC 361 at 390; *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, 3 Asp MLC 178 at 228, HL, per Blackburn J; *London Transport Co Ltd v Trechmann Bros* [1904] 1 KB 635, 9 Asp MLC 518, CA; cf *Blakey v Dixon* (1800) 2 Bos & P 321. There may, however, be a usage of a particular port to give credit: *Somes v Jenkins* (1866) 2 Mar LC 330; cf *Luard v Butcher* (1846) 2 Car & Kir 29 (where the usage was to pay partly in cash and partly by bills of exchange).

4 *Paynter v James* (1867) LR 2 CP 348 (affd (1868) 18 LT 449); *Miedbrodt v Fitzsimon, The Energie* (1875) LR 6 PC 306 at 314; *Vogeman v Bisley* (1897) 2 Com Cas 81.

5 *Black v Rose* (1864) 2 Moo PCCNS 277; *Paynter v James* (1867) LR 2 CP 348 at 355 per Bovill CJ. As against the shipper the shipowner is not bound to require payment of the freight before delivery: *Shepard v De Bernales* (1811) 13 East 565.

6 *Yates v Railston* (1818) 8 Taunt 293.

7 *Paynter v James* (1867) LR 2 CP 348.

- 8 *Canadian Pacific (Bermuda) Ltd v Lagon Maritime Overseas, The Fort Kipp* [1985] 2 Lloyd's Rep 168.
- 9 *Muller v Gernon* (1811) 3 Taunt 394 (where goods which had been imported from France without a licence were landed and re-exported by permission of the government); *Blanck v Solly* (1817) 8 Taunt 89; cf *Waugh v Morris* (1873) LR 8 QB 202, 1 Asp MLC 573 (where the contract was performed without a violation of the law).
- 10 As to load lines see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 671 et seq.
- 11 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683, [1956] 2 Lloyd's Rep 413.

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### **591. Arrival of goods necessary.**

The shipowner is not entitled to insist on the payment of freight unless he is in a position to deliver the goods<sup>1</sup>. Freight is not earned unless and until the shipowner's contract is substantially performed by the carriage and arrival of the goods ready to be delivered to the consignee<sup>2</sup>. It is, therefore, necessary that the goods should have been carried by the shipowner<sup>3</sup> to their destination, that is to say, to the port of discharge specified in the contract<sup>4</sup>. If, however, the contract gives a choice of ports and the port of discharge to which the ship is ordered becomes impossible<sup>5</sup>, the shipowner may charge freight to the nearest port named in the contract, provided that delivery of the cargo has been accepted there<sup>6</sup> and he has received no further orders to proceed to another port.

- 1 *Duthie v Hilton* (1868) LR 4 CP 138; *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680, 12 Asp MLC 437, HL.
- 2 *Dakin v Oxley* (1864) 15 CBNS 646 (approved in *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134 at 155); *Kirchner v Venus* (1859) 12 Moo PCC 361.
- 3 As to the position where the shipowner abandons the voyage see PARA 593.
- 4 *Hunter v Prinsep* (1808) 10 East 378 at 394 per Lord Ellenborough CJ; *Osgood v Groning* (1810) 2 Camp 466; *Shipton v Thornton* (1838) 9 Ad & El 314 at 333 per Lord Denman CJ; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; *St Enoch Shipping Co Ltd v Phosphate Mining Co* [1916] 2 KB 624 (where the ship was diverted from Hamburg and the cargo was discharged at Manchester in consequence of a warning from the Admiralty given on 3 August 1914, and no freight was recoverable). As to the principles applicable in the Prize Court see *The Iolo* [1916] P 206, 13 Asp MLC 141; and **PRIZE** vol 36(2) (Reissue) PARA 827.
- 5 The charterer or holder of a bill of lading, as the case may be, is not entitled to name a port which is known to be impossible, for the shipowner has an implied right to an opportunity to earn the freight: *Aktieselskabet Olivebank v Dansk Svoivlsyre Fabrik* [1919] 2 KB 162, 14 Asp MLC 426, CA.
- 6 *Duncan v Köster, The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214; *Fenwick v Boyd* (1846) 15 M & W 632; *St Enoch Shipping Co Ltd v Phosphate Mining Co* [1916] 2 KB 624 at 626, 627 per Rowlatt J. The master need not deliver the goods at an intermediate port unless the full freight is tendered: *The Patria* (1871) LR 3 A & E 436, 1 Asp MLC 71.

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### **592. Ability to deliver.**

The shipowner must remain in a position to deliver the goods until the expiration of the time within which the consignee is obliged to pay freight<sup>1</sup>. If the consignee fails to take delivery within that time, the shipowner is entitled to claim freight notwithstanding the non-delivery<sup>2</sup>. Moreover, a refusal on the part of the shipowner to deliver the goods until any liens which he may have over them are discharged<sup>3</sup> is not a demand for prepayment of freight, provided that he is ready to deliver on being paid cash<sup>4</sup>; but an excessive claim of lien may be so made as to amount to a dispensation of tender enabling the consignee, who has not tendered the freight due, to maintain an action for damages for non-delivery<sup>5</sup>.

Where an unpaid vendor prevents delivery of goods by exercising his right of stoppage in transit, he incurs an obligation to discharge the shipowner's lien for freight<sup>6</sup>.

1 *Duthie v Hilton* (1868) LR 4 CP 138 (where the bill of lading provided that freight should be paid 'within three days after arrival of ship, and before delivery of any portion of the goods').

2 *Duthie v Hilton* (1868) LR 4 CP 138 at 144 per Brett J; *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134, 1 Asp MLC 519.

3 As to the shipowner's lien see PARA 551.

4 *Paynter v James* (1867) LR 2 CP 348; *Black v Rose* (1864) 2 Moo PCCNS 277. The contract may, however, entitle the consignee, before payment, to ascertain the quantity of goods deliverable to him: *Vogeman v Bisley* (1897) 2 Com Cas 81.

5 *The Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245.

6 *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570, 13 Asp MLC 451. As to stoppage in transit see PARA 495.

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### **593. Failure to deliver.**

Where the shipowner fails to carry the goods to their destination, he has not fulfilled the condition which entitles him to be paid freight<sup>1</sup>. Therefore, in the absence of a contract to that effect<sup>2</sup>, he cannot claim the whole or any portion of the freight<sup>3</sup>. The cause of his failure is immaterial, whether it is the loss of the goods<sup>4</sup> or the abandonment of the ship or voyage<sup>5</sup>. The goods may have been lost by perils of the seas<sup>6</sup>, or have been sold by the master at an intermediate port<sup>7</sup>, or captured by the enemy<sup>8</sup> or seized under an embargo<sup>9</sup>. In all these cases, and also where the goods perish through an inherent defect<sup>10</sup>, no freight can be earned, and the shipowner is not entitled to be remunerated even for the portion of the voyage for which the goods have been carried<sup>11</sup>. Similarly, the loss of the goods after their arrival but before their delivery to the consignee precludes the shipowner from claiming freight<sup>12</sup>, unless the consignee is already in default under a term for payment of freight within a given time irrespective of delivery<sup>13</sup>.

1 *Hunter v Prinsep* (1808) 10 East 378; *Liddard v Lopes* (1809) 10 East 526; *Osgood v Groning* (1810) 2 Camp 466; *Hopper v Burness* (1876) 1 CPD 137, 3 Asp MLC 149; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 468, CA; *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA; *Castel and Latta v Trechman* (1884) Cab & El 276. As to lump freight, however, see PARA 599.

- 2 *Cullen and Andrews v Mico* (1665) 1 Keb 831; *St Enoch Shipping Co Ltd v Phosphate Mining Co* [1916] 2 KB 624. As to pro rata freight see PARA 603.
- 3 *Liddard v Lopes* (1809) 10 East 526; *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA.
- 4 *Duthie v Hilton* (1868) LR 4 CP 138; *Aitken, Lilburn & Co v Ernsthausen & Co* [1894] 1 QB 773, 7 Asp MLC 462, CA; *Weir & Co v Girvin & Co* [1900] 1 QB 45, 9 Asp MLC 7, CA; cf *Acatos v Burns* (1878) 3 Ex D 282, CA; *Hill v Wilson* (1879) 4 CPD 329, 4 Asp MLC 198.
- 5 *Mackrell v Simond* (1776) 2 Chit 666; *Gibbon v Mendez* (1818) 2 B & Ald 17; cf *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA (where the ship was prevented from reaching her destination by ice). See also *Bradley v H Newsom Sons & Co* [1919] AC 16 at 36 et seq, sub nom *Bradley v Newsum, Sons and Co Ltd* 14 Asp MLC 340 at 346 et seq, HL, per Lord Sumner; *The Pantanassa, Norsk Bjergningskompagni A/S v Pantanassa (Owners)* [1970] P 187, [1970] 1 All ER 848, [1970] 1 Lloyd's Rep 153.
- 6 *Bright v Cowper* (1611) 1 Brownl 21.
- 7 *Liddard v Lopes* (1809) 10 East 526; *Hunter v Prinsep* (1808) 10 East 378; *Vlierboom v Chapman* (1844) 13 M & W 230; *Hopper v Burness* (1876) 1 CPD 137, 3 Asp MLC 149; *Hill v Wilson* (1879) 4 CPD 329, 4 Asp MLC 198.
- 8 *Byrne v Pattinson* (1797) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 745-447. A captor taking goods belonging to an enemy laden on a neutral ship must pay the full freight (*The Copenhagen* (1799) 1 Ch Rob 289; *The Wilhelmina* (1799) 2 Ch Rob 101n), unless the goods are contraband of war, in which case no freight is payable by the captor (*The Mercurius* (1799) 1 Ch Rob 288; *The Rebecca* (1799) 2 Ch Rob 101n; *The Emanuel* (1799) 1 Ch Rob 296; *The Rose* (1799) 2 Ch Rob 206). The owners of the goods must pay the full freight to the shipowner if the ship is recaptured (*The Racehorse* (1800) 3 Ch Rob 101), or to the captor, if he takes the ship and goods to their destination and delivers them to their owner (*The Fortuna* (1802) 4 Ch Rob 278), but not if he delivers them to their owner at a different port (*The Vrow Anna Catharina* (1806) 6 Ch Rob 269; *The St Helena* [1916] 2 AC 625, 13 Asp MLC 488, PC (the jurisdiction of the prize court attaches whenever there has been a seizure in prize and extends to all incidental matters, including questions of freight or compensation in lieu of freight)). As to a captor's right to freight see *The Roland* (1915) 84 LJP 127; and **PRIZE** vol 36(2) (Reissue) PARA 827. As to prize law generally see **PRIZE** vol 36(2) (Reissue) PARA 801 et seq.
- 9 *Storer v Gordon* (1814) 3 M & S 308; *Touteng v Hubbard* (1802) 3 Bos & P 291; *The Werldsborgaren* (1801) 4 Ch Rob 17; cf *Castel and Latta v Trechman* (1884) Cab & El 276.
- 10 Cf *Acatos v Burns* (1878) 3 Ex D 282, CA.
- 11 *Liddard v Lopes* (1809) 10 East 526; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; *Hopper v Burness* (1876) 1 CPD 137, 3 Asp MLC 149; *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA.
- 12 *Duthie v Hilton* (1868) LR 4 CP 138; cf *Asfar & Co v Blundell* [1896] 1 QB 123, 8 Asp MLC 106, CA.
- 13 *Duthie v Hilton* (1868) LR 4 CP 138 (where the freight was to be paid 'within three days after arrival of ship, and before delivery of any portion of the goods').

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#### 594. Part delivery.

If part only of the goods are lost, the shipowner is entitled to be paid freight on such of the goods as are delivered<sup>1</sup>. Moreover, the fact that the goods which arrive do so in a damaged condition does not necessarily deprive the shipowner of his right to claim freight on them<sup>2</sup>. It is immaterial that their condition is attributable to the default of the master or crew<sup>3</sup>, or that, in consequence of the damage, they are worth less than the freight<sup>4</sup>. They must, however, arrive in specie<sup>5</sup>; the cargo contracted to be carried must substantially have arrived<sup>6</sup>. If the nature of the cargo is altered and it is no longer merchantable under its original description<sup>7</sup>, there is, in effect, a total loss of the cargo<sup>8</sup>, and, therefore, no freight is payable.

1 *Ritchie v Atkinson* (1808) 10 East 295; *Spaight v Farnworth* (1880) 5 QBD 115, 4 Asp MLC 251; *Christy v Row* (1808) 1 Taunt 300; *Pacific Steam Navigation Co v Thomson Aikman & Co Ltd* (1920) 57 SLR 488, HL. By the terms of the contract, payment of freight may be expressly made conditional on delivery of the whole of the cargo: *Dakin v Oxley* (1864) 15 CBNS 646 at 665 per Willes J. An agreement made whilst the cargo was in transit to pay extra freight in consideration of discharge at a substituted port was held to have reference to the cargo on board at the time of the making of the agreement where, unknown to the parties, a part of the cargo had already been requisitioned and removed from the ship: *Seville and United Kingdom Carrying Co Ltd v Mann, George & Co* (1916) 32 TLR 522, CA.

2 *Hotham v East India Co* (1779) 1 Doug KB 272; *Lutwidge v Grey* (1736) cited in 2 Burr at 885, and noted in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 717, 718, HL; *Dakin v Oxley* (1864) 15 CBNS 646.

3 The cargo owner has, however, a right of action against the shipowner: *Mills v Bainbridge* (1804) cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 702; *Davidson v Gwynne* (1810) 12 East 381; *Dakin v Oxley* (1864) 15 CBNS 646 at 663 per Willes J; cf *Sheels v Davies* (1814) 4 Camp 119.

4 *Dakin v Oxley* (1864) 15 CBNS 646.

5 *Garrett v Melhuish* (1858) 4 Jur NS 943; *Duthie v Hilton* (1868) LR 4 CP 138. They must not be so mixed with goods of other consignees as to be indistinguishable: *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680, 12 Asp MLC 437, HL.

6 *Dakin v Oxley* (1864) 15 CBNS 646; cf *Moorsom v Page* (1814) 4 Camp 103. In this case the cargo owner cannot escape liability for freight by abandoning the cargo to the shipowner: *Dakin v Oxley*.

7 *Duthie v Hilton* (1868) LR 4 CP 138; *Asfar & Co v Blundell* [1896] 1 QB 123, 8 Asp MLC 106, CA; *Montedison SpA v Icroma SpA, The Caspian Sea* [1979] 3 All ER 378, [1980] 1 WLR 48, [1980] 1 Lloyd's Rep 91 (where oil was contaminated by paraffin).

8 *Dakin v Oxley* (1864) 15 CBNS 646 at 667 per Willes J; *Dickson v Buchanan* (1876) 13 SLR 401.

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### 595. Goods forwarded.

Where, in the course of the voyage, the ship in which the goods are being carried is lost, but the goods are saved, the shipowner is entitled to forward them by some other means to their destination<sup>1</sup>, and thus earn the freight<sup>2</sup>. If, however, he does not do so within a reasonable time<sup>3</sup>, he is deemed to have abandoned the voyage, and the consignee is entitled to have them without paying any freight at all<sup>4</sup>, unless there is a new contract to that effect<sup>5</sup> or the shipowner has been prevented from forwarding the goods by the act of their owner<sup>6</sup>. Similarly, if the ship and cargo are left derelict at sea, being abandoned by the master without any intention of returning, the shipowner loses his lien and the cargo owner may treat the contract as at an end and recover possession without payment of freight on discharging the salvor's claim<sup>7</sup>.

1 He is not entitled to do so where the ship is abandoned at sea and is afterwards salvaged and brought to port: *The Arno* (1895) 8 Asp MLC 5, CA; *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA. Cf *The Kathleen* (1874) LR 4 A & E 269, 2 Asp MLC 367; and see PARA 500.

2 *Hunter v Prinsep* (1808) 10 East 378; *Shipton v Thornton* (1838) 9 Ad & El 314; *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA; *The Bahia* (1864) 12 LT 145 (where the cargo owner wrongfully took possession of the cargo and thus prevented it from being forwarded). The shipowner is entitled to the full freight, even though he tranships the goods at a lower rate of freight: *Shipton v Thornton* (1838) 9 Ad & El 314 (where the court declined to express an opinion as to the position if the shipowner had been compelled to pay a higher rate of freight, but suggested that it might be the master's duty in such a case to contract as agent for the cargo owner: see PARA 502).

3 *Cleary v M'Andrew (Cargo ex), The Galam* (1863) 2 Moo PCCNS 216, cited in *The Bahia* (1864) 12 LT 145; *The Soblomsten* (1866) LR 1 A & E 293; *Denny, Mott and Dickson Ltd v Benvenuto* (1921) 55 ILT 129, HL. See also PARA 500 note 13.

4 *Hunter v Prinsep* (1808) 10 East 378; *Cook v Jennings* (1797) 7 Term Rep 381; *Christy v Row* (1808) 1 Taunt 300; *Blasco v Fletcher* (1863) 14 CBNS 147; *Hocquard v R, The Newport* (1858) 6 WR 310, PC; *The Soblomsten* (1866) LR 1 A & E 293. Where the ship is chartered for a round voyage, and is lost on the homeward voyage, the charterer's obligation to pay freight depends upon whether the outward and homeward voyages are distinct, or whether, by the terms of the charterparty, there is only one voyage: Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 743; Malyne's Lex Mercatoria 98; *Mackrell v Simond* (1776) 2 Chit 666.

5 *Thornton v Fairlie* (1818) 8 Taunt 354; *Hocquard v R, The Newport* (1858) 6 WR 310, PC; *The Soblomsten* (1866) LR 1 A & E 293; cf *Mitchell v Darthez* (1836) 2 Bing NC 555. As to pro rata freight see PARA 603.

6 *Cleary v M'Andrew (Cargo ex), The Galam* (1863) 2 Moo PCCNS 216 (followed in *The Soblomsten* (1866) LR 1 A & E 293); *The Bahia* (1864) 12 LT 145; cf *Duncan v Köster, The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214.

7 *Bradley v H Newsom, Sons & Co* [1919] AC 16 at 37, 41, sub nom *Bradley v Newsum, Sons and Co Ltd* 14 Asp MLC 340 at 347, 348, HL, per Lord Sumner.

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## (E) AMOUNT PAYABLE

### 596. Payable on goods delivered.

As freight is usually<sup>1</sup> payable only on delivery<sup>2</sup>, the amount to be paid<sup>3</sup> is necessarily governed by the amount of goods delivered to the consignee, unless the contract provides for payment of a 'lump freight'<sup>4</sup>.

So long as the goods contracted to be carried have been delivered, no deduction may be made from the freight because they have been delivered in a damaged condition<sup>5</sup>, although, if sued for the freight, the consignee may counterclaim in respect of the damage<sup>6</sup>. The contract may, however, expressly provide for deductions to be made, in which case the consignee's right to make such deductions may depend on the shipowner's conduct, and on the question whether the damage is attributable to an excepted peril<sup>7</sup>.

A claim by the charterer for overtime cannot be set off against the shipowner's claim for freight<sup>8</sup>.

1 As to advance freight see PARAS 600-602; as to pro rata freight see PARA 603; and as to dead freight see PARA 460.

2 See PARA 590.

3 Where a bill of exchange is given for the freight and is afterwards dishonoured, the person liable to pay freight is not discharged (*Tapley v Martens* (1800) 8 Term Rep 451), even though the bill of exchange was given by his agent whom he had provided with the proper amount of the freight, unless the bill of exchange was taken in preference to money (*Marsh v Pedder* (1815) 4 Camp 257; *Strong v Hart* (1827) 6 B & C 160). If, however, the bill of exchange is duly honoured, it is a good payment: *Anderson v Hillies* (1852) 12 CB 499. Interest on unpaid freight is not payable (*Merchant Shipping Co v Armitage* (1873) LR 9 QB 99 at 114, 2 Asp MLC 185 at 193, Ex Ch), but there may be a special agreement to pay it (*E Clemens Horst Co v Norfolk and North American Steam Shipping Co Ltd* (1906) 11 Com Cas 141). As to the general discretionary power of courts to award interest see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1303. Payment of freight may be

subject to discount by the custom of a particular port: *Brown v Byrne* (1854) 3 E & B 703, followed in *Falkner v Earle* (1863) 3 B & S 360.

4 *Immanuel (Owners) v Denholm & Co* (1887) 15 R 152; cf *British and South American Steamship Co Ltd v Anglo-Argentine Live Stock and Produce Agency Ltd* (1902) 18 TLR 382. As to the difference between chartered freight and bill of lading freight see PARA 355; and as to lump freight see PARA 599.

5 *Hotham v East India Co* (1779) 1 Doug KB 272; *Shields v Davis* (1815) 6 Taunt 65; *Dakin v Oxley* (1864) 15 CBNS 646; *Meyer v Dresser* (1864) 16 CBNS 646. The goods must, however, arrive in specie: *Dakin v Oxley*; and see PARA 594. An agent cannot set off lost profit against freight which he has collected for his principal but not paid over: *James & Co Scheepvaart en Handelsmij BV v Chinecrest Ltd* [1979] 1 Lloyd's Rep 126, CA.

6 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245; *Garrett v Melhuish* (1858) 6 WR 491; *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, [1973] 2 Lloyd's Rep 333, CA; *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, [1977] 1 Lloyd's Rep 334, HL; *Cleobulos Shipping Co Ltd v Intertanker Ltd, The Cleon* [1983] 1 Lloyd's Rep 586, CA.

7 *Garston Sailing Ship Co Ltd v Hickie, Borman & Co* (1886) 18 QBD 17, 6 Asp MLC 71, CA; *The Barcore* [1896] P 294, sub nom *Eyre Evans & Co v Watsons, The Barcore* 8 Asp MLC 189; *Lakeport Navigation Co Panama SA v Anonima Petroli Italiana SpA, The Olympic Brilliance* [1982] 2 Lloyd's Rep 205, CA.

8 *Freedom Maritime Corp v International Bulk Carriers SA and Mineral and Metals Trading Corp of India Ltd, The Khian Captain (No 2)* [1986] 1 Lloyd's Rep 429.

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### 597. Rate of payment.

The contract under which the goods are carried usually provides for payment of the freight at a specified rate per unit of weight or measurement<sup>1</sup>. The rate of freight specified is not affected by an authorised variation of the charterparty by an agent of the charterer, even where such variation is prejudicial to the charterer<sup>2</sup>.

If no rate is specified, freight must nevertheless be paid at the ordinary rate in force at the time when the goods are put on board<sup>3</sup>. Where, however, the bill of lading expressly provides that the goods are to be carried freight free<sup>4</sup>, as, for example, where they are shipped on the shipowner's account<sup>5</sup>, no freight is payable in any circumstances, notwithstanding that the goods have been sold and the bill of lading transferred to the buyer<sup>6</sup>. A purchaser of the ship<sup>7</sup> or a mortgagee who takes possession<sup>8</sup>, may, therefore, not refuse to deliver the goods to the holder of the bill of lading until freight is paid, as each is bound by the contract made by the shipowner<sup>9</sup>. It is immaterial that the contract under which the goods are sold and the bill of lading transferred provide for the payment to the shipowner of a specified sum under the name of freight in addition to the specified price, as such sum is not in reality freight, but must be considered as a portion of the price<sup>10</sup>.

1 Where a ship is chartered to carry particular goods at a specified rate, and other goods are shipped, the charterer must pay the same freight as if the ship had been loaded in accordance with the charterparty: *Capper v Forster* (1837) 3 Bing NC 938; *Cockburn v Alexander* (1848) 6 CB 791; *Hain Steamship Co Ltd v Minister of Food* [1949] 1 KB 492, [1949] 1 All ER 444, CA (Centrocon charterparty). As to alternative methods of calculating the freight in certain events see *Gibbins v Buisson* (1834) 1 Bing NC 283; *Fenwick v Boyd* (1846) 15 M & W 632. As to the effect of a term to pay the highest freight paid on the same voyage see *Gether v Capper* (1856) 18 CB 866. There may be a special agreement to pay a higher freight than that reserved by the bill of lading: *Hedley v Lapage* (1816) Holt NP 392 (where the goods were to be smuggled into Russia). Freight having been paid, a collateral agreement for rebate made in the United Kingdom will be enforced notwithstanding that payment will subject the shipowner to penalties abroad under foreign legislation: *Trinidad Shipping Co v Alston* [1920] AC 888, 15 Asp MLC 31, PC. Where the price of bunkers was a factor in the calculation of freight, 'price' was held to include brokerage and leadage: *Hansen v Gabriel Wade and English* (1924) 16 Asp MLC 398, HL. As

to the construction of a clause dealing with commission on freight and whether payable in foreign currency see *King Line Ltd v Westralian Farmers Ltd* (1932) 48 TLR 598, HL.

2 *Wiggins v Johnston* (1845) 14 M & W 609.

3 *Gumm v Tyrie* (1865) 6 B & S 298, Ex Ch; *Keith v Burrows* (1877) 2 App Cas 636 at 646, 3 Asp MLC 481 at 483, HL, per Lord Cairns LC. If the cargo shipped does not answer the description in the charterparty, the shipowner is not restricted to nominal damages but may recover the freight ruling for a cargo of the kind actually carried: *Steven v Bromley & Son* [1919] 2 KB 722, 14 Asp MLC 455, CA.

4 *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233; cf *Sweeting v Darthez* (1854) 14 CB 538 (where the charterparty provided for payment of a certain freight in full for the voyage, and it was held that no extra freight was payable in respect of cargoes carried between intermediate ports).

5 If the bill of lading specifies a substantial rate of freight, the fact that the goods are shipped on account of the shipowner does not preclude an assignee of the freight from recovering the full amount: *Weguelin v Cellier* (1873) LR 6 HL 286 (where the shipper was held not to be entitled to set off the price of the goods which he had bought on the shipowner's account).

6 However, the shipowner may, in effect, recover freight by exercising his lien as unpaid seller for the balance of the unpaid price which has been allocated as between himself and the buyer as freight: *Swan v Barber* (1879) 5 Ex D 130, 4 Asp MLC 264, CA.

7 *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233.

8 *Keith v Burrows* (1877) 2 App Cas 636, 3 Asp MLC 481, HL; *Brown v North* (1852) 8 Exch 1.

9 See PARAS 579-580.

10 *Keith v Burrows* (1877) 2 App Cas 636, 3 Asp MLC 481, HL.

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### **598. When measurement or weight to be taken.**

For the purpose of ascertaining the freight to be paid on such goods as are delivered, it is necessary for their weight or measurement to be taken<sup>1</sup>. Wherever there is a difference between the weight or measurement at the port of loading and at the port of discharge, whether such difference is due to mistake<sup>2</sup> or to the expansion or wasting of the goods during the voyage, or to the method of calculation adopted, the question arises as to which weight or measurement is to be the basis of calculating the freight.

In the absence of any provision in the contract, freight is, as a general rule<sup>3</sup>, payable on that amount alone which is put on board, carried throughout the whole voyage, and delivered at the end to the consignee<sup>4</sup>. If, therefore, the goods have increased in weight or bulk, the freight must be calculated on the quantities put on board the ship at the port of loading<sup>5</sup>; but, if the goods have decreased, the freight must be calculated on the quantities delivered at the port of discharge<sup>6</sup>.

If, however, the terms of the contract are explicit<sup>7</sup>, the general rule is disregarded, and the quantities, either at the port of loading<sup>8</sup> or at the port of discharge<sup>9</sup>, as the case may be, are taken as the basis of calculation, whether or not they have increased or diminished during the voyage. Where different methods of weighing or measuring prevail at the ports of loading and discharge, freight is calculated in accordance with the method followed at the port of loading<sup>10</sup> unless, by the custom of a particular trade<sup>11</sup> or by special contract<sup>12</sup>, some other method is to be adopted.

In the absence of any agreement<sup>13</sup> or custom<sup>14</sup> to the contrary, the expense of any weighing or measuring which may be necessary for the purpose of calculating the amount of freight payable<sup>15</sup> falls on the shipowner and not on the consignee<sup>16</sup>.

1 If there is a usage as to weight or measurement in a particular trade, the weight or measurement will be taken accordingly: *Young v Canning Jarrah Timber Co* (1899) 4 Com Cas 96.

2 As to the bill of lading as conclusive evidence see PARA 317.

3 As to the position where a lump freight is payable see PARA 599.

4 *Gibson v Sturge* (1855) 10 Exch 622 (followed in *Buckle v Knoop* (1867) LR 2 Exch 333, Ex Ch); *Pacific Steam Navigation Co v Thomson, Aikman & Co Ltd* (1920) 57 SLR 488, HL (construction of term that freight was to be collected on the gross weights taken at the port of discharge, it being expressly agreed that freight was to be considered as earned and must be paid, cargo lost or not lost).

5 *Gibson v Sturge* (1855) 10 Exch 622.

6 *Dakin v Oxley* (1864) 15 CBNS 646 at 665 per Willes J; *Dampskibsselskabet Svendborg v Love and Stewart Ltd* 1916 SC (HL) 187.

7 *Buckle v Knoop* (1867) LR 2 Exch 333, Ex Ch (where a term that freight was to be payable at the rate of so much per ton delivered was held not to be sufficient to take the case out of the general rule); cf *Coulthurst v Sweet* (1866) LR 1 CP 649 (where the term referred to 'net weight delivered'). As to the meaning of 'intake string measure' as used in the wood trade see *Pool Shipping Co Ltd v SJ Moreland & Sons Ltd* (1936) 56 Ll L Rep 175.

8 *Spaight v Farnworth* (1880) 5 QBD 115, 4 Asp MLC 251; *Mediterranean and New York Steamship Co v Mackay* [1903] 1 KB 297, CA; *London Transport Co Ltd v Trechmann Bros* [1904] 1 KB 635, 9 Asp MLC 518, CA; *Shell International Petroleum Ltd v Seabridge Shipping Ltd, The Metula* [1978] 2 Lloyd's Rep 5, CA (where the freight was to be computed on the quantity loaded and was to be paid on that quantity even if there was a shortage on delivery). If, however, it is not proved that the quantities were taken at the port of loading, freight is payable on the quantities as delivered: *New Line Steamship Co Ltd v Bryson & Co* 1910 SC 409. For a special form of term giving the master an option in the case of grain cargoes see *Tully v Terry* (1873) LR 8 CP 679, 2 Asp MLC 61; and for an option given to a consignee see *The Hollinside* [1898] P 131. The consignee need not exercise his option until the time for payment arises, unless called upon earlier: *The Dowlais* (1902) 18 TLR 683, CA. See also *Dillon and Aldgate Steamship Co Ltd v Livingston, Briggs & Co and Peninsular and Oriental Steam Navigation Co* (1895) 11 TLR 312 (where the consignee had an option to dispense with weighing).

9 *Coulthurst v Sweet* (1866) LR 1 CP 649.

10 *Pust v Dowie* (1864) 5 B & S 20 (affd (1865) 5 B & S 33, Ex Ch); *The Skandinav* (1881) 51 LJ 93, CA; *Fullagen v Walford* (1883) Cab & El 198.

11 *Geraldes v Donison* (1816) Holt NP 346; *Nielsen & Son v Neame & Co* (1884) Cab & El 288; Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 705.

12 *Moller v Living* (1811) 4 Taunt 102; cf *Bottomley v Forbes* (1838) 5 Bing NC 121. Where a charterparty provided that freight should be payable 'per intaken piled fathom of 216 cubic feet', it was held that the charterers were under an implied contractual obligation to measure the cargo at the port of loading in accordance with the method prescribed: *Jos Merryweather & Co Ltd v Wm Pearson & Co* [1914] 3 KB 587, 12 Asp MLC 540.

13 *The Hollinside* [1898] P 131.

14 *Marwood v Taylor* (1901) 6 Com Cas 178, CA; *Gulf Line Ltd v Laycock* (1901) 7 Com Cas 1; cf *Watts, Ward & Co v Grant & Co* (1889) 26 SLR 660.

15 It would be otherwise if the weighing or measuring were for the convenience of the consignee: *Marwood v Taylor* (1901) 6 Com Cas 178, CA. Cf *Petersen v Ronaasen & Son* (1926) 42 TLR 608 (where a charterer was unable to charge a shipowner with the cost of stacking and measuring done for his own purposes).

16 *Coulthurst v Sweet* (1866) LR 1 CP 649 at 654 per Willes J.

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## (F) LUMP FREIGHT

### 599. Lump freight.

If the contract provides for the payment of a lump sum as freight<sup>1</sup>, the shipowner need not deliver the whole of the goods contracted to be carried in order to become entitled to freight. The delivery of any portion of the goods in specie entitles him to the full freight payable under the contract, as he earns it by delivering that which is to be delivered, not that which was originally shipped<sup>2</sup>. It is immaterial whether his failure to deliver the balance is due to the fact that owing to the shipowner's fault it was never taken on board<sup>3</sup>, or that it was lost by perils of the sea<sup>4</sup>, or even that it was lost by circumstances for which the shipowner is responsible<sup>5</sup>. Where, however, the goods are shipped and no portion of them is delivered in specie at their destination, *prima facie* no freight is payable<sup>6</sup>; but the contract may provide otherwise, for example by the clause 'lost or not lost'<sup>7</sup>. Where the freight is a lump sum to be paid for the use of the whole ship for the voyage, the ship is placed at the charterer's disposal to load a full cargo if he pleases, but, whether he so pleases or not, he is bound to pay the lump sum<sup>8</sup>.

Where a vessel is chartered for a lump sum freight, the charterer is not entitled to set off against the freight a claim for damages for an alleged failure to prosecute the voyage with reasonable dispatch<sup>9</sup>.

Where the contract voyage is never performed owing to the shipowner's wrongful repudiation of the contract, the charterer is entitled to set off his claim for damages arising out of the repudiation against the shipowner's claim for the lump freight, provided that the lump freight has already become due before the repudiation<sup>10</sup>.

1 See PARA 255.

2 *Merchant Shipping Co v Armitage* (1873) LR 9 QB 99 at 110, 2 Asp MLC 185 at 190-191, Ex Ch, per Bramwell B; *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245. Where lump sum freight is payable on 'right and true delivery' of the cargo, these words do not mean right and true delivery of the whole of the cargo shipped, and accordingly freight becomes due when the cargo which has arrived at the port of discharge has been completely delivered: *Skibs A/S Trolle and Skibs A/S Tautra v United Enterprises and Shipping (Pte) Ltd, The Tarva* [1973] 2 Lloyd's Rep 385, Singapore HC.

3 *Seeger v Duthie* (1860) 8 CBNS 45 (affd 8 CBNS 45 at 72, Ex Ch); *Blanchet v Powell's Llantivit Collieries Ltd* (1874) LR 9 Exch 74, 2 Asp MLC 224; cf *Ritchie v Atkinson* (1808) 10 East 295.

4 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245; *Robinson v Knights* (1873) LR 8 CP 465, 2 Asp MLC 19; *Merchant Shipping Co v Armitage* (1873) LR 9 QB 99, 2 Asp MLC 185, Ex Ch; *William Thomas & Sons v Harrowing Steamship Co* [1915] AC 58, 12 Asp MLC 532, HL (where part of the cargo was delivered although the ship was wrecked); cf *Carr v Wallachian Petroleum Co Ltd* (1867) LR 2 CP 468, Ex Ch.

5 *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245. The consignee's remedy would be by counterclaim: *Norway (Owners) v Ashburner, The Norway*. As to counterclaim see **SET-OFF AND COUNTERCLAIM** vol 42 (Reissue) PARA 401 et seq.

6 *Merchant Shipping Co v Armitage* (1873) LR 9 QB 99 at 111, 2 Asp MLC 185 at 191, Ex Ch, per Bramwell B; *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245. Cf *Mitchell v Darthez* (1836) 2 Bing NC 555. The charterer may, however, bind himself to pay the lump freight even though no cargo is ever shipped: *Bell v Puller* (1810) 2 Taunt 285.

7 *Northern Sales Ltd v The Giancarlo Zeta, The Giancarlo Zeta* [1966] 2 Lloyd's Rep 317, Can Ex Ct.

8 *Robinson v Knights* (1873) LR 8 CP 465 at 468, 2 Asp MLC 19 at 21 per Brett J.

9 *Gunnstein A/S & Co K/S v Jensen, Krebs and Nielsen, The Alfa Nord* [1977] 2 Lloyd's Rep 434, CA.

10 *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, [1989] 1 Lloyd's Rep 431, HL, revsg [1989] AC 1056, sub nom *Colonial Bank v European Grain and Shipping Ltd, The Dominique* [1988] 3 All ER 233, [1988] 1 Lloyd's Rep 215, CA.

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## (G) ADVANCE FREIGHT

### 600. When advance freight is payable.

The shipowner often requires the payment of at least a portion of the freight in advance<sup>1</sup>. Advance freight is usually made payable on the signing of the bills of lading<sup>2</sup>, or at the expiration of a given number of days after sailing<sup>3</sup>.

The shipowner's right to advance freight is not affected by the loss of the goods during the voyage and their consequent failure to reach their destination<sup>4</sup>. He is, therefore, entitled to retain any advance freight which may already have been paid<sup>5</sup>; or, if it has already become due in the ordinary course of business<sup>6</sup>, but has not been paid at the time of the loss, he may recover it from the consignor<sup>7</sup>. In the absence of a special term in the contract<sup>8</sup> it seems that advance freight is payable at the moment when the ship sails<sup>9</sup>. If advance freight is at the option of the shipowner, he must require payment before loss because, otherwise, the charterer would be denied an opportunity of insuring<sup>10</sup>.

Moreover, where the advance freight is expressed to be calculated on the basis of 'the quantity of cargo to be delivered to the consignees', it seems that none will be payable in respect of a portion of cargo destroyed by an excepted peril before the ship sails<sup>11</sup>. The shipowner's failure to fulfil the terms of the charterparty does not, however, necessarily preclude him from claiming advance freight if the goods are loaded and the voyage proceeded with, for the broken term may not be a condition precedent to his right to freight<sup>12</sup>.

Where the shipowner has become entitled to advance freight and subsequently the contract voyage is lost owing to the shipowner's wrongful repudiation of the charterparty, the charterer is not entitled to set off his claim for damages arising out of the repudiation against the shipowner's claim for the advance freight<sup>13</sup>.

1 In the absence of express term freight is payable only on delivery: see PARA 590. Payment of a portion of the freight may, however, be postponed until after delivery of the goods: *Foster v Colby* (1858) 3 H & N 705.

2 Where the difference between chartered freight and the bill of lading freight is payable at the port of loading, any sum which becomes payable is to all intents and purposes advance freight: *Byrne v Schiller* (1871) LR 6 Exch 319, 1 Asp MLC 111, Ex Ch; *Carr v Wallachian Petroleum Co Ltd* (1867) LR 2 CP 468, Ex Ch; cf *Santos v Brice* (1861) 6 H & N 290. By a custom of the Argentine grain trade advance freight expressed to be payable 'at current rate of exchange for approved commercial bill in London' was paid at the current rate of exchange for 90 days' sight bills in London: *Gripaios v Kahl Wallis & Co Ltd* (1928) 45 TLR 161, 32 Ll L R 328.

3 As to what constitutes a sailing see PARA 476.

4 *Andrew v Moorhouse* (1814) 5 Taunt 435; *Lidgett v Perrin* (1861) 11 CBNS 362; *Hicks v Shield* (1857) 7 E & B 633; *Carr v Wallachian Petroleum Co Ltd* (1867) LR 2 CP 468, Ex Ch. The ship must, however, have been seaworthy when she began her voyage: *Thompson v Gillespy* (1855) 5 E & B 209. If the loss of the goods is attributable to the shipowner's default, the measure of damages includes any advance freight paid: *Dufourcet v Bishop* (1886) 18 QBD 373, 6 Asp MLC 109; *Rodocanachi v Milburn* (1886) 18 QBD 67, 6 Asp MLC 100, CA; *Great*

*Indian Peninsula Rly Co v Turnbull* (1885) 5 Asp MLC 465; *English Coaling Co Ltd v WJ Tatem Ltd* (1919) 63 Sol Jo 336, CA. See also PARA 562.

5 *De Silvale v Kendall* (1815) 4 M & S 37; *Saunders v Drew* (1832) 3 B & Ad 445 (where a clause providing for cesser of hire if the ship was lost was held not to entitle the charterer to a return of hire paid in advance); *Watson & Co v Shankland* (1873) LR 2 Sc & Div 304, 2 Asp MLC 115, HL; cf *Civil Service Co-operative Society v General Steam Navigation Co* [1903] 2 KB 756, 9 Asp MLC 477, CA; *Lloyd Royal Belge SA v Stathatos* (1917) 34 TLR 70, CA (hire prepaid irrecoverable on dissolution of charterparty by frustration); *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494, 15 Asp MLC 358, HL; *English Coaling Co Ltd v WJ Tatem Ltd* (1919) 63 Sol Jo 336, CA; *Troy v Eastern Co of Warehouses Insurance and Transport of Goods and Advances Ltd (of Petrograd)* (1921) 8 Ll L Rep 17, CA. Freight or hire paid in advance cannot be recovered, in the event of frustration of the contract, under the Law Reform (Frustrated Contracts) Act 1943: see s 2(5); *Compania Naviera General SA v Kerametal Ltd, The Lorna I* [1983] 1 Lloyd's Rep 373, CA; and **CONTRACT** vol 9(1) (Reissue) PARA 919.

6 *Oriental Steamship Co v Tylor* [1893] 2 QB 518, 7 Asp MLC 377, CA (where advance freight was payable on signing bills of lading, and the charterers unsuccessfully attempted to escape liability by failing to present the bills of lading). In *Compania Naviera General SA v Kerametal Ltd, The Lorna I* [1983] 1 Lloyd's Rep 373, CA, where a clause in a charterparty stated that 75% of the freight was to be paid 'within five days after the master signed the bills of lading', it was held that the freight was not due until that period had expired, and was in fact not payable at all because the vessel and her cargo were lost in the meanwhile. Cf *Smith, Hill & Co v Pyman, Bell & Co* [1891] 1 QB 742, 7 Asp MLC 7, CA.

7 *Greeves v West India and Pacific Steamship Co Ltd* (1870) 22 LT 615, Ex Ch; *Byrne v Schiller* (1871) LR 6 Exch 319, 1 Asp MLC 111, Ex Ch; *Vagres Compania Maritima SA v Nissho-Iwai American Corp'n, The Karin Vatis* [1988] 2 Lloyd's Rep 330, CA (the balance of the freight is payable although the vessel is lost on the voyage). The shipowner has no lien for advance freight (*Kirchner v Venus* (1859) 12 Moo PCC 361 (disapproving *Gilkison v Middleton* (1857) 2 CBNS 134 and *Neish v Graham* (1857) 8 E & B 505); *Tamvaco v Simpson* (1866) LR 1 CP 363, Ex Ch; *Re Child, ex p Nyholm* (1873) 2 Asp MLC 165; *Gardner v Trechmann* (1884) 15 QBD 154, 5 Asp MLC 558, CA), unless it is conferred by express agreement (*Wehner v Dene Steam Shipping Co* [1905] 2 KB 92).

8 *Seald-Sweet Sales Inc v Finnlines (Meriventi Oy), The Finn Forest* [1975] 2 Lloyd's Rep 92 (EDNY) (where a bill of lading stated that freight was to be 'completely earned on shipment', and it was held that no freight was payable where no goods had been shipped).

9 *Smith, Hill & Co v Pyman, Bell & Co* [1891] 1 QB 742 at 744, 7 Asp MLC 7 at 8, CA, per Esher MR.

10 *Smith, Hill & Co v Pyman, Bell & Co* [1891] 1 QB 742, 7 Asp MLC 7, CA.

11 *Weir & Co v Girvin & Co* [1900] 1 QB 45, 9 Asp MLC 7, CA; cf *A Coker & Co Ltd v Limerick Steamship Co Ltd* (1918) 14 Asp MLC 287, HL.

12 *Seeger v Duthie* (1860) 8 CBNS 45; affd 8 CBNS 45 at 72, Ex Ch.

13 *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, [1989] 1 Lloyd's Rep 431, HL.

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### 601. Effect on balance of freight.

In calculating the balance of the freight to be paid on the completion of the voyage, the advance freight already paid must be taken into account<sup>1</sup>. If a portion of the goods is lost on the voyage, the advance freight is not to be treated as apportionable over the whole, including that portion which is lost, but as a payment on account of such freight as, in the circumstances, is shown to have been in fact earned<sup>2</sup>.

<sup>1</sup> *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, 3 Asp MLC 178, HL.

2 *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, 3 Asp MLC 178, HL.

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## 602. What constitutes advance freight.

Freight is not payable in advance unless the intention of the parties is clear. A mere term that the freight is to be paid at the port of loading and not at the port of discharge is not sufficient<sup>1</sup>.

Where, however, the consignor is given an option between paying freight at a lower rate at the port of loading and paying it at a higher rate at the port of discharge, it may be inferred, if he elects to pay freight at the lower rate, that such freight was to be paid in advance, and is, therefore, payable notwithstanding the loss of the goods on the voyage<sup>2</sup>. Nor are advances in cash made to the master at the port of loading for the purpose of defraying the expenses of the ship<sup>3</sup> always to be regarded as payments made in advance on account of freight; they may be nothing more than loans, having no reference to the freight, in which case they are repayable by the shipowner, whether the goods arrive or not<sup>4</sup>.

How such advances should be regarded depends on the intention of the parties as expressed in the contract. The contract may expressly provide that such advances are to be treated as part of the freight<sup>5</sup> or it may indicate that such is the intention of the parties.

Thus, the existence of a term providing for the insurance<sup>6</sup> of the advances by the consignor<sup>7</sup> shows that the advances are a payment on account of freight and not a mere loan<sup>8</sup>, as a loan would not be endangered by the perils of the voyage<sup>9</sup>. In the absence of any reference in the contract, the intention of the parties to treat an advance as made on account of freight may be inferred from their conduct<sup>10</sup>.

1 *Mashiter v Buller* (1807) 1 Camp 84.

2 *Andrew v Moorhouse* (1814) 5 Taunt 435; *English Coaling Co v WJ Tatem Ltd* (1919) 63 Sol Jo 336, CA.

3 See PARA 562.

4 *Manfield v Maitland* (1821) 4 B & Ald 582; *Gibbs v Charleton* (1857) 26 LJ Ex 321; cf *Roberts v Shaw* (1863) 4 B & S 44. As the master has authority to pledge the shipowner's credit, an express term is unnecessary, and the charterer may recover the amount advanced, even though he has not complied with the term: *Weston v Wright* (1841) 7 M & W 396 (where the charterer failed to take bills for the amount drawn by the master on the owner, as provided by the term in the contract). The shipowner is not, however, liable to a person who, at the request of the charterer, advances the required amount and takes a bill of exchange drawn by the master on the charterer, which is dishonoured: *Harder v Brotherstone* (1815) 4 Camp 254.

5 *De Silvale v Kendall* (1815) 4 M & S 37; *Byrne v Schiller* (1871) LR 6 Exch 319, 1 Asp MLC 111, Ex Ch. In this case the shipowner has the option whether he will take the advance or not, and the charterer cannot insist on advancing the whole or any part of the sum named in the charterparty: *The Primula* [1894] P 128, 7 Asp MLC 429.

6 As to insuring advances see **INSURANCE** vol 25 (2003 Reissue) PARA 376. Where advance freight is payable 'subject to insurance', the charterer is allowed to deduct the cost of insurance, and thus the shipowner in effect pays for the insurance of the advance freight. He is not, however, under any obligation to insure the advance freight himself on behalf of the charterer (*Watson & Co v Shankland* (1873) LR 2 Sc & Div 304, 2 Asp MLC 115, HL; *Jackson v Isaacs* (1858) 3 H & N 405); nor is he by such allowance for insurance relieved from responsibility if, by his failure to perform his obligation, the advance freight is lost to the charterer (*Rodocanachi v Milburn* (1886) 18 QBD 67, 6 Asp MLC 100, CA; *Dufourcet v Bishop* (1886) 18 QBD 373, 6 Asp MLC 109).

7 *Hicks v Shield* (1857) 7 E & B 633.

8 *Hicks v Shield* (1857) 7 E & B 633 at 639 per Lord Campbell CJ; cf *Tamvaco v Simpson* (1866) LR 1 CP 363, Ex Ch.

9 *Hicks v Shield* (1857) 7 E & B 633 at 639 per Lord Campbell CJ.

10 *Droege v Suart, The Karnak* (1869) LR 2 PC 505; *Afro Produce (Supplies) Ltd v Metalfa Shipping Co Ltd, The Georgios* [1978] 2 Lloyd's Rep 197 (where advance freight was not due but was paid to the shipowners, who accepted it on the assumption that it was charter hire, and it was held that the sum so paid was recoverable).

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## (H) PRO RATA FREIGHT

### 603. Freight pro rata.

Where the goods are delivered to the consignee short of the destination prescribed by the contract, the shipowner is not usually entitled to be paid freight in proportion to the distance covered<sup>1</sup>. Such freight, which is usually known as 'freight pro rata itineris peracti', or, in short, as 'pro rata freight', is only payable by virtue of a contract to that effect<sup>2</sup>. The question whether such a contract exists usually arises where the ship is unable to complete the voyage, and the goods are accordingly landed short of their destination.

No contract to pay pro rata freight is to be implied from the mere fact that the consignee has taken delivery<sup>3</sup>, or, where the goods have been sold at an intermediate port, has received the proceeds of the sale<sup>4</sup>. It must further be shown that the consignee either expressly contracted to pay it<sup>5</sup>, or waived any further performance of the original contract<sup>6</sup>, notwithstanding that the shipowner was ready and willing<sup>7</sup> to earn the freight by transhipping and forwarding the goods<sup>8</sup>.

1 *Mitchell v Darthez* (1836) 2 Bing NC 555; Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 726. A different view appears to have been taken in some earlier cases: see *Lutwidge v Grey* (1733-36) HL, cited in Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 717, 718 (followed in *Luke v Lyde* (1759) 2 Burr 882); *The Copenhagen* (1799) 1 Ch Rob 289, in all of which cases pro rata freight was awarded. Pro rata freight was payable under the ancient law maritime: Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 713, 714, citing the ancient authorities. The cause of the shipowner's failure to reach the proper destination is immaterial (*Liddard v Lopes* (1809) 10 East 526; *Hopper v Burness* (1876) 1 CPD 137, 3 Asp MLC 149; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; *Castel and Latta v Trechman* (1884) Cab & El 276), except perhaps where it arises under a state of facts outside the contemplation of the contracting parties in the course of the transaction (*The Friends* (1810) Edw 246 (where it was held that the Court of Admiralty, under its equitable jurisdiction, might apportion the freight)). See also Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 732 et seq, cited in *The Teutonia* (1871) LR 3 A & E 394 at 419 per Sir R Phillimore (affd on other grounds sub nom *Duncan v Köster, The Teutonia* (1872) LR 4 PC 171, 1 Asp MLC 214), and in *Metcalfe v Britannia Ironworks Co* (1876) 1 QBD 613 at 635 per Quain J (affd (1877) 2 QBD 423, 3 Asp MLC 407, CA).

2 *St Enoch Shipping Co Ltd v Phosphate Mining Co* [1916] 2 KB 624. As to the principles on which claims for freight are dealt with in the Prize Court see *The Iolo* [1916] P 206 at 212, 13 Asp MLC 141 at 143 per Sir Samuel Evans, and the cases cited in **PRIZE** vol 36(2) (Reissue) PARA 827; *Christy v Row* (1808) 1 Taunt 300. See, however, *The Leptir* (1885) 5 Asp MLC 411 (where there was no real abandonment of the voyage). Cf *The Cito* (1881) 7 PD 5, 4 Asp MLC 468, CA. No portion of the freight is payable unless the voyage has actually begun: *Curling v Long* (1797) 1 Bos & P 634.

3 *Cook v Jennings* (1797) 7 Term Rep 381; *Osgood v Groning* (1810) 2 Camp 466; *Hocquard v R, The Newport* (1858) 6 WR 310, PC; *Metcalfe v Britannia Ironworks Co* (1877) 2 QBD 423, 3 Asp MLC 407, CA; cf *Mulloy v Backer* (1804) 5 East 316. As to when the full freight is payable see PARA 500.

4 *Hunter v Prinsep* (1808) 10 East 378; *Liddard v Lopes* (1809) 10 East 526; *Vlierboom v Chapman* (1844) 13 M & W 230; *Hopper v Burness* (1876) 1 CPD 137, 3 Asp MLC 149; *Acatos v Burns* (1878) 3 Ex D 282, CA.

5 *Cook v Jennings* (1797) 7 Term Rep 381 at 385 per Lawrence J.

6 *Hunter v Prinsep* (1808) 10 East 378 at 393 per Lord Ellenborough CJ; *The Soblomsten* (1866) LR 1 A & E 293; cf *Thornton v Fairlie* (1818) 8 Taunt 354; *Christy v Row* (1808) 1 Taunt 300.

7 *Vlierboom v Chapman* (1844) 13 M & W 230 at 238 per Parke B.

8 *Hill v Wilson* (1879) 4 CPD 329, 4 Asp MLC 198.

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## (I) BACK FREIGHT

### **604. Non-delivery of goods.**

Where the master is unable to deliver the goods to the consignee because, for example, the consignee refuses to take delivery, the master may deal with the goods as he thinks fit for the benefit of the owners, and may even take them back to the port of loading. In such circumstances he may claim expenses from the owners, which are known as 'back freight'<sup>1</sup>.

1 *The Argos (Cargo ex)*, *Gaudet v Brown* (1873) LR 5 PC 134.

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## **E. GENERAL AVERAGE**

### (A) IN GENERAL

#### **605. Principle of general average.**

General average is part of the law of the sea founded on equity. It formed part of the Rhodian law<sup>1</sup>, was based in earlier custom and existed many centuries before the existence of marine insurance. Rhodian law provided that, when cargo was thrown overboard to lighten a vessel, that which had been given for all had to be replaced by the contribution of all. The most often cited legal definition of 'general average' is 'all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo losses within general average, and must be borne proportionately by all who are interested'<sup>2</sup>.

General average is a general rule of maritime law, independent of the contract of affreightment, although the rights and liabilities of the parties may be limited or varied by the terms of that contract<sup>3</sup>. The obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not. The circumstances of a party being insured can have no influence on the adjustment of general average, the rules of which are entirely independent of insurance<sup>4</sup>.

- 1 See eg *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC, per Lord Watson.
- 2 *Birkley v Presgrave* (1801) 1 East 220 at 228 per Lawrence J. For the statutory meaning of 'general average' see PARA 607.
- 3 *The Brigella* [1893] P 189, 7 Asp MLC 403.
- 4 *The Brigella* [1893] P 189, 7 Asp MLC 403.

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### 606. Meaning of 'particular average'.

During the performance of a contract of carriage by sea there are, in general, three separate interests which are exposed to the risks incidental to a marine adventure: the interest in the ship; the interest in the freight; and the interest in the cargo<sup>1</sup>. In the ordinary course, any loss which may be sustained by any of these interests falls upon the particular interest affected, in which case the loss, if not total, is called a 'particular average loss'<sup>2</sup>.

- 1 As a general rule, all these interests are covered by insurance, and consequently disputes as to liability for general average take place, for the most part, between the insurers of the different interests. Few instances have come before the courts in recent years. In this case it is immaterial, so far as the insurer's liability is concerned, that the same person is the owner of all three interests: *Montgomery & Co v Indemnity Mutual Marine Insurance Co* [1902] 1 KB 734, 9 Asp MLC 289, CA, overruling on this point *The Brigella* [1893] P 189, 7 Asp MLC 403. Cf the Marine Insurance Act 1906 s 66(7); and **INSURANCE** vol 25 (2003 Reissue) PARA 427. The existence of an insurance policy in respect of any of these interests does not affect its owner's right to a general average contribution: *Price v Noble* (1811) 4 Taunt 123.
- 2 Cf the Marine Insurance Act 1906 s 64(1); and **INSURANCE** vol 25 (2003 Reissue) PARA 433.

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### 607. Meaning of 'general average'.

A general average loss is a loss caused by or directly consequential on a general average act; and it includes a general average expenditure<sup>1</sup> as well as a general average sacrifice<sup>2</sup>. There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure<sup>3</sup>.

Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested<sup>4</sup>; and such a contribution is called a general average contribution<sup>5</sup>.

- 1 As to general average expenditure see **INSURANCE** vol 25 (2003 Reissue) PARA 421.

2 See the Marine Insurance Act 1906 s 66(1); and **INSURANCE** vol 25 (2003 Reissue) PARA 420. As to the York-Antwerp Rules see PARA 608.

3 See the Marine Insurance Act 1906 s 66(2); and **INSURANCE** vol 25 (2003 Reissue) PARA 420.

4 The expenditure thus incurred in consequence of extraordinary sacrifices made or expenditure incurred for the preservation of the several interests involved does not fall on the particular interest exclusively but must be borne in due proportion by all: *Birkley v Presgrave* (1801) 1 East 220 at 228 per Lawrence J.

5 See the Marine Insurance Act 1906 s 66(3); and **INSURANCE** vol 25 (2003 Reissue) PARA 420. As to when the right to a general average contribution arises see PARA 610; and as to general average in relation to marine insurance policies see **INSURANCE** vol 25 (2003 Reissue) PARA 420 et seq. It has been suggested that the liability to pay a general average contribution is based upon an implied contract (*Wright v Marwood* (1881) 7 QBD 62 at 67, 4 Asp MLC 451 at 454, CA, per Bramwell LJ), but the better opinion is that it does not arise out of any contract, but is derived from the rule of contribution in case of jettison, which has become part of the law maritime, whence it has been incorporated into English law: *Simonds v White* (1824) 2 B & C 805 at 811 per Abbott CJ; *Burton v English* (1883) 12 QBD 218 at 220, 221, 5 Asp MLC 187 at 188, CA, per Brett LJ; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 at 607, 6 Asp MLC 419 at 421, PC, per Lord Watson.

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### 608. The York-Antwerp Rules.

The York-Antwerp Rules 2004 are a voluntary international code of rules on the subject of general average which, in practice, are often incorporated into the contract of marine insurance and which differ in a number of respects from the common law rules<sup>1</sup>. The York-Antwerp Rules are not, however, a complete code and may require to be supplemented by the provisions of the general law applicable to the contract<sup>2</sup>.

1 If incorporated, the York-Antwerp Rules 2004 (adopted at a conference of the Comité Maritime International held in Vancouver in May-June 2004) prevail over inconsistent provisions of the law governing the contract of carriage, being composed of specific instances of general average (in the numbered rules) and more general classes of general average (in the lettered rules). In either case expenditure attracting contribution must have been reasonably incurred: cf *Corfu Navigation Co v Mobil Shipping Co Ltd, The Alpha* [1991] 2 Lloyd's Rep 515. As to the incorporation of the York-Antwerp Rules into marine insurance policies see **INSURANCE** vol 25 (2003 Reissue) PARA 234. The 1994 version of the York-Antwerp Rules are still recommended by BIMCO for use in charterparties and bills of lading published by them.

2 *Goulondris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74 at 92, [1957] 3 All ER 100 at 106, [1957] 2 Lloyd's Rep 207 at 214.

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### 609. Non-separation agreements.

Where cargo is transhipped during the course of a general average and forwarded by another vessel, it is the practice, where appropriate, to obtain the agreement of the interested parties to certain allowances in general average as if, instead of being forwarded by another vessel, it had been reloaded and carried to its destination in the original vessel, and their agreement to contribute to the general average on that basis. Sometimes, instead of keeping the cargo at a port of refuge until repairs to the vessel are completed and the vessel is ready to sail<sup>1</sup>, the

parties reach a special agreement (a 'non-separation agreement') that the cargo is to be forwarded without delay to its destination by other vessels and that, although the common maritime adventure will be terminated by so doing, contribution will nevertheless be made for those items, including wages, maintenance, fuel and stores, as would have been allowable in general average as if the cargo had been kept justifiably at the port of refuge and then carried to its destination by the original vessel.

<sup>1</sup> See PARA 615.

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## (B) WHEN THE RIGHT TO CONTRIBUTION ARISES

### **610. Requisites for the right to general average contribution.**

To give rise to a general average contribution, the following conditions must be fulfilled:

- 167 (1) the interest claiming contribution and the interest from which contribution is claimed must have been exposed to a common danger<sup>1</sup>, there being no contribution if the latter interest was never in jeopardy<sup>2</sup>, or had been placed in safety before the danger arose<sup>3</sup>;
- 168 (2) the danger must not be attributable to the actionable default of the interest claiming contribution<sup>4</sup>; if goods are improperly shipped in a dangerous condition, and have to be jettisoned or otherwise destroyed for the purpose of saving the adventure, their owner has no claim for general average contribution, but must bear the loss himself<sup>5</sup>; nor may the shipowner in his turn claim for any loss sustained by the ship where the danger arose from the unseaworthiness of the ship at starting<sup>6</sup> or from the negligence of the master or crew acting on his behalf<sup>7</sup>, or occurring after an unjustified deviation<sup>8</sup>; but if, by the terms of the contract of carriage or by statute<sup>9</sup> the shipowner is not responsible for the negligence of his employees<sup>10</sup> or for unseaworthiness<sup>11</sup>, he may claim, as against the other parties to the contract, a general average contribution, notwithstanding that the danger which gives rise to the claim was attributable to such negligence or unseaworthiness<sup>12</sup>; where the interest claiming contribution is not in default, the cause of the danger must be disregarded<sup>13</sup>;
- 169 (3) the danger must be a real danger<sup>14</sup>, such as exists where there is certainty of loss within a short time, unless something not to be anticipated should intervene<sup>15</sup>;
- 170 (4) the property in respect of which general average contribution is claimed must have been sacrificed for the benefit of the adventure<sup>16</sup>; to constitute a sacrifice, the act must have been voluntarily and reasonably done for the purpose of saving the property<sup>17</sup>, and the property dealt with must be safe, except for the common danger<sup>18</sup>, there being no sacrifice either where the property is forced out of the ship by the violence of the waves, even though the rest of the adventure is thereby saved<sup>19</sup> or where the property in question is, owing to its state or condition, doomed already, and must necessarily perish whether the whole adventure is saved or not<sup>20</sup>;
- 171 (5) where the claim is for contribution to a general average sacrifice, as opposed to a general average expenditure, the property in respect of which general average contribution is claimed must have been saved by reason of the sacrifice<sup>21</sup>.

1 *Walthew v Mavrojani* (1870) LR 5 Exch 116, Ex Ch; *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362; cf *McCall & Co Ltd v Houlder & Co* (1897) 8 Asp MLC 252. The danger need not be a danger of total loss of the whole adventure (*Whitecross Wire Co Ltd v Savill* (1882) 8 QBD 653, 4 Asp MLC 531, CA), but it must involve all the interests at risk at the time of the sacrifice or expenditure.

2 *Nesbitt v Lushington* (1792) 4 Term Rep 783 at 787 per Lord Kenyon CJ; cf *Dobson v Wilson* (1813) 3 Camp 480.

3 *Job v Langton* (1856) 6 E & B 779; *Walthew v Mavrojani* (1870) LR 5 Exch 116, Ex Ch; *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362; cf *Sheppard v Wright* (1698) Show Parl Cas 18, HL.

4 *Johnson v Chapman* (1865) 19 CBNS 563; *Pirie & Co v Middle Dock Co* (1881) 4 Asp MLC 388; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 at 608, 6 Asp MLC 419 at 421, PC, per Lord Watson; *Goulondris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74, [1957] 3 All ER 100, [1957] 2 Lloyd's Rep 207; *State Trading Corpn of India v Doyle Carriers Inc, The Jute Express* [1991] 2 Lloyd's Rep 55.

5 *Pirie & Co v Middle Dock Co* (1881) 4 Asp MLC 388. The fact that the cargo shipped is liable eg to catch fire does not preclude the cargo owner from claiming contribution for cargo damaged in the efforts to extinguish the fire, unless his conduct in shipping the cargo was wrongful or negligent: *Greenshields, Cowie & Co v Stephens & Sons Ltd* [1908] AC 431, 11 Asp MLC 167, HL.

6 *Schloss v Heriot* (1863) 14 CBNS 59, applied in *Fiumana Società di Navigazione v Bunge & Co Ltd* [1930] 2 KB 47, 18 Asp MLC 147. See also *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726, 18 Asp MLC 243, HL; *Goulondris Bros Ltd v B Goldman & Sons Ltd* [1957] 1 QB 74, [1957] 3 All ER 100, [1957] 2 Lloyd's Rep 207; *Diestelkamp v Baynes (Reading) Ltd, The Aga* [1968] 1 Lloyd's Rep 431; *Wirth Ltd v Steamship Acadia Forest and Lash Barge CG 204, The Acadia Forest* [1974] 2 Lloyd's Rep 563 (ED La); *United States of America v Eastmount Shipping Corpn, The Susquehanna* [1975] 1 Lloyd's Rep 216 (SDNY); *EB Aaby's Rederi A/S v Union of India, The Evje (No 2)* [1978] 1 Lloyd's Rep 351, CA; *State Trading Corpn of India v Doyle Carriers Inc, The Jute Express* [1991] 2 Lloyd's Rep 55; and **INSURANCE** vol 25 (2003 Reissue) PARA 425.

7 *Prehn v Bailey, The Ettrick* (1881) 6 PD 127, 4 Asp MLC 465, CA; *Gesellschaft für Getreidehandel AG v The Texas, The Texas* [1970] 1 Lloyd's Rep 175 (ED La) (smoke in vessel's holds); *Gemini Navigation Inc v Philipp Bros Division of Minerals and Chemicals, Philipp Corpn and Royal Insurance Co Ltd, The Ionic Bay* [1975] 1 Lloyd's Rep 287 (US 2nd Cir) (improper stowage).

8 *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, 55 Ll L Rep 159, HL; and see PARA 248. See also *Reardon Smith Lines Ltd v Black Sea and Baltic General Insurance Co Ltd, The Indian City* [1938] 2 KB 730, [1938] 2 All ER 706, 60 Ll L Rep 353, CA; revsd on the ground that there was no deviation [1939] AC 562, [1939] 3 All ER 444, 19 Asp MLC 311, HL. If the deviation is waived by another interest, the shipowner will be entitled to claim general average from that interest: *Hain Steamship Co Ltd v Tate and Lyle Ltd*. As to when deviation is justified see PARA 249.

9 *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726, 18 Asp MLC 243, HL (where the exemption conferred on the shipowner by the Merchant Shipping Act 1894 s 502 (repealed) (see now the Merchant Shipping Act 1995 s 186(1)(a); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059) was in point).

10 See PARA 280.

11 *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726, 18 Asp MLC 243, HL.

12 *The Carron Park* (1890) 15 PD 203, 6 Asp MLC 543, following *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 at 609, 6 Asp MLC 419 at 421, PC; *Milburn & Co v Jamaica Fruit Importing and Trading Co of London* [1900] 2 QB 540, 9 Asp MLC 122, CA (distinguishing *Schmidt v Royal Mail Steamship Co* (1876) 4 Asp MLC 217n and *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216); *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726, 18 Asp MLC 243, HL; *Federal Commerce and Navigation Co Ltd v Eisenerz GmbH, The Oak Hill* [1975] 1 Lloyd's Rep 105, Can SC.

13 Thus the fact that the cause of the sacrifice was the shipowner's negligence does not preclude a cargo owner who is not responsible for it from claiming contribution from another: *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 at 609, 6 Asp MLC 419 at 421, PC.

14 Ie the peril must really exist; it is not enough that a peril is reasonably believed to exist: *Joseph Watson & Son Ltd v Firemen's Fund Insurance Co of San Francisco* [1922] 2 KB 355, 16 Asp MLC 93.

15 *Harrison v Bank of Australasia* (1872) LR 7 Exch 39 at 52, 1 Asp MLC 198 at 201.

16 *McCall & Co v Houlder & Co* (1897) 8 Asp MLC 252. See also *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362 at 373; *Butler v Wildman* (1820) 3 B & Ald 398 (where money was thrown overboard to prevent its falling into an enemy's hands, and it was held that the loss was not occasioned by a general average sacrifice).

17 *The Copenhagen* (1799) 1 Ch Rob 289 at 293 per Lord Stowell; *Hallett v Wigram* (1850) 9 CB 580. See also the Marine Insurance Act 1906 s 66(2); *Iredale v China Traders Insurance Co* [1900] 2 QB 515 at 519, 9 Asp MLC 119 at 121, CA, per AL Smith LJ; and **INSURANCE** vol 25 (2003 Reissue) PARA 420. The sacrifice need not, it seems, be made by the master; it may, perhaps, be made by a passenger (*Mouse's Case* (1608) 12 Co Rep 63, although no question of general average arose in this case), or by a captor (*Price v Noble* (1811) 4 Taunt 123 (where the mate remained on board)), or by the orders of the port authority (*Papayanni and Jeronica v Grampian Steamship Co Ltd* (1896) 1 Com Cas 448).

18 *Johnson v Chapman* (1865) 19 CBNS 563.

19 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 753-756.

20 *Shepherd v Kottgen* (1877) 2 CPD 585, 3 Asp MLC 544, CA.

21 See *Chellew v Royal Commission on Sugar Supply* [1921] 2 KB 627 at 636 per Sankey J, following *Fletcher v Alexander* (1868) LR 3 CP 375 at 382 per Bovill CJ. Sankey J decided that at common law, as well as in cases governed by the York-Antwerp Rules, the same rule applied in the case of general average expenditure, affirming on this point the opinion of the learned arbitrator, Mr FD Mackinnon, afterwards Mackinnon LJ. The Court of Appeal ([1922] 1 KB 12, 15 Asp MLC 393) affirmed the decision of Sankey J as to general average expenditure (which alone was in question in the case) on the ground that the matter was governed by the York-Antwerp Rules; it did not decide whether the rule was the same at common law, and Scrutton LJ thought there was much to be said for the view that in cases of general average expenditure contribution should be assessed on the values of the various interests at the time the expenditure was incurred (*Chellew v Royal Commission on Sugar Supply* [1922] 1 KB 12 at 20, 15 Asp MLC 393 at 398, CA). As to the York-Antwerp Rules see PARA 608.

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## 611. General average loss of cargo.

A general average loss of cargo may arise in various ways<sup>1</sup>. Thus, a portion of the cargo may be jettisoned for the purpose of saving the rest of the adventure<sup>2</sup>. A jettison of deck cargo does not, however, give rise to a general average contribution<sup>3</sup> unless the cargo is carried there by virtue of a custom<sup>4</sup> or by agreement of all the parties interested<sup>5</sup>. There is equally a general average loss where, in consequence of a fire on board, the cargo is damaged by water being poured on it to extinguish the fire<sup>6</sup>, or through the ship being scuttled with the same object<sup>7</sup>; or where, through stress of circumstances, it becomes necessary to burn part of the cargo to enable the engines to keep going<sup>8</sup>. The sale of part of the cargo at a port of refuge is a general average sacrifice if it is necessary for the purpose of completing the voyage, and if it is in the interest of the rest of the cargo that the voyage should be completed<sup>9</sup>, but not in any other case<sup>10</sup>. Moreover, any depreciation in the value of the cargo caused by putting into a port of refuge to escape a peril is a general average loss<sup>11</sup>.

1 See PARAS 612-614.

2 *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC; cf *The Marpessa* [1891] P 403, 7 Asp MLC 155 (disapproved, in so far as it decided that general average contribution is too remote to be recoverable as damages, in *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265, [1946] 2 All ER 696, HL). Jettison of the cargo does not divest its owner of his property: *Tucker v Cappes* (1625) 2 Roll Rep 497.

3 *Wright v Marwood* (1881) 7 QBD 62, 4 Asp MLC 451, CA. If the cargo is improperly stowed on deck, there is no case of contribution, but the shipowner is liable for the full value: *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, 6 Asp MLC 92, HL.

4 *Gould v Oliver* (1837) 4 Bing NC 134; *Milward v Hibbert* (1842) 3 QB 120; *Wright v Marwood* (1881) 7 QBD 62 at 67, 4 Asp MLC 451 at 453, CA, per Bramwell LJ. In this case the shipowner is liable to contribute, even though the deck cargo is carried 'at merchant's risk': *Burton v English* (1883) 12 QBD 218, 5 Asp MLC 187, CA. See also **INSURANCE** vol 25 (2003 Reissue) PARA 425.

5 *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 at 609, 6 Asp MLC 419 at 421, PC. If all the cargo belongs to the same person, he is entitled to contribution in respect of any cargo which by the contract is to be carried on deck: *Johnson v Chapman* (1865) 19 CBNS 563.

6 *Stewart v West India and Pacific Steamship Co* (1873) LR 8 QB 362, 2 Asp MLC 32, Ex Ch; cf *McCall & Co v Houlder & Co* (1897) 8 Asp MLC 252 (where the cargo was damaged while the ship was undergoing necessary repairs); *Pirie & Co v Middle Dock Co* (1881) 4 Asp MLC 388; *Whitecross Wire Co Ltd v Savill* (1882) 8 QBD 653, 4 Asp MLC 531, CA; *Greenshields, Cowie & Co v Stephens & Sons Ltd* [1908] AC 431, 11 Asp MLC 167, HL.

7 *Achard v Ring* (1874) 2 Asp MLC 422; *Papayanni and Jeronica v Grampian Steamship Co Ltd* (1896) 1 Com Cas 448.

8 *Robinson v Price* (1877) 2 QBD 295, 3 Asp MLC 407, CA; *Walford de Baedemaeker & Co v Galindez Bros* (1897) 2 Com Cas 137.

9 *The Gratitude* (1801) 3 Ch Rob 240; *Hallett v Wigram* (1850) 9 CB 580. In *Richardson v Nourse* (1819) 3 B & Ald 237 the arbitrators assessed contribution on the actual price received which was higher than the value at the port of destination, and the court declined to set aside the award as wrong in law.

10 *Powell v Gudgeon* (1816) 5 M & S 431. See also *Hopper v Burness* (1876) 1 CPD 137, 3 Asp MLC 149. As to sale of the cargo see PARA 508 et seq.

11 *Anglo-Argentine Live Stock and Produce Agency v Temperley Shipping Co* [1899] 2 QB 403, 8 Asp MLC 595 (where a cargo of live cattle for the United Kingdom had to be landed on the Continent and sold at a lower price, the ship having been compelled to take refuge in a port from which the importation of live cattle was prohibited).

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## 612. General average loss of freight.

There is a general average loss of freight where, in taking steps to avert the danger to the whole adventure, the shipowner so damages a portion of the cargo as to render it unfit to be carried to its destination, and thus sacrifices his opportunity of earning freight on that portion<sup>1</sup>. There is, however, no general average sacrifice of freight where, owing to the inherent defect of the cargo, the shipowner has been compelled to put into a port of refuge and abandon the attempt to carry it further, so that the freight was already lost<sup>2</sup>.

1 *Pirie & Co v Middle Dock Co* (1881) 4 Asp MLC 388; *Iredale v China Traders Insurance Co* [1899] 2 QB 356 at 360, 8 Asp MLC 580 at 582 per Bigham J (affd [1900] 2 QB 515, 9 Asp MLC 119, CA). Where, however, the ship is chartered under a time charterparty containing a cesser of hire clause, there is no general average loss of freight, such loss being caused by the operation of the cesser clause: *The Leitrim* [1902] P 256, 9 Asp MLC 317.

2 *Iredale v China Traders Insurance Co* [1900] 2 QB 515, 9 Asp MLC 119, CA.

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### **613. General average loss of ship and equipment.**

In the case of the ship, her tackle, machinery or other equipment, no question of general average sacrifice arises where the loss takes place through the use of the ship in the ordinary way<sup>1</sup>. However great the peril, it is the duty of the shipowner, in the due performance of the contract, to do everything possible to save both ship and cargo, and for that purpose to make use of all the appliances with which the ship is provided<sup>2</sup>.

To constitute a general average sacrifice there must be an intentionally abnormal use of the ship<sup>3</sup> or of her equipment<sup>4</sup>. Thus, the ship may be run ashore to avoid the danger of a storm or capture<sup>5</sup>, or scuttled to extinguish a fire<sup>6</sup>; an anchor may be slipped, or a cable may be used in a particular manner out of the usual course for the purpose of protecting the ship<sup>7</sup>. A boat may be sacrificed to mislead a pursuing enemy, by being set adrift with a light at its masthead<sup>8</sup>. The engines may be strained in the attempt to force a stranded ship off the ground<sup>9</sup>; a steam pump, owing to the leaking condition of the ship, may have to be worked constantly, and for this purpose it may become necessary to use items of tackle as fuel<sup>10</sup>.

Where, however, the loss is occasioned by the ordinary use of the ship or her equipment for the purposes for which they were intended, there is no general average sacrifice, however great the peril may have been, and however great the efforts made to escape it<sup>11</sup>. Thus, for example, the ship may be compelled to use more fuel than was anticipated<sup>12</sup>; and the shipowner cannot claim contribution where he himself was in default<sup>13</sup>.

1 See *Covington v Roberts* (1806) 2 Bos & PNR 378; cf the cases cited in notes 2-10.

2 *Wilson v Bank of Victoria* (1867) LR 2 QB 203 at 212 per Blackburn J; *Robinson v Price* (1877) 2 QBD 295, 3 Asp MLC 407, CA (use of spars as fuel); cf *Rose v Bank of Australasia* [1894] AC 687, 7 Asp MLC 445, HL.

3 *The Bona* [1895] P 125 at 138, 7 Asp MLC 557 at 558, CA, per Lord Esher MR; *McCall & Co v Houlder & Co* (1897) 8 Asp MLC 252.

4 *Birkley v Presgrave* (1801) 1 East 220.

5 In *Austin Friars Steamship Co Ltd v Spillers and Bakers Ltd* [1915] 3 KB 586, 13 Asp MLC 162, CA, the ship ran aground and was got off in a damaged condition. The master intended to ground her lower down the river, but, as she made water on the way there, he decided to take her into Sharpness dock, although he knew that she would probably strike a pier and do damage. She did strike the pier and damaged both it and herself. It was held that the shipowner could recover general average contribution both for the damage to the ship and for the compensation payable to the owners of the pier. Cf *The Seapool* [1934] P 53, 18 Asp MLC 477 (extraordinary sacrifice, but not voluntary stranding within the York-Antwerp Rules (as to which see PARA 608)).

6 *Whitecross Wire Co Ltd v Savill* (1882) 8 QBD 653 at 663, 4 Asp MLC 531 at 534, CA, per Brett LJ.

7 *Birkley v Presgrave* (1801) 1 East 220.

8 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 770, citing 1 Emerigon 622.

9 *The Bona* [1895] P 125, 7 Asp MLC 557, CA.

10 *Harrison v Bank of Australasia* (1872) LR 7 Exch 39, 1 Asp MLC 198; *Robinson v Price* (1877) 2 QBD 295, 3 Asp MLC 407, CA.

11 *Birkley v Presgrave* (1801) 1 East 220; *Harrison v Bank of Australasia* (1872) LR 7 Exch 39, 1 Asp MLC 198.

12 *Wilson v Bank of Victoria* (1867) LR 2 QB 203. It has been suggested that some dicta of Blackburn J on substituted expenses in this case (see at 211, 212) are inconsistent with the later case of *Lee v Southern Insurance Co* (1870) LR 5 CP 397, but no question of general average arose in that case, and there is no apparent inconsistency between them.

13 See PARA 610.

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#### **614. General average expenditure.**

Extraordinary expenditure<sup>1</sup> incurred by the shipowner for the safety of the adventure may be recovered by him as a general average sacrifice<sup>2</sup>, but he cannot recover all extraordinary expenses incurred for the purpose of continuing the voyage<sup>3</sup>.

Thus, the expense of discharging the cargo and placing it into lighters or landing it is a general average expenditure<sup>4</sup>; but expenses incurred after the removal of the cargo, for example in connection with the refloating of the ship, are incurred to save the ship, and are not, as a general rule, for the preservation of the cargo; they must, therefore, be borne by the shipowner alone<sup>5</sup>. There may, however, be cases in which such expenses would fall under general average, as, for example, where the cargo would be lost unless it is carried on to its destination by the same ship, there being no other means of transport or disposal available<sup>6</sup>, or where the discharging of the cargo and refloating of the ship form one continuous operation<sup>7</sup>. Similarly, payment made to salvors employed by the shipowner may form the subject of general average if the safety of the whole adventure is involved<sup>8</sup>.

1 The expenditure must have been abnormal in kind or degree and must have been incurred on an abnormal occasion for the preservation of the property: *Société Nouvelle d'Armement v Spillers and Bakers Ltd* [1917] 1 KB 865 at 871, 14 Asp MLC 16 at 18 per Sankey J (where it was held that the hire of a tug for an unusually long portion of the voyage in order to minimise the danger of attack from enemy submarines did not satisfy those conditions).

2 *Kemp v Halliday* (1865) 6 B & S 723 at 746 per Blackburn J (affd (1866) LR 1 QB 520, Ex Ch); *Ocean Steamship Co v Anderson* (1883) 13 QBD 651 at 662, 5 Asp MLC 202 at 203, CA, per Brett LJ (revsd (1884) 10 App Cas 107, 5 Asp MLC 401, HL); *Rose v Bank of Australasia* [1894] AC 687, 7 Asp MLC 445, HL.

3 *Walthew v Mavrojani* (1870) LR 5 Exch 116, Ex Ch; cf *Da Costa v Newnham* (1788) 2 Term Rep 407.

4 *Job v Langton* (1856) 6 E & B 779; cf *Rose v Bank of Australasia* [1894] AC 687, 7 Asp MLC 445, HL, doubting *Schuster v Fletcher* (1878) 3 QBD 418, 3 Asp MLC 577.

5 *Job v Langton* (1856) 6 E & B 779; *Walthew v Mavrojani* (1870) LR 5 Exch 116, Ex Ch; *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362.

6 *Job v Langton* (1856) 6 E & B 779 at 793 per Lord Campbell CJ; *Walthew v Mavrojani* (1870) LR 5 Exch 116 at 126, Ex Ch, per Montague Smith J.

7 *Moran v Jones* (1857) 7 E & B 523, doubted in *Svendsen v Wallace Bros* (1884) 13 QBD 69, 5 Asp MLC 232, CA, and in *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362.

8 *Birkley v Presgrave* (1801) 1 East 220; *Kemp v Halliday* (1865) 6 B & S 723; *Anderson v Ocean Steamship Co* (1884) 10 App Cas 107, 5 Asp MLC 401, HL, varying *Ocean Steamship Co v Anderson* (1883) 13 QBD 651, 5 Asp MLC 202, CA.

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### 615. Expenses at port of refuge.

Where the ship puts into a port of refuge, the question whether expenses incurred there are general average expenses or not necessarily depends on the circumstances of each case<sup>1</sup>. It is not sufficient that the expenses should have been incurred for the common benefit of the ship and cargo<sup>2</sup>; they must either themselves fall within the definition of a general average sacrifice<sup>3</sup>, or, if not in themselves a general average sacrifice, be nevertheless caused or rendered necessary by one<sup>4</sup>. In considering the question it is, therefore, necessary to distinguish certain items, as follows:

- 172 (1) the cost of repairing the ship: if the repairs are occasioned by a general average sacrifice, any expenses incurred in repairs fall under general average<sup>5</sup>, otherwise they are borne by the shipowner<sup>6</sup>;
- 173 (2) port charges and pilotage dues: as putting into a port of refuge, if justifiable at all<sup>7</sup>, is a general average sacrifice<sup>8</sup>, provided that a second interest is at risk, all inward port charges and pilotage dues are general average expenses<sup>9</sup>, whether the damage which caused the ship to seek the port of refuge is the subject of general average<sup>10</sup> or not<sup>11</sup>; the outward port charges and pilotage dues, since they are incurred for the purpose of earning the freight<sup>12</sup>, are, however, particular charges on freight unless the original damage was the subject of general average, in which case such charges are, in practice, treated as general average<sup>13</sup>;
- 174 (3) wages of the crew: the shipowner is entitled to a general average contribution towards the wages of the crew in the port of refuge, provided that the damage which caused the ship to seek the port of refuge is itself the subject of general average<sup>14</sup>, but not otherwise<sup>15</sup>;
- 175 (4) the cost of discharging the cargo: if the discharge is necessary for the common preservation of both ship and cargo, it is in itself a general average sacrifice<sup>16</sup>; although not necessary for the preservation of the cargo, it may be impossible to repair the ship unless the cargo is discharged, and then, if the cost of repairs is the subject of general average, the expenses of discharging are equally the subject of general average<sup>17</sup>; in practice, the expenses of discharging the cargo are always treated as the subject of general average<sup>18</sup>;
- 176 (5) the cost of warehousing and reloading the cargo: if the unloading was necessitated by an antecedent act of general average sacrifice, these expenses may form the subject of general average, provided that all the dealings with the cargo form part of a continuous operation<sup>19</sup>; in any other case the warehouse rent of cargo is charged to cargo<sup>20</sup>, whilst the cost of reloading is charged to freight<sup>21</sup>.

1 *Svendsen v Wallace Bros* (1885) 10 App Cas 404 at 420, 5 Asp MLC 453 at 458, HL, per Lord Blackburn, approving (1884) 13 QBD 69 at 85, 5 Asp MLC 232 at 237, CA, per Bowen LJ. See also *Atwood v Sellar & Co* (1880) 5 QBD 286, 4 Asp MLC 283, CA; and PARA 616.

2 *Harrison v Bank of Australasia* (1872) LR 7 Exch 39 at 50, 1 Asp MLC 198 at 203; *Svendsen v Wallace Bros* (1884) 13 QBD 69 at 86, 5 Asp MLC 232 at 238, CA, per Bowen LJ (affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL).

3 As to the meaning of 'general average sacrifice' see PARA 607.

4 *Svendsen v Wallace Bros* (1884) 13 QBD 69 at 85, 5 Asp MLC 232 at 237, CA, per Bowen LJ; affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL.

5 *Hallett v Wigram* (1850) 9 CB 580; *Harrison v Bank of Australasia* (1872) LR 7 Exch 39 at 53, 1 Asp MLC 198 at 202. The shipowner cannot claim for the loss of the use of the ship during the period occupied in the repairs: *The Leitrim* [1902] P 256, 9 Asp MLC 317, as explained in *JH Wetherall & Co Ltd v London Assurance* [1931] 2 KB 448, 18 Asp MLC 205 (a case where the York-Antwerp Rules (see PARA 608) applied).

6 *Hallett v Wigram* (1850) 9 CB 580. As to the allowance of temporary repairs as general average see *Marida Ltd v Oswal Steel, The Bijela* [1994] 2 All ER 289, [1994] 1 WLR 615, [1994] 2 Lloyd's Rep 1, HL. York-Antwerp Rule XIV b was amended in 2004 to limit recovery in General Average of the cost of temporary repairs of accidental damage at a port of refuge to the amount by which the estimated cost of the permanent repairs at the port of refuge exceeds the sum of the temporary repairs plus the permanent repairs actually carried out.

7 See PARA 249.

8 *Svendsen v Wallace Bros* (1884) 13 QBD 69, 5 Asp MLC 232, CA; affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL.

9 *Svendsen v Wallace Bros* (1884) 13 QBD 69, 5 Asp MLC 232, CA; affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL. As to the meaning of 'general average expenses' see PARA 607.

10 *Atwood v Sellar & Co* (1880) 5 QBD 286, 4 Asp MLC 232, CA.

11 *Svendsen v Wallace Bros* (1884) 13 QBD 69, 5 Asp MLC 232, CA; affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL.

12 *Svendsen v Wallace Bros* (1884) 13 QBD 69, 5 Asp MLC 232, CA; affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL; cf *Westoll v Carter* (1898) 3 Com Cas 112.

13 *Atwood v Sellar & Co* (1880) 5 QBD 286, 4 Asp MLC 283, CA. In *Svendsen v Wallace Bros* (1884) 13 QBD 69, 5 Asp MLC 232, CA (affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL), there was no decision on this point. See, however, the text to note 9.

14 *Da Costa v Newnham* (1788) 2 Term Rep 407 at 413; *Atwood v Sellar & Co* (1880) 5 QBD 286 at 291, 4 Asp MLC 283 at 287, CA, per Thesiger LJ. It has been the practice not to charge wages to general average, but there does not appear to be any legal justification for it: *The Leitrim* [1902] P 256 at 268, 9 Asp MLC 317 at 321. The allowance for wages and maintenance of master, officers and crew while the vessel is detained at a port of refuge has been excluded by the York-Antwerp Rules 2004 r xi.

15 *Power v Whitmore* (1815) 4 M & S 141; *Anglo-Argentine Live Stock and Produce Agency v Temperley Shipping Co* [1899] 2 QB 403, 8 Asp MLC 595; cf *Howden & Co v Steamship Nutfield Co Ltd* (1898) 3 Com Cas 56.

16 *Svendsen v Wallace Bros* (1884) 13 QBD 69 at 88, 5 Asp MLC 232 at 238, CA, per Bowen LJ (affd (1885) 10 App Cas 404, 5 Asp MLC 453 HL, citing *The Copenhagen* (1799) 1 Ch Rob 289).

17 *Hamel v Peninsular and Oriental Steam Navigation Co* [1908] 2 KB 298, 11 Asp MLC 71.

18 *Svendsen v Wallace Bros* (1885) 10 App Cas 404, 5 Asp MLC 453, HL (cited in note 1).

19 *Atwood v Sellar & Co* (1880) 5 QBD 286, 4 Asp MLC 283, CA. However, it is, at least, doubtful whether the decision on this point can be reconciled with the principle laid down in *Svendsen v Wallace Bros* (1884) 13 QBD 69 at 89, 5 Asp MLC 232 at 239, CA, per Bowen LJ (affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL). See also *Plummer v Wildman* (1815) 3 M & S 482; *Moran v Jones* (1857) 7 E & B 523.

20 *Svendsen v Wallace Bros* (1884) 13 QBD 69 at 89, 5 Asp MLC 232 at 239, CA, per Bowen LJ; affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL.

21 *Svendsen v Wallace Bros* (1885) 10 App Cas 404 at 416, 5 Asp MLC 453 at 456, HL, per Lord Blackburn.

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## **616. When general average ceases.**

The general average act must be an act done for rescuing the ship and cargo from a common danger<sup>1</sup>, and it is not enough that its object was to ensure the successful completion of the adventure. In short, according to English law, as soon as safety is attained, general average ceases. Therefore, in general, any expenditure which is incurred after the ship has been placed in safety must be borne by the owner of the particular interest which it was intended to benefit<sup>2</sup>.

1 See the Marine Insurance Act 1906 s 66(2); and **INSURANCE** vol 25 (2003 Reissue) PARA 420.

2 *Harrison v Bank of Australasia* (1872) LR 7 Exch 39, 1 Asp MLC 198; *Svensden v Wallace Bros* (1884) 13 QBD 69 at 85 et seq, 5 Asp MLC 232 at 237 et seq, CA (affd (1885) 10 App Cas 404, 5 Asp MLC 453, HL). Where a ship is forced to put into a port to repair damage done to her by a storm, and the master, having no other means of raising money, sells (as he is justified in doing) part of the cargo to defray the expenses of repairs, the owner of the cargo sold does not thereby sustain a general average loss: *Dobson v Wilson* (1813) 3 Camp 480; *Powell v Gudgeon* (1816) 5 M & S 431; *Sarqay v Hobson* (1827) 4 Bing 131, Ex Ch; *Hallett v Wigram* (1850) 9 CB 580. Whether this is also true where the damage to be repaired is directly occasioned by a general average act, or whether in such case the expenditure may be considered as the direct consequence of the general average act, is a point which must still be considered as open to doubt: *Atwood v Sellar & Co* (1880) 5 QBD 286, 4 Asp MLC 283, CA; *Svensden v Wallace Bros*; and see *Plummer v Wildman* (1815) 3 M & S 482.

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## (C) LIABILITY TO CONTRIBUTION

### 617. Persons liable.

All persons whose interest in the adventure is benefited by a general average sacrifice or by a general average expenditure are liable to make a general average contribution<sup>1</sup>. These persons are:

- 177 (1) the shipowner<sup>2</sup>, who is liable in respect of the ship and also in respect of the freight<sup>3</sup>;
- 178 (2) the charterer, if any, who is liable in respect of his interest in the bill of lading freight<sup>4</sup> (in this case the shipowner's liability as regards the freight is restricted to the chartered freight<sup>5</sup> and, if the charterparty is by demise, the charterer is also liable in respect of the ship<sup>6</sup>);
- 179 (3) the owner of the cargo, who is liable in respect of the cargo<sup>7</sup>; and
- 180 (4) any other person who may be liable under some express term in the contract of carriage.

Thus, the bill of lading may preserve the shipper's liability<sup>8</sup>, or it may provide for payment of a general average contribution by the consignee<sup>9</sup>. A consignee is not, as such, liable, even if he has taken delivery of the cargo<sup>10</sup>; but he may make himself liable, as under a new contract, by taking delivery with notice that the cargo is held by the shipowner subject to his lien for general average contribution<sup>11</sup>; or he may be liable as owner of the cargo<sup>12</sup>, or as signatory to a Lloyd's average bond<sup>13</sup>.

1 *Fletcher v Alexander* (1868) LR 3 CP 375 at 382 per Bovill CJ. This applies unless the liability is excluded by special contract: *Jackson v Charnock* (1800) 8 Term Rep 509. There is no liability to contribute in respect of

victuals, or in respect of passenger's personal luggage, as opposed to goods: *Brown v Stapleton* (1827) 4 Bing 119.

2 The shipowner is liable even though the cause of the sacrifice is an excepted peril: *Schmidt v Royal Mail Steamship Co* (1876) 4 Asp MLC 217n, followed in *Greenshields, Cowie & Co v Stephens & Sons Ltd* [1908] AC 431, 11 Asp MLC 167, HL.

3 *Moran v Jones* (1857) 7 E & B 523; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC. Where the ship is chartered out and home, the homeward freight may be liable to contribute towards a general average loss on the outward voyage: *Williams v London Assurance Co* (1813) 1 M & S 318, followed in *Carisbrook Steamship Co v London and Provincial Marine and General Insurance Co* [1902] 2 KB 681, 9 Asp MLC 332, CA; *Moran v Jones*.

4 He is also liable in respect of any chartered freight paid in advance: *Frayes v Worms* (1865) 19 CBNS 159.

5 *Moran v Jones* (1857) 7 E & B 523.

6 This follows from the fact that he is owner for the time being of the ship: see PARA 210.

7 *Scaife v Tobin* (1832) 3 B & Ad 523; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC. The captors of cargo against which a claim for general average contribution exists take the cargo subject to liability for the contribution: *The Sorfareren* (1915) 13 Asp MLC 223; affd on another point (1917) 14 Asp MLC 195, PC.

8 *Walford de Baedemaeker & Co v Galindez Bros* (1897) 2 Com Cas 137.

9 See eg the clause, known as the 'New Jason Clause', which derives from *The Jason* (1912) 225 US 32.

10 *Scaife v Tobin* (1832) 3 B & Ad 523.

11 *Scaife v Tobin* (1832) 3 B & Ad 523; cf PARA 575.

12 *Scaife v Tobin* (1832) 3 B & Ad 523 at 529 per Lord Tenterden CJ.

13 *Thomson v Micks Lambert & Co* (1933) 39 Com Cas 40.

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## 618. Enforcement by lien.

The liability of any particular interest to make contribution is usually enforced by the shipowner on behalf of all interests concerned<sup>1</sup>. As regards the cargo, he is entitled to exercise a lien over it and to withhold delivery until any general average contributions due either to himself or to any other persons have been paid<sup>2</sup>. Unless the contract otherwise provides, it is his duty to exercise his lien on behalf of such other persons<sup>3</sup>, and, if he fails to do so, he is himself liable to them<sup>4</sup>. In practice, delivery of the cargo is usually made on the cargo owner's giving security<sup>5</sup> to pay the amount found due upon adjustment<sup>6</sup>.

1 *Svensen v Wallace Bros* (1885) 10 App Cas 404, 5 Asp MLC 453, HL; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC.

2 *Hallett v Bousfield* (1811) 18 Ves 187; *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216; *Huth & Co v Lamport* (1886) 16 QBD 735, 5 Asp MLC 593, CA.

3 *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 at 606, 6 Asp MLC 419 at 420, PC, distinguishing *Hallett v Bousfield* (1811) 18 Ves 187 (where an injunction was refused). There is no duty, as regards salvors, to exercise the lien: *The Raisby* (1885) 10 PD 114, 5 Asp MLC 473.

4 *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216; *Nobel's Explosives Co Ltd v Rea* (1897) 2 Com Cas 293.

5 For the usual practice in such cases see *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216; *Huth & Co v Lamport* (1886) 16 QBD 735, 5 Asp MLC 593, CA; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC; *Nobel's Explosives Co Ltd v Rea* (1897) 2 Com Cas 293; *Thomson v Micks Lambert & Co* (1933) 39 Com Cas 40.

6 *Svendsen v Wallace Bros* (1885) 10 App Cas 404 at 409, 410, 5 Asp MLC 453 at 454, HL, per Lord Blackburn; *Huth & Co v Lamport* (1886) 16 QBD 735, 5 Asp MLC 593, CA (where it was held that the terms of the security demanded must be reasonable).

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### **619. Enforcement by action.**

The lien is available only to the shipowner, or to the charterer if the charterparty is by demise<sup>1</sup>. If they do not rely on their lien, they may maintain an action against the person liable to contribute<sup>2</sup>. Any other person claiming contribution, such as the owner of the cargo<sup>3</sup> or the person entitled to the freight<sup>4</sup>, may enforce his right only by action.

1 *Walford de Baedemaeker & Co v Galindez Bros* (1897) 2 Com Cas 137. As to charterparties by demise see PARAS 210-212.

2 *Birkley v Presgrave* (1801) 1 East 220; *Anderson v Ocean Steamship Co* (1884) 10 App Cas 107, 5 Asp MLC 401, HL.

3 *Dobson v Wilson* (1813) 3 Camp 480; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, 6 Asp MLC 419, PC; cf *The North Star* (1860) Lush 45.

4 *Pirie & Co v Middle Dock Co* (1881) 4 Asp MLC 388.

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### **620. Adjustment.**

Unless the contract otherwise provides<sup>1</sup>, the adjustment of the amount to be contributed by the respective interests is determined by the law of the place where the adjustment is to be made<sup>2</sup>, that is to say, at the place where under the contract the voyage is to terminate<sup>3</sup>. The adjustment may take place at a port of refuge if the voyage is abandoned there by agreement or by necessity<sup>4</sup>, but not otherwise<sup>5</sup>.

1 *Dalglisch v Davidson* (1824) 5 Dow & Ry KB 6; *Stewart v West India and Pacific Steamship Co* (1873) LR 8 QB 362, 2 Asp MLC 32, Ex Ch. It is usual for the contract to provide expressly that adjustment is to be made in accordance with the York-Antwerp Rules (see PARA 608).

2 As to the practice on adjustment see **INSURANCE** vol 25 (2003 Reissue) PARAS 428-430.

3 *Simonds v White* (1824) 2 B & C 805; *Hill v Wilson* (1879) 4 CPD 329, 4 Asp MLC 198.

4 *Fletcher v Alexander* (1868) LR 3 CP 375; *Mavro v Ocean Marine Insurance Co* (1875) LR 10 CP 414, 2 Asp MLC 590, Ex Ch. As to the position under the York-Antwerp Rules, which provide that contribution is to be made

on the actual values of the property at the termination of the adventure see *Chellev v Royal Commission on Sugar Supply* [1922] 1 KB 12, 15 Asp MLC 393, CA (cited in PARA 610 note 21).

5 *Hill v Wilson* (1879) 4 CPD 329, 4 Asp MLC 198.

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### **621. Value of cargo.**

The rules to be applied, both in estimating the value of the cargo sacrificed and in valuing the cargo saved, depend on the time and place of the adjustment and not on the time and place of the sacrifice<sup>1</sup>. In estimating the value of the cargo sacrificed, it is necessary to take into account the probable state of the cargo on its arrival if the sacrifice had never taken place; if, therefore, it would in all probability have arrived in an unsound state, the value for the purposes of contribution is its value if it had arrived in an unsound state<sup>2</sup>. Similarly, where the cargo is damaged or otherwise depreciated through a general average sacrifice, the difference in value arising from the depreciation is to be allowed<sup>3</sup>.

1 *Fletcher v Alexander* (1868) LR 3 CP 375 at 383 per Bovill CJ. Where, however, the general average sacrifice is a sale of part of the cargo, the value for contribution purposes may be the price realised on the sale: *Richardson v Nourse* (1819) 3 B & Ald 237.

2 *Fletcher v Alexander* (1868) LR 3 CP 375.

3 *Anglo-Argentine Live Stock and Produce Agency v Temperley Shipping Co* [1899] 2 QB 403, 8 Asp MLC 595.

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### **622. Value of the ship.**

The amount to be contributed towards the sacrifice made by the shipowner is to be based on the cost of repairing the ship or making good the equipment sacrificed<sup>1</sup>. If, in consequence of the sacrifice, the ship becomes a constructive total loss<sup>2</sup>, the adjustment is to be based on the value of the ship just before the sacrifice took place<sup>3</sup>. If the ship had at that time already sustained particular average damage<sup>4</sup>, her value at the time of the sacrifice is her value as depreciated by the particular average damage, and this must be calculated by deducting the estimated cost of repairing the particular average damage; a further deduction must be made in respect of the proceeds of the sale of the ship, and the balance is the amount of the general average loss<sup>5</sup>.

If it is the shipowner who has to make contribution, his liability is based on the value of the ship at the time when she arrives at her destination or other place of adjustment<sup>6</sup>.

1 See eg *Fenwick v Robinson* (1828) 3 C & P 323; *Pirie v Steele* (1837) 2 Mood & R 49; *Aitchison v Lohre* (1879) 4 App Cas 755, 4 Asp MLC 168, HL.

2 As to constructive total loss see **INSURANCE** vol 25 (2003 Reissue) PARA 468.

3 *Henderson Bros v Shankland & Co* [1896] 1 QB 525, 8 Asp MLC 136, CA.

4 See PARA 606.

5 *Henderson Bros v Shankland & Co* [1896] 1 QB 525, 8 Asp MLC 136, CA. No deduction is to be made in this case in respect of 'one-third new for old': *Henderson Bros v Shankland & Co*.

6 Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) 796.

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### 623. Value of freight.

The contribution payable by the person entitled to freight is based on the amount of freight at risk<sup>1</sup>, less the expenses of earning it which would have been saved if the ship had been lost<sup>2</sup>.

1 *Cox v May* (1815) 4 M & S 152 at 159 per Lord Ellenborough CJ.

2 *The Brigella* [1893] P 189 at 196, 7 Asp MLC 403 at 405 per Gorell Barnes J.

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### 624. Average statement.

The shipowner is not bound to employ a professional average adjuster, and, in the absence of express contract, any average statement prepared by such an adjuster does not bind the various persons interested<sup>1</sup>. The shipowner must, however, present the average statement within a reasonable time<sup>2</sup>. If he does employ an average adjuster, it is the shipowner's duty to place before him all necessary particulars and accounts<sup>3</sup>.

1 *Wavertree Sailing Ship Co v Love* [1897] AC 373, 8 Asp MLC 276, PC, explaining *Simonds v White* (1824) 2 B & C 805.

2 *Crooks v Allan* (1879) 5 QBD 38, 4 Asp MLC 216; *Wavertree Sailing Ship Co v Love* [1897] AC 373, 8 Asp MLC 276, PC.

3 *Huth & Co v Lamport* (1886) 16 QBD 735, 5 Asp MLC 593, CA; cf *Twizell v Allen* (1839) 5 M & W 337.

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### 625. Period of limitation.

A claim for a general average contribution is barred after six years from the date of the occurrence of the general average loss<sup>1</sup>. The period of limitation does not run from the time when the general average statement is completed<sup>2</sup>.

1 *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65; *Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd, The Potoi Chau* [1983] 2 Lloyd's Rep 376, PC. York-Antwerp Rule XXIII provides for any rights to General Average contribution to be time-barred after a period of one year after the date of the General Average adjustment or six years after the date of termination of the common maritime adventure whichever comes first. The rule recognises that its provisions may be invalid in some countries. As to the York-Antwerp Rules see PARA 608.

2 *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65; *Arthur L Liman, as trustee in bankruptcy of AH Bull Steamship Co v India Supply Mission, The Beatrice* [1975] 1 Lloyd's Rep 220 (SDNY); *Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd, The Potoi Chau* [1983] 2 Lloyd's Rep 376, PC.

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## **(2) CARRIAGE OF PASSENGERS**

### **(i) The Contract of Carriage Generally**

#### **626. Shipowner's position as a carrier of passengers.**

For the purposes of safety and like matters, the carriage of passengers<sup>1</sup> is the subject of numerous statutory regulations<sup>2</sup>.

The position at common law of an owner who carries passengers in his ship<sup>3</sup>, or of a charterer who has control of the ship and is entitled to carry passengers<sup>4</sup>, depends mainly on the terms of the contract between him and the individual passenger<sup>5</sup>. He is not obliged to carry passengers at all, but, if he holds himself out as a common carrier of passengers<sup>6</sup>, he is bound to receive and carry all who are willing to contract with him<sup>7</sup>, provided that there is room in the ship and that the prospective passenger is a fit person to be carried and not one whose presence would be likely to affect injuriously or endanger the ship, the owner, the crew or the other passengers<sup>8</sup>.

The mere fact that the presence of a particular passenger might offend the susceptibilities of others does not justify a refusal to carry<sup>9</sup>; and a person of notoriously bad character who has been accepted as a passenger is entitled to be carried so long as he behaves himself properly<sup>10</sup>.

1 As to the meaning of 'passenger' see *Hay v Trinity House Corp'n* (1895) 65 LJQB 90, 8 Asp MLC 77 (where the master's friends who were carried without paying the fare were held not to be passengers). The expression 'passenger' is not, however, defined for the purposes of the Merchant Shipping Act 1995 Pt IV (ss 85-108): see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 591 et seq.

2 For provisions relating to passenger ships generally see PARA 631 et seq; and as to the construction and equipment of ships see also **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 599 et seq. As to international carriage see PARA 634 et seq.

3 The owners of a ship under a charter to carry goods retain the right to carry passengers in the absence of any prohibition, express or implied, in the charterparty, and provided that they can do so consistently with their obligations to the charterers: *SA Commercial de Esportacion e Importacion (Louis Dreyfus & Cia) Lda v National Steamship Co Ltd* [1935] 2 KB 313, 18 Asp MLC 549. Where a charterparty, not amounting to a demise of the ship, provided for the carriage of a full and complete cargo, but made no provision as to passengers, it was held that, on the construction of the charterparty, the charterer should have the use of the ship for carrying goods

only and that the owners were entitled to the freight earned by the carrying of passengers: *Shaw, Savill & Co v Aitken, Lilburn & Co* (1883) Cab & El 195.

4 See note 3.

5 See PARA 71 et seq.

6 See PARA 38 et seq.

7 See *Henderson v Stevenson* (1875) LR 2 Sc & Div 470 at 477, HL, per Lord Chelmsford; *Clarke v West Ham Corpn* [1909] 2 KB 858 at 882, CA, per Kennedy LJ.

8 See Abbott's Law of Merchant Ships and Seamen (14th Edn, 1901) Pt IV Ch 1.

9 See note 8.

10 *Coppin v Braithwaite* (1844) 8 Jur 875 at 876 per Rolfe B.

## UPDATE

### 626 Shipowner's position as a carrier of passengers

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### 627. Shipowner's liability.

A shipowner is not an insurer of the safety of the passengers carried on his ship<sup>1</sup>. His responsibility is limited by the terms of the contract of carriage<sup>2</sup> and by his implied undertaking to take all due care<sup>3</sup>, including the exercise of reasonable skill and foresight by him and his employees, to carry the passenger in safety<sup>4</sup>. This undertaking involves a duty to provide a ship as fit and seaworthy<sup>5</sup> as care and skill can render her and he is liable for any defect which careful and reasonable examination would reveal, but not for latent defects<sup>6</sup>. Independently of special conditions imposed by statute or by contract<sup>7</sup>, the owner, and the master as his agent, must also make reasonable provision for the food<sup>8</sup>, comfort<sup>9</sup> and accommodation<sup>10</sup>, and take reasonable care for the safety<sup>11</sup>, of the passengers throughout the voyage<sup>12</sup>, and must provide reasonable facilities for the carriage of their luggage<sup>13</sup> so long as it is not in excess of what is usual on such a voyage<sup>14</sup>.

The shipowner's liability to a passenger for injuries sustained by reason of the negligence of the shipowner, or of his employees while acting within the scope of their employment<sup>15</sup>, extends to a passenger in another ship who may be injured by reason of such negligence<sup>16</sup>. A passenger is not identified in respect of negligence with those navigating the ship on which he is carried<sup>17</sup>.

1 See PARA 38.

2 As to the extent and conditions of such limited liability see PARA 628.

3 As to the degree of care required see PARA 38. Cf the strict duty of care in relation to the carriage of goods: see PARAS 16 et seq, 264.

4 As to the right of action of passengers injured in collisions, or of their personal representatives in the event of fatal accidents, see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 821.

5 In a voyage policy there is an implied warranty that at the commencement of the voyage the ship is seaworthy for the purpose of the particular adventure insured, that is to say that she is reasonably fit in all respects to encounter the ordinary perils of the seas of that adventure: see the Marine Insurance Act 1906 s 39(4); and **INSURANCE** vol 25 (2003 Reissue) PARA 245. As to the owner's and master's liability in respect of a dangerously unsafe ship, the use of unsafe lighters etc, and the owner's liability for the unsafe operation of a ship, see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARAS 1207-1209.

6 See PARAS 41, 464 et seq.

7 Any reasonable person must suppose that there will, in a contract of carriage of a passenger by sea, be conditions regulating the conduct of the passenger, and giving the shipowner powers of control, without which it would be impossible to secure the safety of passengers or their luggage: *Acton v Castle Mail Packets Co* (1895) 11 TLR 518, 8 Asp MLC 73.

8 *Young v Fewson* (1837) 8 C & P 55 at 57.

9 *Andrews v Little* (1887) 3 TLR 544, CA (neglect to provide means for getting out of berth).

10 *Adderley v Cookson* (1809) 2 Camp 15.

11 *Andrews v Little* (1887) 3 TLR 544, CA. As to the statutory safety provisions see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 591 et seq.

12 As to the commencement of the voyage see *Gillan v Simpkin* (1815) 4 Camp 241. See also *John v Bacon* (1870) LR 5 CP 437.

13 *Upperton v Union-Castle Mail Steamship Co* (1902) 19 TLR 123; affd (1903) 19 TLR 687, 9 Asp MLC 475, CA (where luggage stowed in a vacant lavatory was damaged by water).

14 *Macrow v Great Western Rly Co* (1871) LR 6 QB 612.

15 *The Druid* (1842) 1 Wm Rob 391.

16 *Mills v Armstrong, The Bernina* (1888) 13 App Cas 1, 6 Asp MLC 257, HL. See also **SHIPPING AND MARITIME LAW** vol 94 (2008) PARAS 819-821.

17 *Mills v Armstrong, The Bernina* (1888) 13 App Cas 1, 6 Asp MLC 257, HL, overruling *Thorogood v Bryan* (1849) 8 CB 115. As to the application of this doctrine to the carriage of goods see *The Milan* (1861) Lush 388; *Tongariro (Cargo Owners) v Drumlanrig (Owners)*, *The Drumlanrig* [1911] AC 16, 11 Asp MLC 520, HL. As to the division of loss under the Merchant Shipping Act 1995, and as to the rights of an innocent party where two vessels are in fault, see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 800 et seq.

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## 628. Limiting liability.

By inserting conditions<sup>1</sup> in a contract of carriage a shipowner may exempt himself<sup>2</sup>, either in whole or in part, from liability for loss in respect of a passenger<sup>3</sup> or his luggage<sup>4</sup>, but he must cause reasonable notice of the conditions to be given to the passenger<sup>5</sup>.

Employees or agents of the shipowner<sup>6</sup>, if sued, cannot rely on conditions limiting the shipowner's liability for negligence where they are not parties to the contract<sup>7</sup>.

In the absence of a special contract<sup>8</sup>, the owner's liability for loss suffered by a passenger is based on negligence<sup>9</sup>, and his liability as to the passenger's luggage is the same as that of

other carriers<sup>10</sup>, but, in all cases where the loss occurs without his actual fault or privity, the statutory limitations may apply<sup>11</sup>.

1 As to the Unfair Contract Terms Act 1977 see ss 28, 29; PARAS 99, 634; and **CONTRACT** vol 9(1) (Reissue) PARA 822. As to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, see reg 4(2); and **CONTRACT** vol 9(1) (Reissue) PARA 791.

2 As a shipowner is under a duty to use due skill and care, a clause exempting him from liability in respect of any cause whatever must exempt him from the consequences both of his negligence and of that of his agents: *Beaumont-Thomas v Blue Star Line Ltd* [1939] 3 All ER 127, CA.

3 See *Beaumont-Thomas v Blue Star Line Ltd* [1939] 3 All ER 127, CA; *Adler v Dickson* [1955] 1 QB 158 at 180, [1954] 3 All ER 397 at 400, [1954] 2 Lloyd's Rep 267 at 270, CA. See also *Jones v Oceanic Steam Navigation Co Ltd* [1924] 2 KB 730, 16 Asp MLC 432 (where the ejusdem generis rule was applied to the negligence clause; it was also held that it was not within the purser's express or implied authority to alter the terms of the contract or to waive a condition as to notice of claim).

4 As to liability for loss of luggage see PARAS 53-55; and see *Wilton v Atlantic Royal Mail Steam Co* (1861) 10 CBNS 453; *Peninsular and Oriental Steam Navigation Co Ltd v Shand* (1865) 2 Mar LC 244, PC; *Taubman v Pacific Steam Navigation Co* (1872) 1 Asp MLC 336; *Thompson v Royal Mail Steam Packet Co* (1875) 5 Asp MLC 190n; *The Stella* [1900] P 161, 9 Asp MLC 66.

5 See PARA 71 et seq; and *Acton v Castle Mail Packets Co* (1895) 8 Asp MLC 73; *Cooke v T Wilson Sons & Co Ltd* (1915) 85 LJB 888, CA; and *Hood v Anchor Line (Henderson Bros)* [1918] AC 837, HL (where, in all three cases, reasonable notice was given to the passengers of the conditions); *Williamson v North of Scotland and Orkney and Shetland Steam Navigation Co* 1916 SC 554 (where reasonable notice of the conditions was not given to the passengers). As to the shipowner's right to limit his liability in the case of international carriage see PARAS 642-643.

6 This includes the master, the boatswain and any other members of the crew.

7 *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, [1954] 2 Lloyd's Rep 267, CA; and see *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, [1961] 2 Lloyd's Rep 365, HL (applying the same principle). It seems, however, that, if a company contracts as agents for its employees and if the passenger assented expressly or by necessary implication to the exemption of those persons, those employees may rely upon the exemption clause, even though they were not parties to the contract but only participated in the performance of it: see *Adler v Dickson* obiter at 184, 196, at 402, 409 and at 272, 280; *Scruttons Ltd v Midland Silicones Ltd*; and see *Alsey Steam Fishing Co Ltd v Hillman (Owners), The Kirknes* [1957] P 51 at 65, 66, [1957] 1 All ER 97 at 106, 107, [1956] 2 Lloyd's Rep 651 at 659 per Willmer J. Cf *Elder Dempster & Co Ltd v Paterson Zochanis & Co Ltd* [1924] AC 522, 16 Asp MLC 351, HL (where the charterers were regarded as agents for the shipowners for the purpose of the exemption clause: see PARA 280 note 2).

8 In the absence of any statutory prohibition, a common carrier or other carrier of passengers may limit his liability: *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233 at 245, [1947] 1 All ER 328 at 332, PC.

9 See generally **NEGLIGENCE** vol 78 (2010) PARA 1 et seq.

10 See PARAS 53-55.

11 As to the statutory limitations see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042 et seq.

## UPDATE

### 628 Limiting liability

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### **629. Delay.**

In the absence of any warranty, a passenger may not insist that a voyage is to begin at the advertised or agreed time, but he has a right of action at common law for unreasonable delay<sup>1</sup> either in the time of sailing or in the prosecution of the voyage, and the shipowner may be liable to an inconvenienced passenger for such damages as are the reasonable consequence of his default, unless he has contracted to be liable to a greater or lesser extent<sup>2</sup>.

Where, in a policy of insurance, a ship is warranted to sail before or after a given day, the underwriter is discharged from liability if the warranty is not exactly complied with, even if the loss is unconnected with the time of her sailing<sup>3</sup>.

1 *Yates v Duff* (1832) 5 C & P 369; *Ellis v Thompson* (1838) 3 M & W 445 at 456; *Sansom v Rhodes* (1840) 8 Scott 544; *Cranston v Marshall* (1850) 5 Exch 395; *Crane v Tyne Shipping Co Ltd* (1897) 13 TLR 172, DC. It is implied in all contracts by charterparty that there will be no such unreasonable delay: *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125 at 142, 2 Asp MLC 435 at 442. As to the carriage of goods see PARAS 78, 205 et seq.

2 See PARA 77.

3 See **INSURANCE** vol 25 (2003 Reissue) PARA 240.

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### **630. Passage money.**

If there is no provision in a contract of carriage as to the time for payment of the passage money, it must be paid at the accustomed time, if there is any usage in this respect; and it seems that, if the money is paid in advance and the ship is lost before the commencement of the voyage, the money must be returned<sup>1</sup>. For unpaid passage money the master has a lien on the passenger's luggage, but not on his person or on the clothes he is wearing<sup>2</sup>.

1 *Gillan v Simpkin* (1815) 4 Camp 241; *Greeves v West India and Pacific Steamship Co Ltd* (1869) 3 Mar LC 255. It has not yet been decided whether, in the case of a collision between two vessels caused by the fault of both of them, the passenger's rights in respect of passage money as against the owner of the other vessel under the Merchant Shipping Act 1995 s 187 (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 800) are limited by the doctrine of identification, but it seems probable that they are not so limited. Cf the limitation in the case of damage or loss to cargo in collisions: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 803.

2 *Wolf v Summers* (1811) 2 Camp 631.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/3. CARRIAGE BY SEA/(2) CARRIAGE OF PASSENGERS/(i) The Contract of Carriage Generally/631. Master's authority over passengers.

### **631. Master's authority over passengers.**

At common law the master of a vessel has absolute control over the passengers, and they are bound to obey all his reasonable orders, and in emergency even to work the ship or to fight for it<sup>1</sup>. The master may use reasonable means to enforce obedience to his lawful commands, and may, when necessary, remove or even imprison a disobedient passenger, but his power is limited to the necessity of the case, and, if he uses excessive means to enforce obedience, or attempts to enforce obedience in such a manner as to exceed his authority, he is liable to an action for damages<sup>2</sup>. The master's common law powers to remove or imprison disobedient passengers are further elaborated by statute, it being specifically provided that masters may refuse to receive on board, or put ashore, persons who are drunk or otherwise in such a state or misconducting themselves in such a manner as to cause annoyance or injury to passengers on board, and may cause any person on board the ship to be put under restraint in the interest of safety or for the preservation of good order or discipline<sup>3</sup>.

1 *Newman v Walters* (1804) 3 Bos & P 612; *Boyce v Bayliffe* (1807) 1 Camp 58; *Boyce v Douglas* (1807) 1 Camp 60; *King v Franklin* (1858) 1 F & F 360. As to the right of passengers to claim a salvage reward see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 937.

2 *Prendergast v Compton* (1837) 8 C & P 454; *Noden v Johnson* (1850) 16 QB 218; *Aldworth v Stewart* (1866) 4 F & F 957.

3 See the Merchant Shipping Act 1995 ss 101, 102, 105; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 446-447; **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1199.

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### **632. Passenger returns.**

The master of every ship which carries any passenger to a place in the United Kingdom from any place out of the United Kingdom, or from any place in the United Kingdom to any place out of the United Kingdom, must furnish a return giving the total number of any passengers so carried<sup>1</sup>. Failure to make such a return or giving false information pursuant to the making of such a return is an offence<sup>2</sup>.

1 See the Merchant Shipping Act 1995 s 107(1), (2); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 653.

2 See the Merchant Shipping Act 1995 s 107(3); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1184.

## **UPDATE**

### **632 Passenger returns**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### **633. Shipowner's liability in tort.**

A shipowner may be sued in tort by his passengers, or by the passengers on other vessels involved in a collision. In addition, the Occupiers' Liability Act 1957, which imposes a duty of reasonable care to visitors, who include passengers, applies to ships (vessels)<sup>1</sup>. Claims by passengers are affected by statutory provisions under which the owner, charterer and certain other persons may in certain circumstances limit their liability in respect of loss of life or personal injury<sup>2</sup>. Claims by passengers against the other vessel involved in a collision must be brought within two years<sup>3</sup>.

1 See the Occupiers' Liability Act 1957 s 1(3)(a); and **NEGLIGENCE** vol 78 (2010) PARA 29.

2 See the Convention on Limitation of Liability for Maritime Claims (London, 1 to 19 November 1976; TS 13 (1990); Cm 955), art 4; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1046. The Convention on Limitation of Liability for Maritime Claims is Scheduled to the Merchant Shipping Act 1995 Sch 7 Pt I); see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1043 et seq. As to the application of the Unfair Contract Terms Act 1977 see PARA 628 note 1; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

3 See the Merchant Shipping Act 1995 s 190; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1063. See also *Curtis v Wild* [1991] 4 All ER 172; *Steedman v Scolfeld* [1992] 2 Lloyd's Rep 163 (a jet-ski is not a vessel within the meaning of this provision).

### **UPDATE**

#### **633-634 Shipowner's liability in tort, Application of Athens Convention**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### **(ii) Carriage of Passengers under the Athens Convention**

#### **A. THE APPLICABLE LAW**

#### **634. Application of Athens Convention.**

The carriage of passengers and their luggage by sea<sup>1</sup> is governed by the Athens Convention<sup>2</sup>, which has the force of law<sup>3</sup> in the United Kingdom<sup>4</sup>.

The Convention applies to both international and non-international carriage<sup>5</sup> and applies also to commercial carriage undertaken by states or public authorities under contracts of carriage<sup>6</sup>. It applies to international carriage (that is, any carriage in which, according to the contract of carriage<sup>7</sup>, the place of departure and the place of destination are situated in two different states, or in a single state if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another state<sup>8</sup>) if:

- 181 (1) the ship<sup>9</sup> is flying the flag of or is registered in a party to the Convention<sup>10</sup>;
- 182 (2) the contract of carriage has been made in a party to the Convention<sup>11</sup>;
- 183 (3) the place of departure or destination, according to the contract of carriage, is in a party to the Convention<sup>12</sup>; or
- 184 (4) notwithstanding the above, the carriage is subject, under any other international convention concerning the carriage of passengers<sup>13</sup> or luggage<sup>14</sup> by another mode of transport, to a civil liability regime under the provisions of such convention, in so far those provisions have mandatory application to carriage by sea<sup>15</sup>,

and it applies to non-international carriage (that is, any contract for the carriage of passengers or of passengers and their luggage by sea<sup>16</sup> under which the places of departure and destination are in the area consisting of the United Kingdom<sup>17</sup>, the Channel Islands<sup>18</sup> and the Isle of Man<sup>19</sup> and under which there is no intermediate port of call outside that area<sup>20</sup>) within the terms of that definition<sup>21</sup>.

These provisions bind the Crown<sup>22</sup>.

1 As to the meaning of 'carriage' for these purposes see PARA 635.

2 The Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 13 December 1974; TS 40 (1987); Cm 202). The Convention came into force on 28 April 1987 and is set out in the Merchant Shipping Act 1995 Sch 6 (see PARA 636 et seq): s 183(1), (2). A Protocol to the Convention adopted on 19 November 1976, which came into force on 30 April 1989, made technical amendments to the Convention in connection with special drawing rights. A subsequent Protocol adopted on 29 March 1990 introduced a series of new measures aimed at raising the amounts of compensation payable under the Convention; however that Protocol did not attract sufficient ratifications to bring it into force and has been superseded by a further Protocol adopted on 1 November 2002 which, when it comes into force (ie 12 months after being accepted by ten states) will introduce a system of compulsory insurance to cover passengers along with other mechanisms to assist passengers in obtaining compensation, as well as further raising the limits of liability.

The Convention does not modify the rights or duties of the carrier, the performing carrier and their servants or agents provided for in international conventions relating to the limitation of liability of owners of sea-going ships: art 19. Also, no liability arises under the Convention for damage caused by a nuclear incident: (1) if the operator of a nuclear installation is liable to such damage under either the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960; Misc 17 (1960); Cmnd 1211: see **FUEL AND ENERGY** vol 19(3) (Reissue) PARA 1345) or the Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963; Misc 9 (1964); Cmnd 2333: see **FUEL AND ENERGY** vol 19(3) (Reissue) PARA 1347); or (2) if the operator of a nuclear installation is liable for such damage by virtue of a national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either of those Conventions: Athens Convention art 20.

3 As to 'having the force of law' cf *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, sub nom *The Morviken* [1983] 1 Lloyd's Rep 1, HL (cited in PARA 395 note 6). For the relationship between the Athens Convention and EC Council Directive 90/314 (OJ L158, 23.6.90, p 59) on package travel, package holidays and package tours (as implemented in the United Kingdom by the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288) see *Lee v Airtours Holidays Ltd* [2004] 1 Lloyd's Rep 683; *Norfolk v My Travel Group plc* [2004] 1 Lloyd's Rep 106; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 817 et seq.

4 Merchant Shipping Act 1995 s 183(1); Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987, SI 1987/670, art 3(1). Nothing in the Athens Convention affects the operation of the Merchant Shipping Act 1995 s 185 (which limits a shipowner's liability in certain cases of loss of life, injury or damage: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042) and nothing in s 186 (which among other things limits a shipowner's liability for the loss or damage of goods in certain cases: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1059) relieves a person of any liability imposed on him by the Convention: Merchant Shipping Act 1995 Sch 6 Pt II paras 12, 13.

If it appears to Her Majesty in Council that there is a conflict between the Convention and any provisions relating to the carriage of passengers or luggage for reward by land, sea or air in any convention which has been signed or ratified by or on behalf of the government of the United Kingdom before 4 April 1979, excluding the Convention, or any enactment of the Parliament of the United Kingdom giving effect to such a convention,

She may by Order in Council make such modifications of the statutory provisions or any such enactment as She considers appropriate for resolving the conflict: Merchant Shipping Act 1995 s 183(3). 4 April 1979 is the date on which the Merchant Shipping Act 1979, which first enacted the Athens Convention in United Kingdom law, received the Royal Assent. At the date at which this volume states the law the operative Order in Council is the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998, SI 1998/2917, which modifies art 7 of the Convention (limit of liability for personal injury: see PARA 642). If it appears to Her Majesty in Council that the government of the United Kingdom has agreed to any revision of the Convention, She may by Order in Council make such modification of Sch 6 (see note 2) as She considers appropriate in consequence of the revision: Merchant Shipping Act 1995 s 183(3). At the date at which this volume states the law no such Orders in Council had effect.

The Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987, SI 1987/670, is made under the Merchant Shipping Act 1995 s 184(1), under which Her Majesty may by Order in Council provide for the Athens Convention: (1) to have the force of law in the United Kingdom, with such modifications as are specified in the Order, in relation to, and to matters connected with, a contract of carriage where the places of departure and destination under the contract are within the British Islands and under the contract there is no intermediate port of call outside those Islands; and (2) pursuant to the making of appropriate modifications to the enabling legislation, to have effect in relation to, and to matters connected with, any such contract subject to the provisions having effect in connection with the Convention or to those provisions with such modifications as are specified in the Order. An Order in Council so made may contain such provisions, including provisions modifying the Unfair Contract Terms Act 1977 s 28 (which relates to certain contracts as respects which the Convention mentioned in the Merchant Shipping Act 1985 s 183(1) (see the text and notes 1-2) does not have the force of law in the United Kingdom: see **CONTRACT** vol 9(1) (Reissue) PARA 819), as the Secretary of State considers appropriate for the purpose of dealing with matters arising in connection with any contract to which the Unfair Contract Terms Act 1977 s 28 applies before the Order is made: Merchant Shipping Act 1995 s 184(2). As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 355.

5 See the text and notes 16-21.

6 Athens Convention art 21.

7 'Contract of carriage' means a contract made by or on behalf of a carrier for the carriage by sea of a passenger or of a passenger and his luggage, as the case may be: Athens Convention arts 1.2, 21; Merchant Shipping Act 1995 s 184(5). Any reference in the Convention to a contract of carriage excludes a contract of carriage which is not for reward: Merchant Shipping Act 1995 Sch 6 Pt II para 9; Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987, SI 1987/670, art 2.

8 Athens Convention art 1.9.

9 For these purposes 'ship' means only a sea-going vessel, excluding an air-cushion vehicle: Athens Convention art 1.3. A 'banana-raft' has been held not to be a ship for these purposes: see *McEwan v Bingham* [2000] CLY 4691.

10 Athens Convention art 2.1(a). As to parties to the Convention see PARA 636.

11 Athens Convention art 2.1(b).

12 Athens Convention art 2.1(c).

13 For these purposes 'passenger' means any person carried in a ship: (1) under a contract of carriage; or (2) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not governed by the Convention: Athens Convention art 1.4.

14 For these purposes 'luggage' means any article or vehicle carried by the carrier under a contract of carriage, excluding: (1) articles and vehicles carried under a charterparty, bill of lading or other contract primarily concerned with the carriage of goods; and (2) live animals: Athens Convention art 1.5.

15 Athens Convention art 2.2. For these purposes provisions of such an international convention as is mentioned in art 2.2 which otherwise do not have mandatory application to carriage by sea are to be treated as having mandatory application to carriage by sea if it is stated in the contract of carriage for the carriage in question that those provisions are to apply in connection with the carriage: Merchant Shipping Act 1995 Sch 6 Pt II para 2.

16 See note 7.

17 As to the United Kingdom see PARA 96 note 1.

18 As to the Channel Islands see **COMMONWEALTH** vol 13 (2009) PARAS 790-798.

19 As to the Isle of Man see **COMMONWEALTH** vol 13 (2009) PARAS 799-800.

20 Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987, SI 1987/670, art 2.

21 Athens Convention art 2.1; Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987, SI 1987/670, Schedule para 1.

22 See the Merchant Shipping Act 1995 ss 183(6), 184(3); Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987, SI 1987/670, art 3(2).

## UPDATE

### 633-634 Shipowner's liability in tort, Application of Athens Convention

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### 635. Meaning of 'carriage'.

For the purposes of the Athens Convention<sup>1</sup> 'carriage' covers the following periods:

- 185 (1) with regard to the passenger<sup>2</sup> and his cabin luggage<sup>3</sup>, the period during which the passenger and/or his cabin luggage are on board the ship<sup>4</sup> or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice versa, if the cost of such transport is included in the fare or if the vessel used for the purpose of auxiliary transport has been put at the disposal of the passenger by the carrier<sup>5</sup>; but, with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or on a quay or in or on any other port installation<sup>6</sup>;
- 186 (2) with regard to cabin luggage, also the period during which the passenger is in a marine terminal or station or on a quay or in or on any other port installation if that luggage has been taken over by the carrier or his servant or agent and has not been redelivered to the passenger<sup>7</sup>; and
- 187 (3) with regard to other luggage which is not cabin luggage, the period from the time of its taking over by the carrier or his servant or agent onshore or on board until the time of its redelivery by the carrier or his servant or agent<sup>8</sup>.

1 As to the Athens Convention see PARA 634.

2 As to the meaning of 'passenger' see PARA 634 note 13.

3 For these purposes 'cabin luggage' means luggage which the passenger has in his cabin or is otherwise in his possession, custody or control; and, except for the application of these provisions and the Athens Convention art 8 (see PARA 643), 'cabin luggage' includes luggage which the passenger has in or on his vehicle: art 1.6. As to the meaning of 'luggage' see PARA 634 note 14.

4 As to the meaning of 'ship' see PARA 634 note 9.

5 For these purposes 'carrier' means a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier; and 'performing carrier' means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage: Athens Convention art 1.1. 'Carrier' does not include servants or agents of the carrier, and, when something wider is intended, appropriate words are used: *RG Mayor (t/a Granville Coaches) v P & O Ferries Ltd, The Lion* [1990] 2 Lloyd's Rep 144. As to the meaning of 'contract of carriage' see PARA 634 note 7.

6 Athens Convention art 1.8(a).

7 Athens Convention art 1.8(b).

8 Athens Convention art 1.8(c).

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### **636. Parties to the Convention.**

If Her Majesty by Order in Council declares that any state specified in the Order is a party to the Athens Convention<sup>1</sup> in respect of a particular country, the Order is, subject to the provisions of any subsequent Order made by virtue of these provisions, conclusive evidence that the state is a party to the Convention in respect of that country<sup>2</sup>. The current Order does not, however, provide a fully up to date and authoritative record of the parties to the Convention, for which reference should be made to the International Maritime Organisation<sup>3</sup>.

1 As to the Athens Convention see PARA 634.

2 Merchant Shipping Act 1995 Sch 6 Pt II para 10. In exercise of the power so conferred Her Majesty has made the Carriage of Passengers and their Luggage by Sea (Parties to Convention) Order 1987, SI 1987/931, which specifies that the contracting states are: the United Kingdom of Great Britain and Northern Ireland (as respects Great Britain and Northern Ireland, the Bailiwicks of Jersey and Guernsey, the Isle of Man, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, St Helena and Dependencies); the Argentine Republic (as respects Argentina); the Commonwealth of the Bahamas (as respects the Bahamas); the German Democratic Republic (as respects the German Democratic Republic); the Republic of Liberia (as respects Liberia); the Polish People's Republic (as respects Poland); the Kingdom of Spain (as respects Spain); the Kingdom of Tonga (as respects Tonga); the USSR (as respects the USSR) and the Yemen Arab Republic (as respects the Yemen Arab Republic).

3 The International Maritime Organisation, which is generally regarded as providing accurate information in this regard, currently lists the following states as having ratified the Athens Convention: Albania; Argentina; Bahamas; Barbados; Belgium; China; Croatia; Dominica; Egypt; Equatorial Guinea; Estonia; Georgia; Greece; Guyana; Hong Kong; Ireland; Jordan; Latvia; Liberia; Luxembourg; Macau; Malawi; Marshall Islands; Nigeria; Poland; Russian Federation; St Kitts and Nevis; Spain; Switzerland; Tonga; Ukraine; United Kingdom; Vanuatu; Yemen.

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### **637. Prohibition on contracting out.**

Any contractual provision concluded before the occurrence of an incident which has caused the death of or personal injury to a passenger<sup>1</sup> or the loss of or damage to his luggage<sup>2</sup>, purporting to relieve the carrier<sup>3</sup> of his liability toward the passenger or to prescribe a lower limit of liability

than that otherwise fixed<sup>1</sup>, and any such provision purporting to shift the burden of proof which rests on the carrier, or having the effect of restricting the option where to bring proceedings<sup>5</sup> is null and void, but the nullity of that provision does not render void the contract of carriage<sup>6</sup> which remains subject to the provisions of the Athens Convention<sup>7</sup>.

1 As to the meaning of 'passenger' see PARA 634 note 13.

2 As to the meaning of 'luggage' see PARA 634 note 14. As to 'loss of or damage to luggage' see PARA 639 note 3.

3 As to the meaning of 'carrier' see PARA 635 note 5.

4 le by the Athens Convention art 8(4): see PARA 643. As to the Athens Convention see PARA 634.

5 le the option specified in the Athens Convention art 17(1): see PARA 646.

6 As to the meaning of 'contract of carriage' see PARA 634 note 7.

7 Athens Convention art 18.

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### 638. Requirements for notification.

Where a contract of carriage<sup>1</sup> is made in the United Kingdom<sup>2</sup>, or a place in the United Kingdom is the place of departure, the carrier<sup>3</sup> must<sup>4</sup> before departure give to the passengers notice of the provisions of the Athens Convention relating to:

- 188 (1) valuables<sup>5</sup>;
- 189 (2) the limit of liability for personal injury<sup>6</sup>;
- 190 (3) the limit of liability for loss of, or damage to, luggage<sup>7</sup>; and
- 191 (4) notice of loss or damage to luggage<sup>8</sup>.

It is sufficient compliance with these requirements if the notice contains a statement that:

- 192 (a) the provisions of the Convention may be applicable<sup>9</sup>;
- 193 (b) the Convention in most cases limits the carrier's liability for death or personal injury or loss of or damage to luggage<sup>10</sup>, including a vehicle, and makes special provision for valuables<sup>11</sup>; and
- 194 (c) the Convention presumes that luggage has been delivered undamaged unless written notice is given to the carrier, in the case of apparent damage, before or at the time of disembarkation or redelivery, or, in the case of damage which is not apparent or of loss, within 15 days from the date of disembarkation or redelivery or from the time when such redelivery should have taken place<sup>12</sup>.

Where a ticket is issued, and it is practicable to do so, the ticket itself must contain a statement specifying the matters set out in heads (a) to (c) above<sup>13</sup>.

A carrier who fails to comply with any of these provisions is guilty of an offence<sup>14</sup>, although failure to comply with the notice requirements does not deprive the carrier of the right to limit his liability<sup>15</sup>.

- 1 As to the meaning of 'contract of carriage' see PARA 634 note 7.
- 2 As to the United Kingdom see PARA 96 note 1.
- 3 As to the meaning of 'carrier' see PARA 635 note 5.
- 4 Ie by virtue of the Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 2(1), (2), Schedule (made pursuant to the Merchant Shipping Act 1995 Sch 6 Pt II para 11(a), which empowers the Secretary of State by order to make provision for requiring a person who is the carrier in relation to a passenger to give to the passenger, in a manner specified in the order, notice of such of the provisions of the Athens Convention as are so specified). As to the Athens Convention see PARA 634. As to the meaning of 'passenger' see PARA 634 note 13. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 355.
- 5 See the Athens Convention art 5; and PARA 641.
- 6 See the Athens Convention art 7; and PARA 642.
- 7 See the Athens Convention art 8; and PARA 643.
- 8 See the Athens Convention art 15; and PARA 648.
- 9 Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 2(2)(a).
- 10 As to the meaning of 'luggage' see PARA 634 note 14.
- 11 Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 2(2)(b).
- 12 Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 2(2)(c).
- 13 Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 2(2) proviso.
- 14 Ie by virtue of the Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 3 (made pursuant to the Merchant Shipping Act 1995 Sch 6 Pt II para 11(b), which empowers the Secretary of State by order to make provision for a person who fails to comply with a requirement imposed on him by such an order as is referred to in note 4 to be guilty of an offence and liable on summary conviction to a fine of an amount not exceeding level 4 on the standard scale or not exceeding a lesser amount). A person guilty of this offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 3 (amended by virtue of the Criminal Justice Act 1988 s 52). As to the standard scale see PARA 113 note 16.
- 15 *RG Mayor (t/a Granville Coaches) v P & O Ferries Ltd, The Lion* [1990] 2 Lloyd's Rep 144 (decided on the effect of non-compliance with the corresponding provisions of the Carriage of Passengers and their Luggage by Sea (Interim Provisions) (Notice) Order 1980, SI 1980/1125).

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## **B. CARRIERS' LIABILITY**

### **639. Liability of the carrier and his servants or agents.**

The carrier<sup>1</sup> is liable for damage suffered as a result of the death of or personal injury to a passenger<sup>2</sup> and the loss of or damage to luggage<sup>3</sup> if the incident which caused the damage so suffered occurred in the course of the carriage<sup>4</sup> and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment<sup>5</sup>. Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment is presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage<sup>6</sup> arose from or in connection with the shipwreck,

collision, stranding, explosion or fire, or defect in the ship<sup>7</sup>. In respect of loss of or damage to other luggage, such fault or neglect is presumed, unless the contrary is proved irrespective of the nature of the incident which caused the loss or damage<sup>8</sup>. In all other cases the burden of proving fault or neglect lies with the claimant<sup>9</sup>.

1 As to the meaning of 'carrier' see PARA 635 note 5.

2 As to the meaning of 'passenger' see PARA 634 note 13.

3 As to the meaning of 'luggage' see PARA 634 note 14. For these purposes 'loss of or damage to luggage' includes pecuniary loss resulting from the luggage not having been redelivered to the passenger within a reasonable time after the arrival of the ship on which the luggage has been or should have been carried, but does not include delays resulting from labour disputes: Athens Convention art 1.7. As to the Athens Convention see PARA 634.

4 As to the meaning of 'carriage' see PARA 635. The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, lies with the claimant: Athens Convention art 3.2.

5 Athens Convention art 3.1. If an action is brought against a servant or agent of the carrier arising out of damage covered by the Athens Convention, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier or the performing carrier is entitled to invoke under the Convention: art 11.

6 As to the meaning of 'cabin luggage' see PARA 635 note 3.

7 Athens Convention art 3.3.

8 Athens Convention art 3.3.

9 Athens Convention art 3.3.

## UPDATE

### 639-644 Carriers' Liability

See also European Parliament and EC Council Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p 24) which lays down the Community regime relating to liability and insurance for the carriage of passengers by sea as set out in the relevant provisions of the Athens Convention and the IMO Resolution and Guidelines for Implementation of the Athens Convention (19 October 2006).

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### 640. Liability of the performing carrier.

If the performance of the carriage<sup>1</sup> or part thereof has been entrusted to a performing carrier<sup>2</sup>, the carrier nevertheless remains liable for the entire carriage according to the provisions of the Athens Convention<sup>3</sup>. In addition, the performing carrier is subject and entitled to the provisions of the Convention for the part of the carriage performed by him<sup>4</sup>. Any special agreement under which the carrier assumes obligations not imposed by the Convention or any waiver of rights conferred by the Convention affects the performing carrier only if agreed by him expressly and in writing<sup>5</sup>.

Nothing in these provisions prejudices any right of recourse as between the carrier and the performing carrier<sup>6</sup>.

- 1 As to the meaning of 'carriage' see PARA 635.
- 2 As to the meanings of 'carrier' and 'performing carrier' see PARA 635 note 5.
- 3 Athens Convention art 4.1. Thus the carrier is liable, in relation to the carriage performed by the performing carrier, for the acts and omissions of the performing carrier and of his servants and agents acting within the scope of their employment: art 4.2. As to the Athens Convention see PARA 634.
- 4 Athens Convention art 4.1. If an action is brought against a servant or agent of the performing carrier arising out of damage covered by the Athens Convention, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier or the performing carrier is entitled to invoke under the Convention: art 11.
- 5 Athens Convention art 4.3. Where and to the extent that both the carrier and the performing carrier are liable, their liability is joint and several: art 4.4.
- 6 Athens Convention art 4.5.

## **UPDATE**

### **639-644 Carriers' Liability**

See also European Parliament and EC Council Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p 24) which lays down the Community regime relating to liability and insurance for the carriage of passengers by sea as set out in the relevant provisions of the Athens Convention and the IMO Reservation and Guidelines for Implementation of the Athens Convention (19 October 2006).

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### **641. Liability for valuables.**

The carrier<sup>1</sup> is not liable for the loss of or damage to moneys, negotiable securities, gold, silverware, jewellery, ornaments, works of art or other valuables, except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping in which case the carrier is liable up to the specified limit<sup>2</sup> unless a higher limit is<sup>3</sup> agreed on<sup>4</sup>.

- 1 As to the meaning of 'carrier' see PARA 635 note 5.
- 2 Ie the limit specified in the Athens Convention art 8.3, as to which see PARA 643. As to the Athens Convention see PARA 634.
- 3 Ie in accordance with the Athens Convention art 10, as to which see PARAS 642, 643.
- 4 Athens Convention art 5.

## **UPDATE**

### **639-644 Carriers' Liability**

See also European Parliament and EC Council Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p 24) which lays down the Community regime relating to liability and insurance for the carriage of passengers by sea as set out in the relevant provisions of the Athens Convention and the IMO Reservation and Guidelines for Implementation of the Athens Convention (19 October 2006).

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## 642. Limit of liability for personal injury.

The liability of any carrier<sup>1</sup> whose principal place of business is in the United Kingdom<sup>2</sup> for the death of or personal injury to a passenger<sup>3</sup> must in no case exceed 300,000 units of account<sup>4</sup> per carriage<sup>5</sup>, although the carrier and the passenger may agree, expressly and in writing, to higher limits of liability<sup>6</sup>. The prescribed limits apply to the aggregate of all amounts recoverable in applicable claims<sup>7</sup>, and interest on damages and legal costs must not be included in the limits so prescribed<sup>8</sup>.

1 As to the meaning of 'carrier' see PARA 635 note 5.

2 As to the United Kingdom see PARA 96 note 1.

3 As to the meaning of 'passenger' see PARA 634 note 13.

4 The unit of account mentioned in the Athens Convention is the special drawing right as defined by the International Monetary Fund: art 9. The amounts mentioned in arts 7, 8 (see PARAS 642-643) must be converted into the national currency of the state of the court seized of the case on the basis of the value of that currency on the date of the judgment or the date agreed upon by the parties: art 9. Provision is made for the conversion of special drawing rights into sterling: see the Merchant Shipping Act 1995 Sch 6 Pt II para 5. As to the Athens Convention see PARA 634.

5 Athens Convention art 7.1; Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998, SI 1998/2917, art 3 (made under the Merchant Shipping Act 1995 Sch 6 Pt II para 4 (which empowers the Secretary of State by order to provide that, in relation to a carrier whose principal place of business is in the United Kingdom, art 7.1 has effect with the substitution for the limit for the time being specified therein (ie 46,666 units of account) of a different limit specified in the order, which must not be lower than 46,666 units of account), pursuant to the Athens Convention art 7.2 (which provides that the national law of any party to the Convention (see PARA 636) may, notwithstanding art 7.1, fix, as far as carriers who are nationals of such state are concerned, a higher per capita limit of liability)). As to the meaning of 'carriage' see PARA 635. Where, in accordance with the law of the court seized of the case, damages are awarded in the form of periodical income payments, the equivalent capital value of those payments must not exceed such limit: art 7.1. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 355.

6 Athens Convention art 10.1.

7 Where the limits of liability prescribed in the provisions relating to liability for personal injury and loss of or damage to luggage (ie the Athens Convention arts 7, 8 (see PARAS 642, 643)) take effect, they apply to the aggregate of the amounts recoverable in all claims arising out of the death of or personal injury to any one passenger or the loss of or damage to his luggage: art 12.1. In relation to the carriage performed by a performing carrier, the aggregate of the amounts recoverable from the carrier and the performing carrier and from their servants and agents acting within the scope of their employment must not exceed the highest amount which could be awarded against either the carrier or the performing carrier under the Convention, but none of the persons mentioned is liable for a sum in excess of the limit applicable to him: art 12.2. In any case where a servant or agent of the carrier or of the performing carrier is entitled under art 11 (see PARAS 639, 640)

to avail himself of the limit of liability prescribed by the provisions relating to the limit of liability for personal injury and loss of or damage to luggage, the aggregate of the amounts recoverable from the carrier or the performing carrier, as the case may be, and from that servant or agent, must not exceed those limits: art 12.3.

The limitations on liability mentioned in these provisions apply to the aggregate liabilities of the persons in question in all proceedings for enforcing the liabilities or any of them which may be brought whether in the United Kingdom or elsewhere: Merchant Shipping Act 1995 Sch 6 Pt II para 6. The court before which proceedings are brought pursuant to the Athens Convention art 17 (see PARA 646) to enforce a liability which is limited by virtue of art 12 may at any stage of the proceedings make such orders as appear to the court to be just and equitable in view of art 12 and of any other proceedings which have been or are likely to be begun in the United Kingdom or elsewhere to enforce the liability in whole or in part; and, without prejudice to the generality of these provisions, such a court has jurisdiction, where the liability is or may be partly enforceable in other proceedings in the United Kingdom or elsewhere, to award an amount less than the court would have awarded if the limitation applied solely to the proceedings before the court or to make any part of its award conditional on the results of any other proceeding: Merchant Shipping Act 1995 Sch 6 Pt II para 8.

As to the meaning of 'luggage' see PARA 634 note 14. As to 'loss of or damage to luggage' see PARA 639 note 3. As to the meaning of 'performing carrier' see PARA 635 note 5.

8 Athens Convention art 10.2.

## UPDATE

### 639-644 Carriers' Liability

See also European Parliament and EC Council Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p 24) which lays down the Community regime relating to liability and insurance for the carriage of passengers by sea as set out in the relevant provisions of the Athens Convention and the IMO Reservation and Guidelines for Implementation of the Athens Convention (19 October 2006).

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### 643. Limit of liability for loss of or damage to luggage.

The liability of the carrier<sup>1</sup> for the loss of or damage to luggage<sup>2</sup> must in no case exceed:

- 195 (1) 833 units of account<sup>3</sup> per passenger<sup>4</sup> per carriage in the case of cabin luggage<sup>5</sup>;
- 196 (2) 3,333 units of account per vehicle per carriage in the case of vehicles including all luggage carried in or on the vehicle<sup>6</sup>; and
- 197 (3) 1,200 units of account per passenger per carriage in the case of any other luggage<sup>7</sup>.

The carrier and the passenger may, however, agree:

- 198 (a) to higher limits of liability<sup>8</sup>; or
- 199 (b) that the liability of the carrier is to be subject to a deduction not exceeding 117 units of account in the case of damage to a vehicle and not exceeding 13 units of account per passenger in the case of loss of or damage to other luggage, such sum to be deducted from the loss or damage<sup>9</sup>.

The prescribed limits apply to the aggregate of all amounts recoverable in applicable claims<sup>10</sup>, and interest on damages and legal costs must not be included in the limits so prescribed<sup>11</sup>.

- 1 As to the meaning of 'carrier' see PARA 635 note 5.
- 2 As to the meaning of 'luggage' see PARA 634 note 14. As to 'loss of or damage to luggage' see PARA 639 note 3.
- 3 As to units of account see PARA 642 note 4.
- 4 As to the meaning of 'passenger' see PARA 634 note 13.
- 5 Athens Convention art 8.1. As to the Athens Convention see PARA 634. As to the meaning of 'cabin luggage' see PARA 635 note 3.
- 6 Athens Convention art 8.2.
- 7 Athens Convention art 8.3.
- 8 Athens Convention art 10.1. Such agreement must be express and in writing: art 9.1.
- 9 Athens Convention art 8.4.
- 10 See PARA 642 note 7.
- 11 Athens Convention art 10.2.

## **UPDATE**

### **639-644 Carriers' Liability**

See also European Parliament and EC Council Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p 24) which lays down the Community regime relating to liability and insurance for the carriage of passengers by sea as set out in the relevant provisions of the Athens Convention and the IMO Reservation and Guidelines for Implementation of the Athens Convention (19 October 2006).

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### **644. Loss of right to limit liability.**

Carriers, performing carriers and servants or agents of carriers or performing carriers are not entitled to the benefit of the prescribed limits of liability<sup>1</sup> if it is proved that the damage resulted from an act or omission of the carrier, servant or agent done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result<sup>2</sup>. Non-compliance with the statutory provisions relating to notification of the application of the Athens Convention<sup>3</sup> does not affect the right to limit liability<sup>4</sup>.

1 As to the prescribed limits see the Athens Convention arts 7, 8, 10(1); and PARAS 642-643. As to the Athens Convention see PARA 634.

2 Athens Convention art 13. As to the meanings of 'carrier' and 'performing carrier' see PARA 635 note 5. Since 'carrier' does not include servants or agents of a carrier, an act or omission of a servant or agent of the

carrier done with the requisite state of mind does not, therefore, deprive the carrier of the right to limit liability: *RG Mayor (t/a Granville Coaches) v P & O Ferries Ltd, The Lion* [1990] 2 Lloyd's Rep 144.

3 See the Carriage of Passengers and their Luggage by Sea (Notice) Order 1987, SI 1987/703, art 2: see PARA 638.

4 *RG Mayor (t/a Granville Coaches) v P & O Ferries Ltd, The Lion* [1990] 2 Lloyd's Rep 144.

## **UPDATE**

### **639-644 Carriers' Liability**

See also European Parliament and EC Council Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p 24) which lays down the Community regime relating to liability and insurance for the carriage of passengers by sea as set out in the relevant provisions of the Athens Convention and the IMO Reservation and Guidelines for Implementation of the Athens Convention (19 October 2006).

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## **C. CLAIMS AND PROCEEDINGS**

### **645. Basis for claims.**

No action for damages for the death of or personal injury to a passenger<sup>1</sup>, or for the loss of or damage to luggage<sup>2</sup>, may be brought against a carrier or performing carrier<sup>3</sup> otherwise than in accordance with the Athens Convention<sup>4</sup>.

1 As to the meaning of 'passenger' see PARA 634 note 13.

2 As to the meaning of 'luggage' see PARA 634 note 14. As to 'loss of or damage to luggage' see PARA 639 note 3.

3 As to the meanings of 'carrier' and 'performing carrier' see PARA 635 note 5.

4 Athens Convention art 14. As to the Athens Convention see PARA 634.

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### **646. Competent jurisdiction.**

An action arising under the Athens Convention<sup>1</sup> must, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located within the jurisdiction of a party to the Convention<sup>2</sup>:

- 200 (1) the court of the place of permanent residence or principal place of business  
of the defendant<sup>3</sup>;
- 201 (2) the court of the place of departure or that of the destination according to the  
contract of carriage<sup>4</sup>;
- 202 (3) a court of the state of the domicile or permanent residence of the claimant, if  
the defendant has a place of business and is subject to jurisdiction in that state<sup>5</sup>; or
- 203 (4) a court of the state where the contract of carriage was made, if the  
defendant has a place of business and is subject to jurisdiction in that state<sup>6</sup>.

After the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages be submitted to any jurisdiction or to arbitration<sup>7</sup>.

1 As to the Athens Convention see PARA 634.

2 As to parties to the Convention see PARA 636. As to the powers of the court before which proceedings are brought in pursuance of the Athens Convention art 17 to enforce a liability which is limited by virtue of art 12: see the Merchant Shipping Act 1995 Sch 6 Pt II para 8; and PARA 642 note 7.

3 Athens Convention art 17.1(a).

4 Athens Convention art 17.1(b). As to the meaning of 'contract of carriage' see PARA 634 note 7.

5 Athens Convention art 17.1(c).

6 Athens Convention art 17.1(d).

7 Athens Convention art 17.2.

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#### **647. Time limits.**

Any claim for damages or arbitral proceedings arising out of the death of or personal injury to a passenger<sup>1</sup> or for the loss of or damage to luggage<sup>2</sup> is time-barred after a period of two years<sup>3</sup>, to be calculated as follows:

- 204 (1) in the case of personal injury, from the date of disembarkation of the  
passenger<sup>4</sup>;
- 205 (2) in the case of death occurring during carriage<sup>5</sup>, from the date when the  
passenger should have disembarked<sup>6</sup>;
- 206 (3) in the case of personal injury occurring during carriage and resulting in the  
death of the passenger after disembarkation, from the date of death, provided that  
this period must not exceed three years from the date of disembarkation<sup>7</sup>; and
- 207 (4) in the case of loss of or damage to luggage, from the date of disembarkation  
or from the date when disembarkation should have taken place, whichever is later<sup>8</sup>.

The law of the court seised of the case governs the grounds of suspension and interruption of limitation periods; but in no case may a claim under the Athens Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later<sup>9</sup>. However, the

period of limitation may be extended<sup>10</sup> by a declaration of the carrier or by agreement of the parties after the cause of action has arisen<sup>11</sup>.

1 As to the meaning of 'passenger' see PARA 634 note 13.

2 As to the meaning of 'luggage' see PARA 634 note 14. As to 'loss of or damage to luggage' see PARA 639 note 3.

3 Athens Convention art 16.1; Merchant Shipping Act 1995 Sch 6 Pt II para 7 (substituted by the Arbitration Act 1996 Sch 3 para 61). The provisions of the Arbitration Act 1996 s 14 (see **ARBITRATION** vol 2 (2008) PARA 1219) apply to determine when an arbitration is commenced: Merchant Shipping Act 1995 Sch 6 Pt II para 7 (as so substituted). As to the Athens Convention see PARA 634. Although the provisions of the Limitation Act 1980 regarding the extension or exclusion of ordinary time limits are applicable to the Athens Convention and are not excluded by the Limitation Act 1980 s 39, s 33 cannot be regarded as operating to disapply the two-year limitation period for personal injury claims under these provisions: see *Higham v Stena Sealink Ltd* [1996] 3 All ER 660, [1996] 1 WLR 1107, [1996] 2 Lloyd's Rep 26, CA (plaintiff time-barred); and **LIMITATION PERIODS** vol 68 (2008) paras 918, 1001-1002.

4 Athens Convention art 16.2(a).

5 As to the meaning of 'carriage' see PARA 635.

6 Athens Convention art 16.2(b).

7 Athens Convention art 16.2(b).

8 Athens Convention art 16.2(c).

9 Athens Convention art 16.3.

10 Ie notwithstanding the Athens Convention arts 16.1-16.3: see the text and notes 1-9.

11 Athens Convention art 16.4. The declaration or agreement must be in writing: art 16.4.

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#### **648. Method for making complaints of loss of or damage to luggage.**

Unless the condition of luggage<sup>1</sup> has at the time of its receipt been the subject of joint survey or inspection<sup>2</sup>, any complaint involving loss of or damage to luggage must be made by written notice to the carrier<sup>3</sup> or his agent<sup>4</sup>. In the case of apparent damage to cabin luggage<sup>5</sup>, the passenger<sup>6</sup> must give such notice before or at the time of disembarkation<sup>7</sup>; for all other luggage, notice must be given before or at the time of its redelivery<sup>8</sup>. Where luggage is lost or damage is not apparent, notice must be given within 15 days from the date of disembarkation or redelivery or from the time when such redelivery should have taken place<sup>9</sup>. If the passenger fails to comply with these requirements he is presumed, unless the contrary is proved, to have received the luggage undamaged<sup>10</sup>.

1 As to the meaning of 'luggage' see PARA 634 note 14. As to 'loss of or damage to luggage' see PARA 639 note 3.

2 Athens Convention art 15.3. As to the Athens Convention see PARA 634.

3 As to the meaning of 'carrier' see PARA 635 note 5.

- 4 Athens Convention art 15.1. As to the Athens Convention see PARA 634.
- 5 As to the meaning of 'cabin luggage' see PARA 635 note 3.
- 6 As to the meaning of 'passenger' see PARA 634 note 13.
- 7 Athens Convention art 15.1(a)(i).
- 8 Athens Convention art 15.1(a)(ii).
- 9 Athens Convention art 15.1(b).
- 10 Athens Convention art 15.2.

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#### **649. Contributory fault.**

If the carrier<sup>1</sup> proves that the death of or personal injury to a passenger<sup>2</sup> or the loss of or damage to his luggage<sup>3</sup> was caused or contributed to by the fault or neglect of the passenger, the court seized of the case may exonerate the carrier wholly or partly from his liability in accordance with the provisions of the law of that court<sup>4</sup>.

- 1 As to the meaning of 'carrier' see PARA 635 note 5.
- 2 As to the meaning of 'passenger' see PARA 634 note 13.
- 3 As to the meaning of 'luggage' see PARA 634 note 14. As to 'loss of or damage to luggage' see PARA 639 note 3.
- 4 Athens Convention art 6. As to the Athens Convention see PARA 634. The reference to 'the law of the court' is to be construed as a reference to the Law Reform (Contributory Negligence) Act 1945 (see **NEGLIGENCE** vol 78 (2010) PARA 75 et seq); Merchant Shipping Act 1995 Sch 6 Pt II para 3.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/4. INTERNATIONAL CARRIAGE BY ROAD AND RAIL/(1) INTERNATIONAL CARRIAGE BY ROAD/(i) The Applicable Law/650. Carriage of goods under the CMR Convention.

## **4. INTERNATIONAL CARRIAGE BY ROAD AND RAIL**

### **(1) INTERNATIONAL CARRIAGE BY ROAD**

#### **(i) The Applicable Law**

#### **650. Carriage of goods under the CMR Convention.**

The Convention on the Contract for the International Carriage of Goods by Road (the 'CMR Convention')<sup>1</sup> was enacted for the purpose of harmonising the laws of the contracting parties<sup>2</sup> relating to the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier's liability<sup>3</sup>, and is enacted in England and Wales by the Carriage of Goods by Road Act 1965<sup>4</sup>. The Convention does not provide a comprehensive code, however, since many matters (such as

liability for freight between the sender and the consignee) are only peripherally dealt with. Moreover, the carrier's relations with some of those involved in the carriage, for example, the freight forwarder, remain untouched, because the emphasis of the Convention is upon the regulation of the rights of the sender and the consignee as against the carrier<sup>5</sup>. Matters not covered by the Convention remain to be dealt with under national law where relevant, after application of the rules of conflict of the *lex fori*<sup>6</sup>.

1     The Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956; Cmnd 2260). The Convention is known by the acronym 'CMR', taken from its French title 'Convention relative au Contrat de Transport International de Marchandises par Route'. The CMR Convention is in two texts, English and French, which have equal status: see art 51. Whilst only the English text is given the force of law in the United Kingdom (see the Carriage of Goods by Road Act 1965 s 1; and the text and notes 2-6), it is legitimate to have regard to the French text whenever the interpretation of the English text is unclear: see *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL. As to the United Kingdom see PARA 96 note 1.

2     As to the contracting parties to the CMR Convention see PARA 651.

3     See the Preamble to the CMR Convention.

4     See the Carriage of Goods by Road Act 1965 s 1, Schedule (amended by the Carriage by Air and Road Act 1979 s 4). Pursuant to the Carriage of Goods by Road Act 1965 s 9 (amended by the Statute Law (Repeals) Act 1993), which provides that the Act may be extended by Order in Council to the Isle of Man, any of the Channel Islands, and to any colony, the Carriage of Goods by Road Act 1965 has been extended to Gibraltar (see the Carriage of Goods by Road (Gibraltar) Order 1967, SI 1967/820 (amended by SI 1981/604)); the Isle of Man (see the Carriage of Goods by Road (Isle of Man) Order 1981, SI 1981/1543); and Guernsey (see the Carriage of Goods by Road (Guernsey) Order 1986, SI 1986/1882). The Convention does not, however, apply to traffic between the United Kingdom and Northern Ireland and the Republic of Ireland (see the Carriage of Goods by Road Act 1965 Schedule, Protocol of Signature art 1) nor to road carriage between England and Jersey, since Jersey is not a different country for Convention purposes (see *Chloride Industrial Batteries Ltd v F & W Freight Ltd* [1989] 3 All ER 86, [1989] 1 WLR 823, CA). As to the meaning of 'colony' see **COMMONWEALTH** vol 13 (2009) PARA 705. As to the Channel Islands and the Isle of Man see **COMMONWEALTH** vol 13 (2009) PARAS 790-800. The Carriage of Goods by Road Act 1965 binds the Crown: s 13.

If it appears to Her Majesty in Council that there is any conflict between the provisions of the Carriage of Goods by Road Act 1965 and the CMR Convention and any provisions relating to the carriage of goods for reward by land, sea or air contained in any other Convention which has been signed or ratified by or on behalf of Her Majesty's Government in the United Kingdom before 5 August 1965 (ie the date on which the Carriage of Goods by Road Act 1965 received Royal Assent) or any enactment of the Parliament of the United Kingdom giving effect to such a Convention, Her Majesty may by Order in Council make such provision as may seem to Her to be appropriate for resolving that conflict by amending or modifying the Carriage of Goods by Road Act 1965 or any such enactment: see s 8. At the date at which this volume states the law no such Order in Council was in force. The United Kingdom implementing legislation may also be amended when the Convention is revised: s 8A (added by the Carriage by Road and Rail Act 1979 s 3(3); and amended by the International Transport Conventions Act 1983 Sch 2).

The contracting parties to the Convention have made a general agreement not to vary any of the provisions of the Convention: see art 1.5; and PARA 651. The Convention does not, in general, confer third party rights: see the Contracts (Rights of Third Parties) Act 1999 s 6(5), (8); and **CONTRACT**.

5     See PARA 653. As to freight forwarders and forwarding agents see PARAS 92-93.

6     See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 11 et seq. It is not legitimate for the English court, when interpreting the CMR Convention, to attempt to fill 'gaps' in its provisions by giving effect to what the draftsman has omitted expressly to provide for (see *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL); the Convention also does not allow room for the application of, for example, standard conditions of carriage and storage as drafted by the Road Haulage Association (see *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 All ER (Comm) 242, [2007] 2 Lloyd's Rep 397). The Convention is not to be interpreted as if it were a statute, but on 'broad principles of general acceptance': see *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 at 350, HL, per Lord Macmillan. The modern approach to the interpretation of multilateral treaties is to adopt a 'purposive' approach consistent with the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 31.1 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 71 et seq): see *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, HL; *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, [1983] 1 Lloyd's Rep 1, HL.

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### **651. Parties to the CMR Convention.**

Her Majesty may by Order in Council certify who are the high contracting parties to the CMR Convention<sup>1</sup> and in respect of what territories they are respectively parties<sup>2</sup>. It is further stated that except so far as it has been superseded by a subsequent order, such an Order in Council is conclusive evidence of the matters certified<sup>3</sup>: it will, however, be apparent that the current Order does not provide a fully up to date and authoritative record of the parties to the Convention, for which reference should be made to the United Nations Economic Commission for Europe<sup>4</sup>. The contracting parties agree not to vary any of the provisions of the Convention by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorise the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods<sup>5</sup>, and are deemed to have submitted to the jurisdiction of United Kingdom courts and tribunals where appropriate<sup>6</sup>.

1 As to the CMR Convention see PARA 650.

2 Carriage of Goods by Road Act 1965 s 2(1). Pursuant to this provision the Carriage of Goods by Road (Parties to Convention) Order 1967, SI 1967/1683 (amended by SI 1980/697) states that the following countries are high contracting parties to the CMR Convention: the United Kingdom (which is also a High Contracting Party in respect of Gibraltar, the Isle of Man and Guernsey: see PARA 650 note 4); Austria; Belgium; Bulgaria; Czechoslovakia; Denmark; Finland; France; Germany; Greece; Hungary; Italy; Luxembourg; the Netherlands; Norway; Poland; Portugal; Romania; Spain; Sweden; Switzerland; Yugoslavia. The original signatories to the CMR Convention were Austria; Belgium; France; Luxembourg; Poland; Sweden; Switzerland; Federal Republic of Germany; the Netherlands; Yugoslavia.

3 Carriage of Goods by Road Act 1965 s 2(2).

4 The United Nations currently lists the following states as having ratified and acceded to the CMR Convention: Albania; Armenia; Austria; Azerbaijan; Belarus; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Greece; Hungary; Iran; Ireland; Italy; Kazakhstan; Kyrgyzstan; Latvia; Lebanon; Lithuania; Luxembourg; Macedonia; Malta; Moldova; Mongolia; Montenegro; Morocco; Netherlands; Norway; Poland; Portugal; Romania; Russian Federation; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Tajikistan; Tunisia; Turkey; Turkmenistan; Ukraine; United Kingdom; Uzbekistan.

5 CMR Convention art 1.5.

6 Carriage of Goods by Road Act 1965 s 6.

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### **652. Contracts to which the CMR Convention applies.**

The provisions of the CMR Convention<sup>1</sup> apply to every contract for the carriage of goods by road in vehicles<sup>2</sup> for reward, when the place of taking over of the goods<sup>3</sup> and the place designated for delivery<sup>4</sup>, as specified in the contract, are situated in two different countries one of which at least is a party to the Convention<sup>5</sup>, irrespective of the nationality or place of residence of the parties<sup>6</sup>. The court should be slow to imply conditions for the application of the Convention<sup>7</sup>.

The Convention applies where the carriage is performed by successive road carriers<sup>8</sup>, and where carriage coming within its scope is carried out by states or by governmental institutions or organisations<sup>9</sup>. It does not apply to carriage performed under the terms of any international postal convention, or to funeral consignments, or to furniture removal<sup>10</sup>.

1 As to the CMR Convention see PARA 650.

2 For the purposes of the CMR Convention 'vehicles' means motor vehicles, articulated vehicles, trailers, and semi-trailers as defined in the Convention on Road Traffic (Geneva, 19 September 1949; TS 49 (1958); Cmnd 578) art 4: CMR Convention art 2. Thus 'motor vehicle' means any self-propelled vehicle normally used for the transport of persons or goods upon a road, other than vehicles running on rails or connected to electric conductors; 'articulated vehicle' means any motor vehicle with a trailer having no front axle and so attached that part of the trailer is superimposed upon the motor vehicle and a substantial part of the weight of the trailer and of its load is borne by the motor vehicle, such a trailer being called a 'semi-trailer'; and 'trailer' means any vehicle designed to be drawn by a motor vehicle: art 2.

3 Where carriage takes place under a contract providing for or permitting the carriage of goods by road on one leg of a multimodal journey (see PARA 655), references to the place of taking over and delivery of the goods should be read as referring to the start and end of the contractually provided or permitted road leg: *Quantum Corpn Inc v Plane Trucking Ltd* [2002] EWCA Civ 350, [2003] 1 All ER 873, [2002] 1 WLR 2678. It is implicit in the phrase 'taking over the goods' that the carrier must have received the goods in order for the CMR Convention to become applicable. Hence non-performance in circumstances where the consignor fails to deliver the goods to the carrier or the carrier declines to accept them will not be covered by the provisions of the CMR Convention but by national law, after application of the rules of the *lex fori* (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 11 et seq).

4 The use of the words 'designated for delivery' indicates that the goods need not reach their destination country (or indeed leave the country of departure) for the CMR Convention to apply. It is the contract of carriage, as opposed to the carriage itself, which must be international.

5 As to the parties to the CMR Convention see PARA 651.

6 CMR Convention art 1. As to what constitutes a contract of carriage for the purposes of the CMR Convention see *Royal & Sun Alliance Insurance plc v MK Digital FZE (Cyprus) Ltd* [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110, HL (a contract with a 'commissionnaire de transport' (ie a freight forwarder) was not a contract falling within the scope of the CMR Convention); on the same point see also *Inco Europe Ltd v First Choice Distribution (a firm)* [1999] 1 All ER 820 at 827-831, [1999] 1 WLR 270 at 277-281, per Hobhouse LJ (upheld but without reference to this specific point at [2000] 2 All ER 109, [2000] 1 All ER (Comm) 674, [2000] CLC 1015, HL); but cf *Aqualon (UK) Ltd v Vallana Shipping Corpn* [1994] 1 Lloyd's Rep 669, for a case which shows that, on specific facts, a freight-forwarder may be found to be acting as a principal under a CMR contract for the carriage of goods by road. On a different point, see *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 4 All ER 765, [2007] 2 Lloyd's Rep 114 (a contract under the CMR Convention existed despite the fact that one of the relevant terms and conditions read: 'This section sets out various restrictions and conditions which limit and govern the extent of the service UPS offers'; held the use of the word 'offers' did not prevent the conclusion of a contract for the carriage of goods by road for the purposes of the CMR Convention).

7 See *Gefco UK Ltd v Mason* [1998] 2 Lloyd's Rep 585, CA.

8 See the CMR Convention art 34; and PARA 654 et seq.

9 CMR Convention art 3. This includes the Crown: see PARA 650 note 4.

10 CMR Convention art 4.

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### **653. Persons to whom the CMR Convention applies.**

The CMR Convention<sup>1</sup> has the force of law in the United Kingdom<sup>2</sup> so far as relating to the rights and liabilities of the following persons concerned in the carriage of goods by road under a contract to which it applies<sup>3</sup>:

- 8 (1) the sender<sup>4</sup>;
- 9 (2) the consignee<sup>5</sup>;
- 10 (3) any carrier, including a successive carrier, who is a party to the contract of carriage<sup>6</sup>;
- 11 (4) any employee, agent or other person of whose services the carrier makes use for the performance of the carriage, when such employee, agent or other person is acting within the scope of his employment<sup>7</sup>; and
- 12 (5) any person to whom the rights and liabilities of any of the persons described in heads (1) to (4) above have passed, whether by assignment, assignation or operation of law<sup>8</sup>.

For the purposes of the Convention 'carrier' means someone who has contracted to carry, as opposed to a mere agent who brings about the contract of carriage between two principals<sup>9</sup>. Hence a person may be a 'carrier' for these purposes notwithstanding that he never takes physical possession of the goods but sub-contracts the carriage in its entirety<sup>10</sup>. In this context, it is important to note that the freight forwarder may be held to have adopted either role, carrier or agent, depending upon the circumstances<sup>11</sup>. A successive carrier is not merely a carrier who carries for a second portion of the transit, but can include a carrier to whom the entirety of the carriage has been sub-contracted<sup>12</sup>.

1 As to the CMR Convention see PARA 650.

2 As to the United Kingdom see PARA 96 note 1.

3 Carriage of Goods by Road Act 1965 s 1. As to the contracts to which the CMR Convention applies see PARA 652.

4 Carriage of Goods by Road Act 1965 s 14(2)(a).

5 Carriage of Goods by Road Act 1965 s 14(2)(b).

6 Carriage of Goods by Road Act 1965 s 14(2)(c). As to carriage by successive carriers see PARA 654.

7 Carriage of Goods by Road Act 1965 s 14(2)(d).

8 Carriage of Goods by Road Act 1965 s 14(2)(e).

9 See *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346, CA; *Moto Vespa SA v MAT (Brittania Express) Ltd, Moto Vespa SA v Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175; *Tetroc Ltd v Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep 192; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49.

10 See *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346, CA.

11 See *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49; and see the other authorities referred to in note 9.

12 See *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346, CA.

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#### **654. Carriage by successive carriers.**

If carriage governed by a single contract is performed by successive road carriers, each of them is responsible for the performance of the whole operation<sup>1</sup>, the second carrier and each succeeding carrier becoming a party to the contract of carriage under the terms of the consignment note by reason of their acceptance of the goods and the note<sup>2</sup>. Successive carriers, for this purpose, are not merely carriers who carry for successive periods of transit, since a carrier to whom the entirety of the carriage has been sub-contracted may be a successive carrier<sup>3</sup>.

1 CMR Convention art 34. As to the CMR Convention see PARA 650. The successive carrier remains responsible for the whole operation notwithstanding that he may have sub-contracted performance of part of it: see art 3; and PARA 670. See also *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep 487, CA. Whilst all such successive carriers are responsible for the whole operation, however, the claimant may sue only three of them: see PARA 680.

2 CMR Convention art 34. As to the handing-over of goods between successive carriers and the significance of the consignment note see PARA 663. The failure of a carrier to enter his name and address in the consignment note as required by art 35.1 (see PARA 663) will not prevent him from being a successive carrier for these purposes: see *SGS-Ates Componenti Elettronici SpA v Grappo Ltd* [1978] 1 Lloyd's Rep 281. However, a carrier is unlikely to be a successive carrier, even if he performs part of the carriage, unless he has received the consignment note, since the CMR Convention art 34 appears to require that he receives both the goods and the consignment note. Such a carrier may be a 'party to the contract of carriage' and subject to the Convention by virtue of the Carriage of Goods by Road Act 1965 s 14(2)(c) (see PARA 653); but see *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 1 Lloyd's Rep 346 at 360, CA, per Megaw LJ. It is unlikely that art 4 of the Convention, which provides that the absence of the consignment note does not affect the validity of the contract of carriage (see PARA 661), has any application to the provisions of the Convention relating to successive carriers: see *SGS-Ates Componenti Elettronici SpA v Grappo Ltd*. To be successive carriers, each carrier must carry under a single consignment note; hence if a cargo is split in transit and its portions are then carried by different carriers each of whom issues his own consignment note, they will not be successive carriers of each other's cargo because successive carriers are successive carriers under a single consignment note: see *Arctic Electronics Co (UK) Ltd v McGregor Sea and Air Services Ltd* [1985] 2 Lloyd's Rep 510.

3 See *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1975] 2 Lloyd's Rep 502 at 508 per Donaldson J; [1977] 1 Lloyd's Rep 346 at 360, CA, per Megaw LJ. Where a sub-contracting carrier is engaged to carry for a purely domestic portion of the carriage and crosses no international boundaries, it appears that the CMR Convention has no application to him however, notwithstanding that the carrier who has engaged him has contracted to carry internationally: see *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep 487, CA.

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#### **655. Carriage partly by sea, rail, inland waterways or air ('multimodal carriage').**

International road carriage from or to England or Wales is necessarily multimodal. As a general principle, where the international road carriage is partly by sea, rail, inland waterway or air, the provisions of the CMR Convention<sup>1</sup> apply to the whole of the carriage, provided that the goods are not unloaded from the vehicle<sup>2</sup>.

However, there is an exception to this general principle. In so far as any loss, damage or delay in delivery of the goods occurs during the carriage by the other means of transport<sup>3</sup> and is caused not by an act or omission of the carrier by road<sup>4</sup> but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport<sup>5</sup>, then the liability of the carrier by road is not governed by the provisions of the Convention<sup>6</sup>. Rather it is governed in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage by the other means of transport<sup>7</sup>. Hence, if the carriage is partly by land and partly by sea and the exception applies, it is for the court or the arbitral tribunal (as the case may be) to decide what conditions the sender would and could have agreed with the sea carrier, having regard to the constraints which would have been placed upon this hypothetical agreement by any 'conditions prescribed by law'. If there are no such prescribed conditions, the liability of the carrier by road is determined by the Convention<sup>8</sup>.

It has been held that the Convention is applicable to an international road leg of a larger contract where the carrier has promised unconditionally to carry by road and on a trailer, or promised this but reserved either a general or a limited option to elect for some other means of carriage for all or part of the way, or has left the means of transport open either entirely or as between a number of possibilities at least one of them being carriage by road, and is also applicable where the carrier has undertaken to carry by some other means but has reserved either a general or limited option to carry by road<sup>9</sup>.

1 As to the CMR Convention see PARA 650.

2 CMR Convention art 2.1. This is subject to art 14, which deals with the carrier's right to dispose of the goods if it becomes impossible to carry out the contract in accordance with the terms of the consignment note before the goods reach the place designated for delivery: see PARA 668.

3 Where the carriage is partly by sea, this includes loading operations: see *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142 at 1147, [1981] 1 WLR 1470 at 1476 per Neill J.

4 The carrier is liable for the acts and omissions of his employees and agents and of any other persons of whose services he makes use for the performance of the carriage, when such employees, agents or other persons are acting within the scope of their employment as if such acts or omissions were his own: CMR Convention art 3; and see PARA 670. However, the application of art 3 for this purpose is, at most, a limited one and it does not automatically follow that any act or omission of a sub-contracting carrier by another means of transport will be treated as 'an act or omission of the carrier by road': see *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142 at 1147, [1981] 1 WLR 1470 at 1476 per Neill J. If the carrier by road is also the carrier by the other means of transport, his liability must be determined in accordance with the CMR Convention art 2.1, but as if, in his capacities as carrier by road and as carrier by the other means of transport, he were two separate persons: art 2.2.

5 As to the meaning of the words '... in the course of and by reason of the carriage by that other means of transport' see *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142, [1981] 1 WLR 1470, where Neill J applied the test whether '... any adequate description of the relevant events in [the] case' would have had to make reference to matters which could only have occurred in the course of and by reason of the other means of transport, viz collision with the bulkhead of a ship, which could only occur in the course of, and by reason of, sea carriage.

6 CMR Convention art 2.1.

7 CMR Convention art 2.1. See also *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142 at 1149, [1981] 1 WLR 1470 at 1477-1478 per Neill J, who held that such an agreement, on the facts of the case, would have had to comply with the requirements of the Hague Rules, taking account, however, of the fact that art permits a carrier to increase his responsibilities and liabilities under the Rules. As to the Hague Rules and the Hague-Visby Rules see PARAS 367-401.

8 CMR Convention art 2.1.

9 *Quantum Corpn Inc v Plane Trucking Ltd* [2002] EWCA Civ 350, [2002] 2 All ER (Comm) 392, [2002] 1 WLR 2678.

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### **656. Prohibition on contracting out.**

Any stipulation which would directly or indirectly derogate from the provisions of the CMR Convention<sup>1</sup>, other than an agreement between carriers on provisions other than those relating to the apportionment of liability between carriers for compensation payable to claimants<sup>2</sup>, is void<sup>3</sup>: in particular, a clause shifting the burden of proof or giving the carrier the benefit of insurance obtained by the sender or consignee will be null and void<sup>4</sup>. The nullity of any such stipulation does not, however, involve the nullity of the other provisions of the contract<sup>5</sup>.

1 As to the CMR Convention see PARA 650.

2 Carriers are free to agree among themselves on provisions other than those laid down in the CMR Convention arts 37, 38 (proceedings involving successive carriers: see PARA 680): art 40.

3 CMR Convention art 41.1. Hence an arbitration clause which, contrary to the provisions of the Convention (see PARA 679) does not expressly provide that the arbitrators must apply the terms of the Convention, a clause conferring jurisdiction on a foreign court which will not apply the terms of the Convention, and a general lien wider than that provided for by art 13.1 (see PARA 667) are all void: see, respectively, *AB Bofors-Uva v AB Skandia Transport* [1982] 1 Lloyd's Rep 410; *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, [1983] 1 Lloyd's Rep 1, HL; and *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 All ER (Comm) 242, [2007] 2 Lloyd's Rep 397.

4 CMR Convention art 41.2.

5 CMR Convention art 41.1.

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### **657. Carriage of passengers.**

The international carriage of passengers by road is not currently the subject of legislative provision in the United Kingdom. There has been an international convention on the subject (that is, the Convention on the Contract for the International Carriage of Passengers and Luggage by Road<sup>1</sup>) since 1973, but it has never been ratified by the United Kingdom<sup>2</sup> and its domestic implementing legislation (that is, the Carriage of Passengers by Road Act 1974) was repealed in 2004 without having been brought substantively into force<sup>3</sup>, and has not been replaced. There is, however, legislation at European Community level governing the international carriage of passengers by coach and bus within the territory of the Community by carriers for hire or reward or own-account carriers established in member states<sup>4</sup>.

1 Geneva, 1 March 1973; Misc 17(1974); Cmnd 5622.

2 At the date at which this volume states the law the Convention has been ratified by only eight states and signed by two more.

3 The Carriage of Passengers by Road Act 1974 was enacted on 31 July 1974 to give effect to the Convention on the Contract for the International Carriage of Passengers and Luggage by Road, but the implementing provisions of the Act were never brought into force and the whole Act was repealed on 22 July 2004 by the Statute Law (Repeals) Act 2004.

4 See EC Council Regulation 684/92 (OJ L74, 20.3.92, p 1) on common rules for the international carriage of passengers by coach and bus; EC Commission Regulation 2121/98 (OJ L268, 3.10.98, p 10) laying down detailed rules for the application of EC Council Regulation 684/92; and **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARAS 1651-1655.

## **UPDATE**

### **657 Carriage of passengers**

NOTE 4--Regulation 684/92 replaced with effect in part from 4 June 2010 and in part from 4 December 2011: European Parliament and EC Council Regulation 1073/2009 (OJ L300, 14.11.2009, p 88).

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## **(ii) The Contract and the Consignment Note**

### **658. Conclusion of the contract of carriage.**

For the purposes of the CMR Convention<sup>1</sup> the contract of carriage must be confirmed by the making out of a consignment note<sup>2</sup> in triplicate, signed<sup>3</sup> by the sender and the carrier<sup>4</sup>. The sender and the carrier are entitled, respectively, to the first and third copies of the consignment note, and the second copy must accompany the goods<sup>5</sup>. If the goods have to be loaded in different vehicles, or are of different kinds or are divided into different lots, either party has the right to require a separate consignment note to be made out in respect of each vehicle, or each kind or lot of goods<sup>6</sup>.

1 As to the CMR Convention see PARA 650.

2 CMR Convention art 4. As to the consignment note see PARAS 659-660; and as to the consequences of omission or inaccuracy of the particulars see PARA 661.

3 The signatures may be replaced by stamps or printed, if the law of the country where the consignment note is made out so permits: CMR Convention art 5.1; and see *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146.

4 CMR Convention art 5.1.

5 CMR Convention art 5.1.

6 CMR Convention art 5.2.

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### **659. Contents of the consignment note.**

For the purposes of the CMR Convention<sup>1</sup>, the consignment note must contain the following particulars<sup>2</sup>:

- 13 (1) the date when and the place where it is made out<sup>3</sup>;
- 14 (2) the names and addresses of the sender, the carrier and the consignee<sup>4</sup>;
- 15 (3) the place and date of taking over the goods, and the place designated for delivery<sup>5</sup>;
- 16 (4) the ordinary description of the nature of the goods and the method of packing and, in the case of dangerous goods<sup>6</sup>, their generally recognised description<sup>7</sup>;
- 17 (5) the number of packages and their special marks and numbers<sup>8</sup>;
- 18 (6) the gross weight of the goods or their quantity otherwise expressed<sup>9</sup>;
- 19 (7) charges relating to the carriage<sup>10</sup>;
- 20 (8) the requisite instructions for customs and other formalities<sup>11</sup>; and
- 21 (9) a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of the Convention<sup>12</sup>.

The consignment note must contain the following particulars where they are applicable:

- 22 (a) a statement that transshipment is not allowed<sup>13</sup>;
- 23 (b) the charges which the sender undertakes to pay<sup>14</sup>;
- 24 (c) the amount of 'cash on delivery' charges<sup>15</sup>;
- 25 (d) a declaration of the value of the goods<sup>16</sup>;
- 26 (e) a declaration of the amount representing any special interest in delivery<sup>17</sup>;
- 27 (f) the sender's instructions to the carrier regarding insurance of the goods<sup>18</sup>;
- 28 (g) the agreed time limit within which the carriage is to be carried out<sup>19</sup>;
- 29 (h) a list of the documents handed to the carrier<sup>20</sup>;
- 30 (i) where the carrier has no reasonable means of checking the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, his reservations together with the grounds upon which they are based<sup>21</sup>; similarly if the carrier has reservations regarding the apparent condition of the goods and their packaging, his reservations and the grounds on which they are based<sup>22</sup>; and
- 31 (j) any agreement that open unsheeted vehicles may be used for the carriage of the goods<sup>23</sup>.

The parties may enter any other useful particulars in the consignment note<sup>24</sup>.

1 As to the CMR Convention see PARA 650.

2 As to the consignment note see PARAS 658, 660. As to the consequences of omission or inaccuracy of the particulars see PARA 661.

3 CMR Convention art 6.1(a).

4 CMR Convention art 6.1(b), (c), (e).

5 CMR Convention art 6.1(d).

6 In the case of dangerous goods, the sender must also inform the carrier of the exact nature of the danger and indicate, if necessary, the precautions to be taken: see the CMR Convention art 22.1; and PARA 671.

7 CMR Convention art 6.1(f). Where the sender requires the carrier to check the contents of the packages, the carrier must enter the results of such checks: art 8.3. The carrier is entitled to claim the cost of such checking: art 8.3.

- 8 CMR Convention art 6.1(g).
- 9 CMR Convention art 6.1(h). Where the sender requires the carrier to check the gross weight of the goods or their quantity otherwise expressed, the carrier must enter the results of such checks: art 8.3. The carrier is entitled to claim the cost of such checking: art 8.3.
- 10 CMR Convention art 6.1(i). In addition to carriage charges, these include supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery: art 6.1(i).
- 11 CMR Convention art 6.1(j). As to responsibility for these formalities see PARA 662.
- 12 CMR Convention art 6.1(k).
- 13 CMR Convention art 6.2(a).
- 14 CMR Convention art 6.2(b).
- 15 CMR Convention art 6.2(c).
- 16 CMR Convention art 6.2(d). See also art 24; and PARAS 673-674.
- 17 CMR Convention art 6.2(d). See also art 26; and PARAS 673-674.
- 18 CMR Convention art 6.2(e).
- 19 CMR Convention art 6.2(f). As to the significance of this agreed time limit see PARA 669.
- 20 CMR Convention art 6.2(g). As to the position regarding responsibility for documents required for customs and other formalities see PARA 662.
- 21 CMR Convention arts 8.1, 8.2. As to the evidential value of these reservations and the presumption which arises in the absence of any reservations by the carrier see the CMR Convention art 9.2; and PARA 660.
- 22 CMR Convention arts 8.1, 8.2. See PARA 660.
- 23 CMR Convention art 17.4(a).
- 24 CMR Convention art 6.3. As to the nullity of provisions contrary to the Convention see art 41; and PARA 656.

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### **660. Evidential value of the consignment note.**

For the purposes of the CMR Convention<sup>1</sup>, the consignment note<sup>2</sup> is prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier<sup>3</sup>. On taking over the goods, the carrier must check the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers<sup>4</sup> unless he has no reasonable means of checking them, in which case he must enter his reservations on the consignment note together with the grounds on which they are based<sup>5</sup>. Similarly, although the consignment note need contain no statement as to the apparent condition of the goods and their packaging, the carrier must check these<sup>6</sup> and must enter any reservation he has as to their state onto the consignment note<sup>7</sup>. Unless the consignment note contains a specific reservation by the carrier it is presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over and that the number of packages, their marks and numbers correspond with the

statements in the consignment note<sup>8</sup>. The reservations are not binding upon the sender unless he has expressly agreed to be bound by them in the consignment note<sup>9</sup>.

1 As to the CMR Convention see PARA 650.

2 As to the consignment note see PARAS 658, 659. As to the consequences of omission or inaccuracy of the particulars see PARA 661.

3 CMR Convention art 9.1. Hence, for example, the identification of one particular party as 'carrier' in the consignment note is rebuttable evidence that the party identified contracted as a principal to carry (see PARA 653) although the weight to be given to the evidence will depend upon the circumstances in which the consignment note was completed (see *Tetroc Ltd v Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep 192; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49; *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146).

4 CMR Convention art 8.1(a). See PARA 659.

5 CMR Convention art 8.2. See PARA 659.

6 CMR Convention art 8.1(b).

7 CMR Convention art 8.2.

8 CMR Convention art 9.2.

9 CMR Convention art 8.2. The sender is entitled to require the carrier to check the gross weight of the goods or their quantity otherwise expressed and also to check the contents of the packages: art 8.3. Whilst the results of the checks must be entered on the consignment note (see art 8.3; and PARA 659), the Convention makes no express provision for the evidential value to be given to them, although the court will obviously have regard to them.

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## **661. Consequences of omission or inaccuracy of the consignment note.**

In general the absence, irregularity or loss of the consignment note<sup>1</sup> does not affect the existence or the validity of the contract of carriage<sup>2</sup>. To this general principle, however, there appear to be a number of exceptions: in particular, liability limits and declarations of special interest in delivery must be declared in the consignment note<sup>3</sup>, and certain rights to dispose of the goods in transit can be exercised by the sender or consignee<sup>4</sup>, but only upon presentation of the consignment note<sup>5</sup>. Further, a carrier probably cannot become a successive carrier for the purpose of the Convention unless he receives a consignment note<sup>6</sup>; and since successive carriers carry subject to the terms of the consignment note<sup>7</sup>, an inaccuracy in or omission from those terms will probably have effect, notwithstanding that it is not binding as against the first carrier<sup>8</sup>.

The sender is liable for all expenses, loss and damage sustained by the carrier by reason of the inaccuracy or inadequacy of certain particulars which the consignment note must contain<sup>9</sup>, or by reason of the inaccuracy or inadequacy of any other particulars or instructions given by him to enable the consignment note to be made out<sup>10</sup>.

The carrier is liable for all expenses, loss and damage sustained by the person entitled to dispose of the goods as a result of the omission of the statement<sup>11</sup> that the contract is subject to the Convention<sup>12</sup>.

- 1 As to the consignment note see PARAS 658-660.
- 2 CMR Convention art 4. As to the CMR Convention see PARA 650.
- 3 See the CMR Convention arts 24, 26; and PARA 674.
- 4 See the CMR Convention arts 12, 13; and PARAS 665-666.
- 5 See the CMR Convention arts 12.2, 12.3, 12.5(a), 13; and PARAS 665-666.
- 6 See the CMR Convention art 34; and PARA 654.
- 7 See the CMR Convention art 34; and PARA 654.
- 8 CMR Convention art 4 (see the text and notes 1-2) has been held not to apply to the provisions of the Convention which relate to successive carriers: see *SGS-Ates Componenti Elettronici SpA v Grappo Ltd, British Road Services Ltd and Furtrans BV* [1978] 1 Lloyd's Rep 281 at 284 per Goff J.
- 9 These are the particulars specified in the CMR Convention arts 6.1(b), (d)-(h), (j), 6.2 (as to which see PARA 659); see art 7.1(a), (b). If the carrier enters these particulars in the consignment note at the sender's request, he is deemed to have done so on the sender's behalf unless the contrary is proved: art 7.2.
- 10 CMR Convention art 7.1.
- 11 See the CMR Convention art 6.1(k); and PARA 659.
- 12 CMR Convention art 7.3.

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## **662. Sender's responsibilities regarding documentation.**

For the purposes of the customs or other formalities which have to be completed before delivery of the goods, the sender must attach the necessary documents to the consignment note or place them at the carrier's disposal<sup>1</sup>. The sender must also furnish the carrier with all the information he requires<sup>2</sup>. The carrier is under no duty to inquire into the accuracy or adequacy of the documents and information<sup>3</sup>. The liability of the carrier for the consequences arising from the loss or incorrect use of the documents specified in and accompanying the consignment note or deposited with the carrier is that of agent, such liability being limited to the amount which would have been payable in the event of loss of the goods<sup>4</sup>. The sender is liable to the carrier for any damage caused by the absence, inadequacy or irregularity of the documents and information he is required to supply, except in the case of some wrongful act or neglect on the part of the carrier<sup>5</sup>.

- 1 CMR Convention art 11.1. As to the CMR Convention see PARA 650.
- 2 CMR Convention art 11.1.
- 3 CMR Convention art 11.2.
- 4 CMR Convention art 11.3. As to the amount payable in the case of loss of the goods see PARAS 673-674.
- 5 CMR Convention art 11.2.

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### **663. Receipt of goods by successive carriers.**

On receipt of the goods from a previous carrier, the subsequent carrier must give him a dated and signed receipt and enter his name and address on the second copy of the consignment note<sup>1</sup>. He must check the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and must check the apparent condition of the goods and their packaging<sup>2</sup>. If he has no reasonable means of checking the accuracy of the statements in the consignment note, he must enter his reservations, specifying the grounds on which they are based, on the second copy of the consignment note and on the receipt<sup>3</sup>. He must also enter on the second copy of the consignment note and the receipt any reservations he has as to the apparent condition of the goods and their packaging<sup>4</sup>. If the consignment note contains no specific reservations by the successive carrier, it is presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the successive carrier took them over and that the number of packages, their marks and numbers corresponded with the statements in the consignment note<sup>5</sup>.

1 CMR Convention art 35.1. The second copy of the consignment note is the copy which accompanies the goods: see PARA 658; and see further, as to the role of the consignment note in determining whether or not a person is a successive carrier, PARA 654. As to the CMR Convention generally see PARA 650.

2 CMR Convention art 8.1.

3 CMR Convention arts 8.2, 35.1. See PARAS 659-661.

4 CMR Convention art 8.2.

5 CMR Convention arts 9, 35.2.

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### **664. The Uniform Customs and Practice for Documentary Credits.**

Commercial letters of credit (that is, bank undertakings to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit) generally incorporate the Uniform Customs and Practice for Documentary Credits<sup>1</sup>, which make specific provision in connection with the content of road transport documents. Such a document, however named, must appear to:

- 32 (1) indicate the name of the carrier<sup>2</sup>;
- 33 (2) indicate the date of shipment or the date the goods have been received for shipment, dispatch or carriage at the place stated in the credit<sup>3</sup>;
- 34 (3) indicate the place of shipment and the place of destination stated in the credit<sup>4</sup>;
- 35 (4) be signed by the carrier or a named agent for or on behalf of the carrier<sup>5</sup>; and

- 36 (5) indicate receipt of the goods by signature, stamp or notation by a carrier or named agent for or on behalf of the carrier<sup>6</sup>.

A road transport document must appear to be the original for consignor or shipper or bear no marking indicating for whom the document has been prepared<sup>7</sup>.

Where a transport document covers two or more different modes of transport (a 'multimodal or combined transport document'), the requirements relating to that document are virtually identical to those which apply in connection with the content of bills of lading and sea waybills<sup>8</sup>. Provision is also made in connection with transshipments<sup>9</sup>.

1. See the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600), as drafted and published by the International Chamber of Commerce: see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 925. As to the nature and operation of credits generally and under the Uniform Customs and Practice for Documentary Credits see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 923-966.

2. Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(i).

3. Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(ii). Unless the transport document contains a dated reception stamp, an indication of the date of receipt or a date of shipment, the date of issuance of the transport document will be deemed to be the date of shipment: art 24(a)(ii).

4. Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(iii).

5. Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(i). Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent, and any signature, stamp or notation of receipt of the goods by an agent must indicate that the agent has signed for or on behalf of the carrier: art 24(a)(i). If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier: art 24(a)(i).

6. Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(i). See note 5.

7. Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(b)(i). In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set: art 24(c).

8. See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 19; PARA 366; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 925.

9. See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(d), (e).

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### (iii) Transit and Delivery

#### **665. Sender's and consignee's rights of disposal in transit.**

The sender normally has the right to dispose of the goods<sup>1</sup>. His right ceases to exist when the second copy<sup>2</sup> of the consignment note is handed to the consignee or when the consignee exercises his right to require delivery of that copy and the goods<sup>3</sup>. If the sender provides expressly in the consignment note that the consignee should have the right of disposal, the consignee has that right from the time when the note is drawn up<sup>4</sup>. If a consignee in exercising his right of disposal orders the delivery of the goods to another person, that other person is not entitled to name other consignees<sup>5</sup>.

1 CMR Convention art 12.1. Pursuant to his right of disposal the seller may stop the goods in transit or require the carrier to deliver them to a place or to a consignee other than that indicated in the consignment note: art 12.1. As to the CMR Convention see PARA 650. As to stoppage in transit generally see PARA 766 et seq. As to conditions for disposal see PARA 666.

2 le the copy which accompanies the goods: see the CMR Convention art 5.1; and PARA 658.

3 CMR Convention art 12.2. As to the consignee's right to require delivery of the second copy and the goods see art 13.1; and PARA 667.

4 CMR Convention art 12.3.

5 CMR Convention art 12.4.

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### **666. Conditions for exercise of right of disposal.**

The person entitled to dispose of the goods<sup>1</sup> may only require the carrier to carry in accordance with fresh instructions if the following conditions are fulfilled:

- 37 (1) unless, after arrival of the goods at the place designated for delivery, the consignee has refused the goods<sup>2</sup>, the person having the right of disposal must produce the first copy of the consignment note<sup>3</sup> on which the new instructions to the carrier have been entered<sup>4</sup>;
- 38 (2) the carrier must be indemnified against all expenses, loss and damage involved in carrying out such instructions<sup>5</sup>;
- 39 (3) the carrying out of such instructions must be possible at the time when the instructions reach the person who is to carry them out<sup>6</sup>;
- 40 (4) the carrying out of the instructions must not interfere with the normal working of the carrier's undertaking or prejudice the senders or consignees of other consignments<sup>7</sup>;
- 41 (5) the instructions must not result in a division of the consignment<sup>8</sup>.

A carrier who has not carried out the instructions of the person entitled to dispose of the goods where these conditions have been fulfilled or who has carried out instructions without requiring the first copy of the consignment note to be produced is liable to the person entitled to make a claim for any loss or damage thereby caused<sup>9</sup>.

1 See PARA 665.

2 See the CMR Convention art 15.1; and PARA 668. If the consignee refuses the goods, the sender is entitled to dispose of them without being obliged to produce the first copy of the consignment note: art 15.1. As to the CMR Convention see PARA 650.

3 le the sender's copy: see PARA 658.

4 CMR Convention art 12.5(a).

5 CMR Convention art 12.5(a).

6 CMR Convention art 12.5(b). If, by reason of this condition, the carrier cannot carry out the instructions which he receives, he must immediately notify the person who gave him them: art 12.6.

7 CMR Convention art 12.5(b). If, by reason of this condition, the carrier cannot carry out the instructions which he receives, he must immediately notify the person who gave him them: art 12.6.

8 CMR Convention art 12.5(c).

9 CMR Convention art 12.7. In some circumstances, however, the carrier is entitled to obey the sender's instructions without the sender's producing the first copy of the consignment note: see PARA 668.

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### **667. Consignee's right to demand delivery.**

After arrival of the goods at the place designated for delivery, the consignee is entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note<sup>1</sup> and the goods<sup>2</sup>. From that time on the carrier is bound to obey the orders of the consignee<sup>3</sup>. If the loss of the goods is established<sup>4</sup>, or in a case of delay<sup>5</sup>, the consignee is entitled to enforce in his own name any rights arising from the contract of carriage<sup>6</sup>. A consignee who avails himself of the right to require delivery of the goods or to enforce rights arising from the contract of carriage must pay the charges shown to be due on the consignment note, but in the event of dispute on this matter the carrier is not required to deliver the goods unless the consignee furnishes security<sup>7</sup>.

1 The second copy of the consignment note accompanies the goods in transit: see PARA 658.

2 Carriage of Goods by Road Act 1965 s 1, Schedule art 13 para 1. As to the CMR Convention see PARA 650.

3 CMR Convention art 12.2. See PARA 665.

4 If the goods remain undelivered for a certain period, they are presumed to be lost: see the CMR Convention art 20.1; and PARA 669.

5 As to the meaning of 'delay' for these purposes see the CMR Convention art 19; and PARA 669.

6 CMR Convention art 13.1. This right applies irrespective of whether the consignee would be regarded as in contractual privity with the carrier at English common law: see *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146; and PARA 678.

7 CMR Convention art 13.2. The effect of this provision is to create a statutory lien for carriage charges, as to the operation of which see *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 All ER (Comm) 242, [2007] 2 Lloyd's Rep 397.

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### **668. Carrier's rights of disposal in transit and after arrival of the goods at the place designated for delivery.**

If for any reason it is or becomes impossible to carry out the contract in accordance with the terms laid down in the consignment note before the goods reach the place designated for

delivery<sup>1</sup>, the carrier must ask the person who is entitled to dispose of the goods<sup>2</sup> for his instructions<sup>3</sup>. However, if circumstances are such as to enable the carriage to be carried out under conditions differing from those laid down in the consignment note and if the carrier has been unable to obtain instructions in reasonable time from the person entitled to dispose of the goods, the carrier must take such steps as seem to him to be in the best interests of the person entitled to dispose of the goods<sup>4</sup>.

If circumstances prevent the delivery of the goods to the consignee after they have been carried to the place designated for delivery, the carrier must ask the sender for his instructions<sup>5</sup>. If the consignee refuses the goods, the sender is entitled to dispose of them without being obliged to produce the first copy of the consignment note<sup>6</sup>. However, even if he has refused the goods, the consignee may nevertheless require delivery so long as the carrier has not received instructions to the contrary from the sender<sup>7</sup>.

Where the carrier has not been able to deliver the goods, he may immediately unload the goods for the account of the person entitled to dispose of them; and if he does unload them, the carriage is deemed to be at an end<sup>8</sup>. The carrier must then hold the goods on behalf of the person so entitled<sup>9</sup>. However, he may entrust them to a third party, in which case he will only be liable for loss or damage caused if he was negligent in the choice of a third party<sup>10</sup>.

Where, in the above circumstances, the carrier has asked for instructions from the person entitled to dispose of the goods, he may without waiting for those instructions sell the goods if they are perishable, if their condition warrants such a course, or if the storage expenses would be out of proportion to their value<sup>11</sup>. In other cases, he may sell the goods if, after the expiry of a reasonable period, he has not received instructions to the contrary from the person entitled to dispose of the goods<sup>12</sup> which he may reasonably be required to carry out<sup>13</sup>. If the goods have been sold, the proceeds of sale must be placed at the disposal of the person entitled to dispose of the goods after deduction of the expenses chargeable against the goods<sup>14</sup>.

1 See the CMR Convention arts 4, 9; and PARA 665. As to the CMR Convention see PARA 650.

2 See PARAS 665-666.

3 CMR Convention art 14.1.

4 CMR Convention art 14.2.

5 CMR Convention art 15.1.

6 CMR Convention art 15.1.

7 CMR Convention art 15.2. Where the consignment note expressly provides that the person entitled to dispose of the goods is the consignee, and after giving an order for the goods to be delivered to another person circumstances arise preventing delivery, arts 15.1, 15.2 apply as if the consignee were the sender and the person to whom delivery was ordered to be made were the consignee: art 15.3. Where the carrier is obliged to ask for instructions, he is entitled to recover the cost of his request and any expenses entailed in carrying out the instructions, unless those expenses were caused by his wrongful act or neglect: art 16.1.

8 CMR Convention art 16.2.

9 CMR Convention art 16.2.

10 CMR Convention art 16.2.

11 CMR Convention art 16.3.

12 See PARAS 665-666.

13 CMR Convention art 16.3.

14 CMR Convention art 16.4. If the charges exceed the proceeds of sale, the carrier is entitled to the difference: art 16.4. The procedure on the sale is governed by the law or custom of the country or place where the goods are situated: art 16.5.

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#### **(iv) Losses, Liability and Compensation**

##### **669. Delay and loss of the goods in transit.**

Goods are deemed to have been delayed where they have not been delivered within the agreed time limit<sup>1</sup> or, where there is no agreed time limit, when the actual duration of the carriage exceeds the time which it would be reasonable to allow a diligent carrier having regard to the circumstances of the case<sup>2</sup>. However, unless a reservation has been sent in writing to the carrier within 21 days from the time that the goods were placed at the disposal of the consignee, no compensation is payable for delay in delivery<sup>3</sup>.

If goods are not delivered within 30 days following the expiry of the agreed time limit or, if there is no agreed time limit, within 60 days from the time when the carrier took over the goods, this is conclusive evidence of the loss of the goods and the person entitled to make a claim may thereupon treat them as lost<sup>4</sup>. Such a person may, however, on receipt of compensation for the missing goods request in writing that he be notified immediately should the goods be recovered in the course of the year following the payment of compensation, and he must be given a written acknowledgment of such request<sup>5</sup>. If the goods are then recovered, within the 30 days following receipt of notification, the person entitled to make a claim may require the goods to be delivered to him against payment of charges shown to be due on the consignment note and also against refund of the compensation he received less any charges included therein but without prejudice to any claims to compensation he may make for delay in delivery and, where applicable, for damages recoverable following a declaration of special interest in delivery<sup>6</sup>. In the absence of a written request by the person entitled to make a claim or of any instructions given within 30 days of notification, or if the goods are not recovered until more than one year after the payment of compensation, the carrier is entitled to deal with them in accordance with the law applicable where the goods are situated<sup>7</sup>.

1 The agreed time limit should be entered on the consignment note: see PARA 659. As to the position where an agreed time limit has not been entered on the consignment note see PARAS 660-661.

2 CMR Convention art 19. As to the CMR Convention see PARA 650. Where the load is a partial load it is legitimate to take into account the time required to make up a complete load in the normal way: art 19.

3 CMR Convention art 30.3. In calculating the time limits, the date of delivery, the date of checking or the date when the goods were placed at the disposal of the consignee, as the case may be, is not included: art 30.4. The carrier and the consignee must give each other every reasonable facility for making the requisite investigations and checks: art 30.5.

4 CMR Convention art 20.1. The presumption arises whether or not the claimant wishes it to do so: see *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354.

5 CMR Convention art 20.2.

6 CMR Convention art 20.3. As to compensation for delay and declarations of special interest in delivery see arts 23, 26; and PARAS 673-674.

7 CMR Convention art 20.4. As to the position at common law see PARA 7 et seq.

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### **670. Carrier's liability for loss, damage or delay in transit.**

The carrier is liable for the total or partial loss of the goods and for damage to the goods occurring between the time when he takes over the goods and the time of delivery as well as for any delay in delivery<sup>1</sup>. He is responsible for the acts and omissions of his employees and agents and of any other persons of whose services he makes use for the performance of the carriage when such employees, agents or other persons are acting within the scope of their employment, as if such acts or omissions were his own<sup>2</sup>. If the carrier delivers goods to the consignee without collecting a 'cash on delivery' charge which he has agreed to collect under the terms of the contract, he is liable to compensate the sender, without prejudice to his right to claim against the consignee<sup>3</sup>.

If the consignee takes delivery of the goods without checking their condition with the carrier or without sending him reservations giving a general indication of the loss or damage, not later than the time of delivery in the case of apparent loss or damage and within seven days of delivery<sup>4</sup> in the case of loss or damage which is not apparent, the fact of his taking delivery is prima facie evidence that he has received the goods in the condition described in the consignment note<sup>5</sup>. When the condition of the goods has been duly checked by the consignee and the carrier, evidence contradicting the result of this checking is only admissible in the case of loss or damage which is not apparent and provided that the consignee has duly sent reservations in writing to the carrier within seven days<sup>6</sup> from the date of checking<sup>7</sup>.

1 CMR Convention art 17.1. As to the CMR Convention see PARA 650. Arrival of the goods at their destination is not synonymous with delivery: see art 15.1; and PARAS 666, 668. As to exceptions to the carrier's liability see PARA 672.

2 CMR Convention art 3. Thus the carrier cannot limit his liability where, for example, there is a strong balance of probability that loss was occasioned by theft by his employees: see *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 4 All ER 765, [2007] 2 Lloyd's Rep 114; and PARA 673.

3 CMR Convention art 21.

4 Sundays and public holidays are excepted from the reckoning of this period: CMR Convention art 30.1.

5 CMR Convention art 30.1. In the case of loss or damage which is not apparent, the reservations referred to must be made in writing: art 30.1. In calculating the time limits, the date of delivery, the date of checking or the date when the goods were placed at the disposal of the consignee, as the case may be, is not included: art 30.4. The carrier and the consignee must give each other every reasonable facility for making the requisite investigations and checks: art 30.5.

6 Sundays and public holidays are excepted from the reckoning of this period: CMR Convention art 30.2.

7 CMR Convention art 30.2.

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### **671. Defectively packed goods and dangerous goods.**

The sender is liable to the carrier for damage to persons, equipment or other goods and for any expenses due to defective packing of the goods, unless the defect was apparent or known to the carrier at the time when he took over the goods and he had no reservations concerning it<sup>1</sup>. When the sender hands goods of a dangerous nature to the carrier, he must inform the carrier of the exact nature of the danger and indicate, if necessary, the precautions to be taken<sup>2</sup>. If this information has not been entered in the consignment note, the burden of proving, by some other means, that the carrier knew the exact nature of the danger constituted by the carriage of the goods rests upon the sender or the consignee<sup>3</sup>. Where the carrier is unaware of the dangerous nature of the goods at the time he took them over for carriage and the nature of the danger and precautions to be taken have not been entered in the consignment note, he may at any time or place unload them, destroy them or render them harmless without being liable to pay compensation<sup>4</sup>. Further, the sender is liable for all expenses, loss or damage arising out of their handing over for carriage or their carriage<sup>5</sup>.

1 CMR Convention art 10. As to the CMR Convention see PARA 650.

2 CMR Convention art 22.1. See also art 6.1(f); and PARA 659.

3 CMR Convention art 22.1.

4 CMR Convention art 22.2.

5 CMR Convention art 22.2.

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## **672. Exceptions to the carrier's liability.**

The carrier is not liable for loss, damage or delay caused by:

- 42 (1) the wrongful act or neglect of the person making the claim<sup>1</sup>;
- 43 (2) the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier<sup>2</sup>;
- 44 (3) the inherent vice of the goods<sup>3</sup>; or
- 45 (4) circumstances which the carrier could not avoid and the consequences of which he was unable to prevent even with the utmost care<sup>4</sup>.

The burden of proving that the loss, damage or delay was so caused rests upon the carrier<sup>5</sup>. The carrier is not relieved of liability by reason of the defective condition of the vehicle he has used to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he has hired it or the employees or agents of the latter<sup>6</sup>. Nor is the carrier liable for loss or damage which arises from the special risks inherent in any of the following circumstances:

- 46 (a) the use of open unsheeted vehicles if their use has been expressly agreed and specified in the consignment note<sup>7</sup>;
- 47 (b) lack of or defective packing in the case of goods liable to wastage or to be damaged when not packed or properly packed<sup>8</sup>;
- 48 (c) handling, loading, stowage or unloading of the goods by the sender or by the consignee or by persons acting on their behalf<sup>9</sup>;

- 49 (d) the nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin<sup>10</sup>;
- 50 (e) insufficiency or inadequacy of marks or numbers on the packages<sup>11</sup>; or
- 51 (f) the carriage of livestock<sup>12</sup>.

When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of these special risks, it is presumed that it was so caused, although the claimant is entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks<sup>13</sup>. However, certain of the special risk exceptions have further rules relating to the burden of proof<sup>14</sup>.

Where the carrier is not under any liability in respect of some of the factors causing the loss, damage or delay, he is liable only to the extent that those factors for which he is liable<sup>15</sup> have contributed to the loss, damage or delay<sup>16</sup>.

1 CMR Convention art 17.2. As to the CMR Convention see PARA 650.

2 CMR Convention art 17.2.

3 CMR Convention art 17.2. As to the defence of inherent vice see *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346, CA; affg [1975] 2 Lloyd's Rep 502. See also PARA 666.

4 CMR Convention art 17.2. The words '... even with the utmost care' do not appear in the Convention but the defence in art 17.2 is to be interpreted as if they did: see *JJ Silber Ltd v Islander Trucking Ltd* [1985] 2 Lloyd's Rep 243. 'Utmost care' sets a standard which is somewhere between, on the one hand, a requirement to take every conceivable precaution, however extreme, within the limits of the law, and on the other hand a duty to do no more than act reasonably in accordance with prudent current practice: *JJ Silber Ltd v Islander Trucking Ltd* [1985] 2 Lloyd's Rep 243; cf *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142 at 1150, [1981] 1 Lloyd's Rep 200 at 206 per Neill J (obiter), who, in rejecting the suggestion that the words should be read as if the words '... by the exercise of reasonable care' had been added to them, thought that the words 'could not' in the defence should be given their full meaning. Cf also *Michael Galley Footwear Ltd v Iaboni* [1982] 2 All ER 200 at 207, in which Hodgson J, in holding that the defence imposed a higher standard than that of reasonable care, said: 'The only gloss I would think must be placed on the words ... is the perhaps obvious requirement that what the carrier could have done must be lawful'. If the carrier raises the defence, it is for the claimant to suggest (although not to prove) what the carrier ought to have done, and it is then for the carrier to rebut, if he can, the specific complaints put forward: see *JJ Silber Ltd v Islander Trucking Ltd*.

5 CMR Convention art 18.1.

6 CMR Convention art 17.3. See also *Walek & Co v Chapman & Ball (International) Ltd* [1980] 2 Lloyd's Rep 279.

7 CMR Convention art 17.4(a).

8 CMR Convention art 17.4(b).

9 CMR Convention art 17.4(c).

10 CMR Convention art 17.4(d). As to the operation and scope of this defence see *Tetroc Ltd v Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep 192; *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346, CA (affg [1975] 2 Lloyd's Rep 502); *Centrocoop Export-Import SA v Brit European Transport Ltd* [1984] 2 Lloyd's Rep 618; *W Donald & Son (Wholesale Meat Contractors) v Continental Freeze Ltd* 1984 SLT 182.

11 CMR Convention art 17.4(e).

12 CMR Convention art 17.4(f). The carrier is only entitled to be relieved of liability under art 17.4(f) if he proves that he took all steps normally incumbent upon him and complied with any special instructions: art 18.5.

13 CMR Convention art 18.2. The burden which is on the claimant to show that the loss or damage was not caused by the special risk is one of proof on the balance of probabilities and it is not necessary for him, in

discharging that burden, to establish precisely how the loss or damage occurred: see *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641 at 648-650, [1977] 1 WLR 625 at 634-636, [1977] 1 Lloyd's Rep 346 at 352-354, CA (affg [1975] 2 Lloyd's Rep 502).

14 As regards the defence of special risks relating to the use of open unsheeted vehicles (see the CMR Convention art 17.4(a); and the text and note 7), the presumption in the carrier's favour does not apply where there has been an abnormal shortage or a loss of any package: art 18.3. Further, as regards the defence of special risks relating to the nature of certain kinds of goods (see art 17.4(d); and the text and note 10), where the carriage is performed in vehicles specially equipped to protect the goods from the effects of heat, cold, variations in temperature or the humidity of the air, the carrier is not entitled to claim the benefit of the defence unless he proves that all steps incumbent on him in the circumstances with respect to the choice, maintenance and use of such equipment were taken and that he complied with any special instructions issued to him: art 18.4; and see *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346, CA (affg [1975] 2 Lloyd's Rep 502); *Centrocoop Export-Import SA v Brit European Transport Ltd* [1984] 2 Lloyd's Rep 618.

15 Ie under the CMR Convention art 17 (see the text and notes 1-12).

16 CMR Convention art 17.5.

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### **673. Compensation payable by carrier.**

Compensation which is payable by the carrier for total or partial loss of, or damage to, goods is calculated by reference to the value at the time and place at which they were accepted for carriage<sup>1</sup>. Unless there has been a declaration of value or special interest in delivery of the goods<sup>2</sup>, there is a limitation on the carrier's liability in the case of loss or damage<sup>3</sup>. In addition, the carriage charges, customs duties and 'other charges' in respect of the carriage of the goods must be refunded in full in a case of total loss and in proportion to the loss sustained in a case of partial loss<sup>4</sup>. No further damages are payable<sup>5</sup>, although such 'other charges' may include excise duty payable by the sender upon the theft of spirits within the jurisdiction<sup>6</sup>, survey costs to determine the extent of any damage to the cargo in transit<sup>7</sup>, and the cost of returning damaged goods to their place of departure<sup>8</sup>.

Where goods are damaged, the amount of compensation payable is the amount by which they have diminished in value<sup>9</sup>, although carriage charges, customs duties and other charges incurred in respect of the carriage must be refunded in proportion to the loss of value of the goods<sup>10</sup>. Compensation in the case of damage of the whole of a consignment of goods may not exceed the amount which would have been payable in the case of total loss of the consignment<sup>11</sup>; and if only part of the consignment has been damaged, compensation may not exceed the amount which would have been payable in the case of the loss of the part affected<sup>12</sup>.

In the case of delay, if damage is proved, the carrier's liability for compensation is limited to the amount of the carriage charges<sup>13</sup>.

1 CMR Convention arts 23.1, 25.1. As to the CMR Convention see PARA 650. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to the current market price, or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality: art 23.2. As to the determination of market value for these purposes see *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL.

2 See the CMR Convention arts 24, 26; and PARA 674.

3 CMR Convention arts 23.3, 23.6. By virtue of art 23.3, liability is limited to 8.33 units of account per kilogramme of gross weight short; however liability cannot be limited where there is a strong balance of probability that loss was occasioned by theft by the carrier's employees: see *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 4 All ER 765, [2007] 2 Lloyd's Rep 114.

A court or arbitration tribunal before which proceedings are brought to enforce a liability which is limited by the CMR Convention art 23 may at any stage of the proceedings make any such order as appears to be just and equitable in view of the provisions of art 23 and of any other proceedings which have been, or are likely to be, commenced in the United Kingdom or elsewhere to enforce the liability in whole or in part: Carriage of Goods by Road Act 1965 ss 3(1), 7(1). Without prejudice to this, a court or tribunal before which proceedings are brought to enforce a liability which is limited by the CMR Convention art 23 must, where the liability is, or may be, partly enforceable in other proceedings in the United Kingdom or elsewhere, have jurisdiction to award an amount less than it would have awarded if the limitation applied solely to the proceedings before it, or to make any part of its award conditional on the result of any other proceedings: Carriage of Goods by Road Act 1965 s 3(2). As to the competence of arbitration tribunals to adjudicate claims under the CMR Convention see PARA 679.

The unit of account referred to above is the special drawing right as defined by the International Monetary Fund, and the amount is converted into the national currency of the state of the court seised of the case on the basis of the value of that currency on the date of the judgment or the date agreed upon by the parties: CMR Convention art 23.7. Conclusive evidence of the rate of exchange may be obtained in a Treasury certificate: see the Carriage by Air and Road Act 1979 s 5(2).

4 CMR Convention art 23.4.

5 CMR Convention art 23.4. In the case of loss of, or damage to, goods, the carrier is not therefore liable to compensate the owner for any other loss suffered (eg loss of profits) unless there has been a declaration of special interest in delivery (see PARA 674).

6 *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL. However, excise duty payable owing to the loss by the carrier of a consignment of tax seals, which were to have been used to show that duty on goods which were not the subject of the carriage agreement had been paid, has been held not to be recoverable: see *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108.

7 *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354.

8 *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142 at 1150, [1981] 1 Lloyd's Rep 200 at 207 per Neill J (obiter). See also *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] QB 208, [1977] 1 All ER 518, CA, per Lord Denning MR and Roskill LJ, disapproving the decision of Browne J to the contrary in *William Tatton & Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep 203.

9 CMR Convention art 25.1. As to the calculation of value see note 1.

10 CMR Convention arts 25.1, 23.4; and see *William Tatton & Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep 203; cf *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142, [1981] 1 Lloyd's Rep 200, where Neill J considered (obiter) that although a damaged machine had a scrap value, the damage was such as to render the entire machine unacceptable and if compensation had been payable under these provisions, the entire carriage charges would have been repayable. Other authorities have emphasised that there is no doctrine of 'constructive total loss' under the provisions of the CMR Convention and cases of damage are to be treated as such notwithstanding that the cost of repair and forwarding the goods to their destination would exceed the value of the goods on arrival: see *William Tatton & Co Ltd v Ferrymasters Ltd*. In the context of the limitation provisions in the CMR Convention art 32 (see PARA 681) see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692, [1983] 1 Lloyd's Rep 61. See also *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354.

11 CMR Convention art 25.2(a).

12 CMR Convention art 25.2(b).

13 CMR Convention art 23.5.

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#### 674. Declarations of value and declarations of special interest in delivery.

On payment of an agreed surcharge, the sender may declare in the consignment note a value of the goods in excess of a specified limit<sup>1</sup>, in which case the limit of the carrier's liability is the declared value for the purpose of calculation of the value of the goods in cases of loss or damage, and not the specified limit<sup>2</sup>. Similarly, the sender may fix the amount of a special interest in delivery in the case of loss or damage or of the agreed time limit being exceeded, by entering that amount in the consignment note<sup>3</sup>, in which case the carrier is liable up to that amount for loss suffered as a result of non-delivery, delay or delivery of damaged goods, in addition to his normal liability<sup>4</sup>.

1    I.e 8.33 units of account per kilogramme of gross weight: see the CMR Convention art 23.3; and PARA 673. As to the CMR Convention see PARA 650.

2    CMR Convention art 24.

3    CMR Convention art 26.1.

4    CMR Convention art 26.2.

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#### 675. Interest.

The claimant is entitled to claim interest on compensation payable by the carrier. Such interest accrues at 5 per cent per annum from the date on which the claim<sup>1</sup> was sent in writing to the carrier or, if no such claim is made, from the date on which legal proceedings were instituted<sup>2</sup>. Where the amounts on which the calculation of the compensation is based are not expressed in the currency of the country in which payment is claimed, conversion is at the rate of exchange applicable on the day and at the place of payment of compensation<sup>3</sup>.

1    As to the formal requirements of the claim see *William Tatton & Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep 203; and as to the requirements of a claim interrupting the limitation period see PARA 681.

2    CMR Convention art 27.1. As to the CMR Convention see PARA 650. This provision confers a substantive right to interest, rather than a discretionary procedural remedy, and the court accordingly has no discretion to withhold an award of such interest in circumstances where it might otherwise be just (for example where the claimant has delayed in pursuing the claim): see *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49.

3    CMR Convention art 27.2.

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#### 676. Extra-contractual claims.

The carrier may rely on the provisions of the CMR Convention which exclude or limit his liability in cases where, under the law applicable, the claim to damages does not arise from the contract of carriage<sup>1</sup>. This protection extends to the carrier's employees, agents and other persons whose services he uses<sup>2</sup> for whom he is responsible<sup>3</sup>.

1 CMR Convention art 28.1. As to the CMR Convention see PARA 650. The provisions of the Convention are therefore effective to limit or modify the carrier's liability in tort by or towards persons not parties to the contract: see PARA 652.

2 See the CMR Convention art 3; and PARA 670.

3 CMR Convention art 28.2.

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### **677. Effect of wilful misconduct.**

If the carrier or his employees, agents or sub-contractors, by their wilful misconduct or by default which, in accordance with the law of the court or tribunal seised of the case, is considered equivalent to wilful misconduct<sup>1</sup>, cause the loss, damage or delay in question, they are not entitled to avail themselves of any provision of the CMR Convention which excludes or limits their liability<sup>2</sup> or shifts the burden of proof of any matter to the person claiming compensation<sup>2</sup>.

1 For 'wilful misconduct' to be proved, there must be either: (1) an intention to do something which the actor knew to be wrong; or (2) a reckless act in the sense that the actor was aware that loss might result from his act and yet did not care whether loss would result or not: see *National Semiconductors (UK) Ltd v UPS Ltd* [1996] 2 Lloyd's Rep 212 (distinguishing *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146; and approving *Sidney G Jones Ltd v Martin Bencher Ltd* [1986] 1 Lloyd's Rep 54). In *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369, it was held that the failure to follow clear instructions in a manner which departed from the ordinary duty of a driver to protect his load amounted to wilful misconduct. As to 'wilful misconduct' at common law see PARA 84.

2 CMR Convention art 29. As to the CMR Convention see PARA 650. The carrier retains the benefit of limitation defences: see PARA 681.

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## **(v) Claims and Proceedings**

### **678. Courts having jurisdiction.**

Proceedings arising from the carriage of goods governed by the CMR Convention<sup>1</sup> may only be brought:

- 52 (1) in any court or tribunal<sup>2</sup> of a contracting country<sup>3</sup> designated by agreement between the parties<sup>4</sup>;

- 53 (2) in the courts or tribunals of a country within whose territory the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract was made<sup>5</sup>;
- 54 (3) in the courts or tribunals of a country within whose territory the goods were taken over by the carrier<sup>6</sup>; or
- 55 (4) in the courts or tribunals of a country within whose territory the place designated for delivery is situated<sup>7</sup>.

Subject to this, proceedings may be brought in no other court or tribunal<sup>8</sup>. Every high contracting party to the Convention is, for the purposes of any proceedings brought<sup>9</sup> in a court or tribunal in the United Kingdom to enforce a claim in respect of carriage undertaken by that party, deemed to have submitted to the jurisdiction of that court or tribunal<sup>10</sup>.

When a judgment entered by a court or tribunal of a contracting country following such proceedings has become enforceable in that country, it also becomes enforceable in each of the other contracting states as soon as the formalities required in the country concerned have been complied with<sup>11</sup>.

Proceedings in respect of the same issue between the same parties as proceedings already pending or in which judgment has been given cannot be commenced in another country unless the judgment is unenforceable in the second country<sup>12</sup>. English courts may take into account the fact that proceedings have been or are likely to be commenced in the United Kingdom or elsewhere, and in such a case the court can make any order that it thinks just and equitable<sup>13</sup>. Further, if the contract of carriage contains an arbitration clause which satisfies the requirements of the Convention, the court may stay the claim<sup>14</sup>.

The Convention does little to identify the parties who are entitled to sue the carrier<sup>15</sup>, and so the usual rules of English law apply on this question<sup>16</sup>.

1 As to the CMR Convention see PARA 650.

2 This may include an arbitration tribunal: see the CMR Convention art 33; and PARA 679.

3 As to the contracting countries see PARA 651.

4 CMR Convention art 31.1. If the English court has no jurisdiction under art 31, the claimant will not be able to found jurisdiction against a foreign defendant who does not submit to the proceedings: see *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 3 All ER 567, [1981] 1 WLR 1363, [1981] 2 Lloyd's Rep 402, CA; *Arctic Electronics Co (UK) Ltd v McGregor Sea and Air Services Ltd* [1985] 2 Lloyd's Rep 510; *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp* [1981] QB 368 at 385, [1980] 3 All ER 359 at 370, CA, per Roskill LJ.

5 CMR Convention art 31.1(a). See note 4. These courts or tribunals are also the courts or tribunals having jurisdiction where a carrier wishes to take proceedings to enforce his right of recovery over a successive carrier or carriers: see art 39.2; and PARA 680.

6 CMR Convention art 31.1(b). See note 4.

7 CMR Convention art 31.1(b). See note 4.

8 CMR Convention art 31.1.

9 In accordance with the CMR Convention art 31 (see the text and notes 1-8, 10-12).

10 Carriage of Goods by Road Act 1965 ss 6, 7(1). Rules of court may accordingly provide for the manner in which any such claim is to be commenced and carried on (although nothing in s 6 authorised the issue of execution against the property of any high contracting party): s 6.

11 CMR Convention art 31.3. The formalities do not permit the merits of the case to be reopened: art 31.3. The provisions of art 31.3 apply to judgments after trial, judgments by default and settlements confirmed by an order of the court, but do not apply to interim judgments or to awards of damages, in addition to costs against a

claimant who wholly or partly fails in his claim: art 31.4. The Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (excluding s 4(2), (3)) applies, whether or not it would otherwise have so applied, to any judgment which: (1) has been given in any such claim as is referred to in the CMR Convention art 31.1; (2) has been so given by any court or tribunal (including an arbitration tribunal) of a territory in respect of which one of the parties to the Convention, other than the United Kingdom, is a party to the Convention; and (3) has become enforceable in that territory: Carriage of Goods by Road Act 1965 ss 4(1), (2), 7(1). The registration, in accordance with the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I, of any such judgment constitutes, in relation to that judgment, compliance with the formalities of the CMR Convention art 31.3: Carriage of Goods by Road Act 1965 s 4(3). As to the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 171-182. Note that the recognition of judgments pursuant to these provisions is unaffected by the provisions of the Civil Jurisdiction and Judgments Act 1982 ss 31, 32 relating to the recognition and enforcement of overseas judgments: see ss 31(3), 32(4); **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 147; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 261.

12 CMR Convention art 31.2. A claim which has been commenced but has not yet been served is not a pending claim for the purposes of art 31.2: *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH* [2001] EWCA Civ 61, [2001] 1 All ER (Comm) 883; see also *Royal & Sun Alliance Insurance plc v MK Digital FZE (Cyprus) Ltd* [2005] 2 Lloyd's Rep 679 (revsd on other grounds [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110, HL); and PARA 652.

13 See the Carriage of Goods by Road Act 1965 s 3; and PARA 673.

14 See *AB Bofors-Uva v AB Skandia Transport* [1982] 1 Lloyd's Rep 410 at 413 per Bingham J (obiter).

15 In certain circumstances, the consignee is entitled to sue: see PARA 667. In *Ulster-Swift Ltd v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1977] 3 All ER 641, [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346, CA, Donaldson J was of the view that the Convention created a contract between the owner of the goods and the carrier, consistent with the right of the owner to sue the carrier in bailment at common law: see also *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146. Where the carrier omits to include a statement in the consignment note that the contract is subject to the Convention, the person entitled to dispose of the goods may sue for any loss sustained: see PARA 661. As to the identity of the person entitled to dispose of the goods see PARA 665.

16 As to the common law position see PARA 752 et seq.

## UPDATE

### 678 Courts having jurisdiction

NOTE 5--Term 'defendant' does not extend to any action against an insurer or an assignee: *Hatzl v XL Insurance Co Ltd* [2009] EWCA Civ 223, [2009] 3 All ER 617.

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### 679. Arbitrations.

The contract of carriage may contain a clause conferring competence on an arbitration tribunal if that clause provides that the tribunal will apply the CMR Convention<sup>1</sup>. High contracting parties to the Convention are deemed to have submitted to the jurisdiction of an arbitration tribunal so appointed<sup>2</sup>, which has the like power as the court to take account of other proceedings commenced or likely to be commenced for the purposes of enforcing the liability in dispute<sup>3</sup> and is subject to the statutory provisions governing the registration and enforcement of foreign judgments<sup>4</sup>.

The existence of a valid arbitration clause does not deprive the claimant of his right to bring proceedings under the Convention<sup>5</sup>, but any proceedings so brought may be stayed<sup>6</sup>.

1 CMR Convention art 29. As to the CMR Convention see PARA 650. As to the contracts of carriage which are governed by the Convention see PARA 652. The clause must expressly state that the provisions of the Convention are to be applied, otherwise it will be void as a stipulation which derogates from the provisions of the Convention: see art 41; and PARA 656. This will be so notwithstanding that it is clear that the arbitrators would have applied the provisions of the Convention in any event: see *AB Bofors-Uva v AB Skandia Transport* [1982] 1 Lloyd's Rep 410.

2 See, by virtue of the Carriage of Goods Act 1965 s 7(1), s 6; and PARA 678.

3 See, by virtue of the Carriage of Goods Act 1965 s 7(1), s 3; and PARA 673 note 3.

4 See, by virtue of the Carriage of Goods Act 1965 s 7(1), s 4; and PARA 678 note 11. The statutory provisions governing the registration and enforcement of foreign judgments are contained in the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (excluding, for these purposes, s 4(2), (3)): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 171-182.

5 See under the CMR Convention art 31; as to which see PARA 678.

6 See *AB Bofors-Uva v AB Skandia Transport* [1982] 1 Lloyd's Rep 410 at 413 per Bingham J (obiter). As to the staying of proceedings in these circumstances see the Arbitration Act 1996 s 9; *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, [2000] 1 All ER (Comm) 674, [2000] CLC 1015, HL; and **ARBITRATION** vol 2 (2008) PARA 1222.

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## **680. Proceedings involving successive carriers.**

Proceedings in respect of loss, damage or delay may be brought only against the first carrier<sup>1</sup>, the last carrier<sup>2</sup> or the carrier in possession of the goods when the loss, damage or delay occurred<sup>3</sup>. All the carriers who are liable to pay compensation may be joined as defendants in one claim<sup>4</sup>.

A carrier who has paid compensation<sup>5</sup> in compliance with the provisions of the CMR Convention<sup>6</sup> is entitled to recover such compensation, together with interest and all costs and expenses incurred by reason of the claim, from the carrier responsible<sup>7</sup> for the loss or damage<sup>8</sup>. When the loss or damage is caused by the action of two or more carriers, each must pay an amount proportionate to his share of liability; should it be impossible to apportion such liability, each carrier is liable in proportion to the share of the payment for the carriage which is due to him<sup>9</sup>. If it is impossible to ascertain to whom the loss is attributable, the amount of compensation which the carrier who has paid a claim in full may recover from each of the other carriers is proportionate to the share of the carriage charges due to each<sup>10</sup>.

If a carrier who is liable for some or all of the compensation becomes insolvent, then the share of compensation due from him and unpaid by him must be divided among the other carriers in proportion to the share of the payment for the carriage due to them<sup>11</sup>. A carrier from whom an indemnity or contribution is claimed is estopped from disputing the validity of the payment of compensation if the amount of compensation was determined by legal proceedings and he was given due notice of those proceedings and had an opportunity of entering an appearance in them<sup>12</sup>.

1 For this purpose, the 'first carrier' is not necessarily the first carrier to carry the goods physically: the expression may include the person with whom the owner of the goods contracts, all subsequent carriers being successive carriers: see *Ulster-Swift v Taunton Meat Haulage Ltd (Fransen Transport NV, third party)* [1975] 2 Lloyd's Rep 502 at 508 per Donaldson J; [1977] 1 Lloyd's Rep 346 at 361, CA.

2 This probably means the last carrier physically to carry the goods, rather than the last carrier who contracted to carry them since the latter could not become a 'successive carrier' in cases of total loss of the goods. Receipt of the goods and the consignment note is necessary for a carrier to become a successive carrier: see PARAS 654, 663.

3 CMR Convention art 36. The claim may be brought against more than one of those carriers at the same time: art 36. A counterclaim or a set-off may, however, be raised in a claim brought by another carrier: art 36. As to the CMR Convention generally see PARA 650.

4 CMR Convention art 39.2.

5 A claim by one carrier against another under this provision does not arise until the first carrier has paid the compensation: see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692 at 698, [1983] 1 Lloyd's Rep 61 at 66 per Parker J. As to the bringing of counterclaims see CPR Pt 20; and **CIVIL PROCEDURE**. See also *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 3 All ER 567, [1981] 1 WLR 1363, CA, per Brandon LJ (obiter); *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep 487 at 494, CA, per Bingham LJ.

6 See *Rosewood Trucking Ltd v Brian Balaam* [2005] EWCA Civ 1641, [2006] 1 Lloyd's Rep 429, CA (compensation paid in compliance with obligations assumed under a sub-contract falling outside the CMR Convention art 36 (see the text and notes 1-3) was not compensation paid in compliance with the Convention for these purposes).

7 The 'carrier responsible', for this purpose, can only be a person who has made himself a party to the international contract of carriage: see PARA 654. Thus if a carrier who has contracted to carry internationally sub-contracts a purely domestic portion of that carriage to another carrier who loses the goods, the latter is not the 'carrier responsible' for these purposes: see *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep 487, CA.

8 CMR Convention art 37(a). When a judgment entered by a court or tribunal of a contracting country following proceedings under art 37 or art 38 (as to which see the text and note 11) has become enforceable in that country, it also becomes enforceable in each of the other contracting states as soon as the formalities required in the country concerned have been complied with: arts 31.3, 39.3. The formalities do not permit the merits of the case to be reopened: art 31.3. The provisions of art 31.3 apply to judgments after trial, judgments by default and settlements confirmed by an order of the court, but do not apply to interim judgments or to awards of damages, in addition to costs against a claimant who wholly or partly fails in his claim: art 31.4.

The provisions of art 37 are exclusive for these purposes and supplant the statutory provisions relating to contribution and indemnity otherwise in force in England and Wales (ie the Civil Liability (Contribution) Act 1978 s 1; as to which see **DAMAGES** vol 12(1) (Reissue) PARAS 839-843) which do not confer on a carrier under a contract to which the Convention applies who is liable for loss and damage any right to recover contribution in respect of that loss or damage from any other carrier who, in accordance with the CMR Convention art 34 (see PARA 654), is a party to the contract of carriage: Carriage of Goods by Road Act 1965 s 5(1), (2) (s 5(1) amended by the Civil Liability (Contribution) Act 1978 Sch 1 para 7); *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 2 Lloyd's Rep 402 at 405, CA, per Brandon LJ (obiter); *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep 487 at 494, CA, per Bingham LJ (obiter).

A carrier wishing to take proceedings to enforce his right of recovery may make his claim before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident or has his principal place of business or the branch or agency through which the contract of carriage was made: CMR Convention art 39.2. The word 'may' in this context is probably permissive rather than mandatory in that it permits the carrier against whom recovery is sought to submit to other jurisdictions under the procedure contemplated by art 39.1 (see the text and note 12) and a third party notice to be issued or a claim for indemnity to be made against him: see *Arctic Electronics Co (UK) Ltd v McGregor Sea and Air Services Ltd* [1985] 2 Lloyd's Rep 510 at 514 per Hobhouse J; *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 2 Lloyd's Rep 402 at 409, CA, per Eveleigh LJ (obiter). Contrast *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* at 408 per Brandon LJ (obiter); and see note 5. The carrier making the claim is not a 'carrier concerned' for these purposes: see *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd*; *Arctic Electronics Co (UK) Ltd v McGregor Sea and Air Services Ltd*. Further, the 'carrier concerned' must be a successive carrier within the meaning of the CMR Convention art 34 (see PARA 654): see *Arctic Electronics Co (UK) Ltd v McGregor Sea and Air Services Ltd*. All the carriers concerned may be made defendants in the same claim: CMR Convention art 39.2.

9 CMR Convention art 37(b). See note 8.

10 CMR Convention art 37(b), (c). See note 8.

11 CMR Convention art 38. See note 8.

12 CMR Convention art 39.1.

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### 681. Limitation periods.

Any right to claim arising from a contract of carriage governed by the CMR Convention<sup>1</sup> is barred if proceedings are not commenced within a year; if, however, the cause arises from wilful misconduct or from default which, in accordance with the law of the court or tribunal seised of the case, is considered equivalent to wilful misconduct<sup>2</sup>, the period of limitation is three years<sup>3</sup>. The period of limitation begins to run:

- 56 (1) in the case of partial loss, damage<sup>4</sup> or delay in delivery, from the date of delivery<sup>5</sup>;
- 57 (2) in the case of total loss<sup>6</sup> where there is an agreed time limit, from the thirtieth day after the expiry of that time limit, or, where there is no agreed time limit, from the sixtieth day from the date on which the goods were taken over by the carrier<sup>7</sup>;
- 58 (3) in all other cases<sup>8</sup>, on the expiry of a period of three months after the making of the contract of carriage<sup>9</sup>.

The period of limitation is suspended by a written claim; if the carrier rejects the claim in writing, then the period starts to run again<sup>10</sup>. A claim must be made by the claimant or someone authorised on his behalf to make it<sup>11</sup> and must be sent to the defendant or someone authorised on the defendant's behalf to receive it<sup>12</sup>. It probably need not be documented<sup>13</sup> and need not be for a quantified sum<sup>14</sup>; a general intimation that the claimant intends to hold the carrier liable is probably sufficient<sup>15</sup>. The *lex fori* governs all other instances of the extension of the limitation period<sup>16</sup>. Once a right to claim is barred by lapse of time, it cannot be exercised by way of set-off or counterclaim<sup>17</sup>.

These provisions also apply to claims between carriers<sup>18</sup>, save that time begins to run either on the date of the judicial decision fixing the compensation payable under the Convention or, if there is no such judicial decision, from the actual day of payment<sup>19</sup>.

1 As to the CMR Convention see PARA 650. As to the contracts of carriage which are governed by the CMR Convention see PARA 652.

2 See PARA 677.

3 CMR Convention art 32.1. As to the determination of the time at which an arbitration is commenced see the Carriage of Goods by Road Act 1965 s 7(2)(a) (substituted by the Arbitration Act 1996 Sch 3 para 21); the Arbitration Act 1996 s 14(3)-(5); and **ARBITRATION** vol 2 (2008) PARA 1219. The day on which the period of limitation begins to run must not be included in the period: art 32.1.

4 As to the distinction between 'damage' and 'total loss' see note 6; and PARA 673 note 10.

5 CMR Convention art 32.1(a). Arrival of the goods at their destination is not synonymous with delivery: see art 15; and PARA 668. Hence when damaged goods are rejected by a consignee there may be no delivery at their destination: see *Moto Vespa SA v MAT (Brittania Express) Ltd, Moto Vespa SA v Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175. However, where the sender then instructs the carrier to return them to him or to take them elsewhere, he might be treated as exercising his rights of disposal to change the place of delivery: see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692 at 698, [1983] 1 Lloyd's Rep 61 at 65 per Parker J (obiter). As to rights of disposal see PARA 665 et seq.

6 There is 'total loss' for these purposes where the goods are destroyed or where the owner is irretrievably deprived of them. There is no doctrine of constructive total loss under the CMR Convention akin to that set out in the Marine Insurance Act 1906 s 60(2)(iii) (see **INSURANCE** vol 25 (2003 Reissue) PARA 468) and damage so extensive that the goods cease to be anything of the kind entrusted to the carrier is very arguably damage and not total loss for the purposes of these provisions: see *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354 at 358 per Staughton J (following *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692, [1983] 1 Lloyd's Rep 61 per Parker J; *William Tatton & Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep 203 at 205 per Browne J); cf *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 All ER 1142, [1981] 1 WLR 1470 per Neill J (obiter); and see PARA 673 note 10.

7 CMR Convention art 32.1(b). If goods are not delivered within this time limit, they are conclusively presumed to have been lost: see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692, [1983] 1 Lloyd's Rep 61; *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354; and PARA 669.

8 The words 'in all other cases' in this context probably mean in all cases not covered by the CMR Convention art 32.1(a), (b) (see the text and notes 4-7): see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692 at 698, [1983] 1 Lloyd's Rep 61 at 65 per Parker J (obiter); contrast *Moto Vespa SA v MAT (Brittania Express) Ltd, Moto Vespa SA v Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175.

9 CMR Convention art 32.1(c).

10 CMR Convention art 32.2. If the carrier rejects the claim, he must return the documents attached to the claim with his notification of rejection: art 32.2. The letter rejecting the claim must be clear and unambiguous and a holding letter which makes no unequivocal rejection is insufficient: see *Microfine Minerals and Chemicals Ltd v Transferry Shipping Co Ltd* [1991] 2 Lloyd's Rep 630. A written claim, if made before the limitation period has started to run, and if unrejected, suspends the limitation period as soon as it begins to run: see *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354 at 361 per Staughton J. However, once the claim has been rejected, the limitation period is not suspended by the making of further claims having the same object: CMR Convention art 32.2. If a part of the claim is admitted, the period of limitation starts to run again only in respect of that part of the claim still in dispute: art 32.2. The burden of proof of the receipt of the claim, or of the reply and of the return of the documents, rests with the party relying upon those facts: art 32.2. A claim against the first carrier under the Convention does not suspend time for claims against all successive carriers: see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692, [1983] 1 Lloyd's Rep 61.

11 *Sidney G Jones Ltd v Martin Bencher Ltd* [1986] 1 Lloyd's Rep 54. It must be clear that the claim is a claim of the goods owner rather than that of one carrier against another: see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692, [1983] 1 Lloyd's Rep 61.

12 *Poclain SA v SCAC SA* [1986] 1 Lloyd's Rep 404, CA (whether carrier's underwriters were authorised to receive the claim). A claim against one carrier does not suspend the limitation period against all carriers, but only against the carrier receiving the claim: see *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692, [1983] 1 Lloyd's Rep 61.

13 *Moto Vespa SA v MAT (Brittania Express) Ltd, Moto Vespa SA v Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175 at 180 per Mocatta J (obiter); and cf *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354 at 360 per Staughton J, who did not find it necessary to decide the point.

14 *Moto Vespa SA v MAT (Brittania Express) Ltd, Moto Vespa SA v Mateu & Mateu SA and Galvez* [1979] 1 Lloyd's Rep 175 at 180 per Mocatta J, in relation to the CMR Convention art 27 (see PARA 675); followed in *ICI plc and ICI France SA v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354 (in relation to the CMR Convention art 32).

15 *William Tatton & Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep 203 at 207 per Browne J; *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 All ER 692 at 699, [1983] 1 Lloyd's Rep 61 at 66 per Parker J (obiter); cf *Muller Batavier Ltd v Laurent Transport Co Ltd* [1977] 1 Lloyd's Rep 411 at 416 per May J; *Impex Transport A/S v AG Thames Holdings Ltd* [1982] 1 All ER 897 at 907, [1981] 1 WLR 1547 at 155 per Robert Goff J.

16 CMR Convention art 32.3. As to the lex fori see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 11 et seq.

17 CMR Convention art 32.4.

18 As to claims between carriers see PARA 680. A claim by one carrier against another for unpaid freight is not a claim between carriers for this purpose: see *Muller Batavier Ltd v Laurent Transport Co Ltd* [1977] 1 Lloyd's Rep 411 (in such a claim time began to run three months after the making of the contract of carriage pursuant to the CMR Convention art 32.1(c) (see the text and notes 8-9)).

19 CMR Convention art 39.4.

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## **682. Security for costs.**

A national of a high contracting party to the CMR Convention cannot be required to give security for costs in proceedings under the CMR Convention if he is resident or has his place of business in the territory of any party to the CMR Convention<sup>1</sup>.

<sup>1</sup> CMR Convention art 31.5. As to the CMR Convention see PARA 650. As to the parties to the Convention see PARA 651.

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## **(2) INTERNATIONAL CARRIAGE BY RAIL**

### **(i) The Applicable Law**

#### **683. The COTIF Convention.**

International Carriage by Rail is governed by the Convention concerning International Carriage by Rail (the 'COTIF Convention')<sup>1</sup>, which is given the force of law in the United Kingdom by statutory instrument<sup>2</sup>. The Convention makes provision for the establishment and operation of the Intergovernmental Organisation for International Carriage by Rail ('OTIF')<sup>3</sup> and introduces a number of sets of uniform rules governing international rail traffic and admission of railway material to use in such traffic<sup>4</sup>. Of these, two may be considered the principal sets of rules governing international carriage by rail: the Uniform Rules Concerning the Contract of International Carriage of Passengers by Rail ('CIV')<sup>5</sup>; and the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail ('CIM')<sup>6</sup>. There are also rules dealing with the carriage of dangerous goods<sup>7</sup> and the use of vehicles<sup>8</sup>, as well as three other sets of rules which are not properly the subject matter of this title<sup>9</sup>.

<sup>1</sup> Berne, 9 May 1980; Cm 41. The original COTIF Convention consolidated and revised a number of existing sets of rules governing the international carriage of goods, passengers and luggage by rail. A new version was introduced via a Modifying Protocol signed at Vilnius on 3 June 1999, which entered into force in the United Kingdom on 1 July 2006 (see the London, Edinburgh and Belfast Gazettes of 3 July 2006) and is the version considered in this title. As to the parties to the Convention see PARA 684. Provision is made for the modification of the Convention by member states (see arts 33-35), and the Secretary of State is required to publish in such manner as he thinks fit information concerning any change to the list of parties to the Convention, and any such modification (Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 4(d)); member states may also make declaration and reservations in relation to the Convention, denounce the Convention and suspend their membership (see the COTIF Convention arts 40-42). As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

<sup>2</sup> See the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 3(1). Regulation 2 provides that the Convention so implemented is the version of COTIF set out after art 7 of the Modifying Protocol of 1999 (see note 1) and forming an integral part of that Protocol and comprising the Convention itself, the Protocol on the Privileges and Immunities of the Intergovernmental Organisation for International Carriage by Rail ('OTIF') referred to in the COTIF Convention art 1.4, and Appendixes A-G to the

Convention, including the Annexes to Appendixes C and F, all as modified in accordance with its provisions from time to time by a decision of one of the committees under art 33.4, art 33.5 or art 33. The original COTIF Convention (see note 1) was given force of law in the United Kingdom by the International Transport Conventions Act 1983 s 1 (repealed).

For the avoidance of doubt any question arising as to whether the Convention applies in the circumstances of a particular case falls to be determined in accordance with the provisions of art 3.2, which provides that the obligations resulting from art 3.1 (see note 3) for the member states which are at the same time members of the European Communities or parties to the EEA Agreement will not prevail over their obligations as members of the European Communities or parties to the EEA Agreement: Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 3(2). The Convention does not, in general, confer third party rights: see the Contracts (Rights of Third Parties) Act 1999 s 6(5), (8); and **CONTRACT**.

When interpreting and applying the Convention its character of international law and the necessity to promote uniformity must be taken into account: COTIF Convention art 8.1. In the absence of provisions in the Convention, national law (ie the law of the state in which the person entitled asserts his rights, including the rules relating to conflict of laws) applies: arts 8.2, 8.3.

3 See the COTIF Convention art 1. The aim of OTIF is to promote, improve and facilitate international traffic by rail by, inter alia, establishing uniform systems of law regarding international carriage by rail: see art 2. See further arts 13-24 (structure and functioning) and arts 25-27 (finances). OTIF member states undertake to concentrate their international cooperation in the railway field, in principle, within the framework of OTIF, and this to the extent that there exists a coherence in the tasks which are attributed to it in accordance with the Convention: art 3.1. To attain this objective, the member states are required to adopt all measures necessary and useful in order that the international multilateral conventions and agreements in force to which they are contracting parties should be adapted, to the extent that those conventions and agreements concern international cooperation in the railway field and attribute competences to other intergovernmental or non-governmental organisations which cut across the tasks attributed to OTIF: art 3.1.

4 See the COTIF Convention art 6.

5 The CIV Rules derive from the International Convention concerning the Carriage of Passengers and Luggage by Rail (25 February 1961; Cmnd 5898), which was implemented in the United Kingdom by the Carriage by Railway Act 1972 (repealed) before being incorporated into the original COTIF Convention (see note 1): the revised CIV Rules (incorporating the Additional Convention dealing with liability for death of or injury to passengers) form Appendix A to the revised COTIF Convention. See further PARA 703 et seq.

6 The CIM Rules derive from the International Convention concerning the Carriage of Goods by Rail (25 February 1961; Cmnd 5898), which was implemented in the United Kingdom by the Carriage by Railway Act 1972 (repealed) before being incorporated into the original COTIF Convention (see note 1): the revised CIM Rules form Appendix B to the revised COTIF Convention. See further PARA 691 et seq.

7 Ie the Regulation concerning the International Carriage of Dangerous Goods by Rail ('RID'), which forms Appendix C to the revised COTIF Convention and is discussed in PARAS 748-751.

8 Ie the Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic ('CUV'), which forms Appendix D to the revised COTIF Convention and makes provision in connection with the identification of vehicles using signs and inscriptions, liability in the case of loss of or damage to or caused by a vehicle, the subrogation of vehicles to other undertakings, liability for servants and other persons, and the bringing and limitation of actions.

9 Ie the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic ('CUI'), forming Appendix E to the revised COTIF Convention; the Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic ('APTU'), forming Appendix F to the revised COTIF Convention; and the Uniform Rules concerning Technical Admission of Railway Material used in International Traffic ('ATMF'), forming Appendix G to the revised COTIF Convention. There are also several other systems of uniform law elaborated by OTIF which form further Appendixes to the Convention.

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#### **684. OTIF member states and parties to the COTIF Convention.**

Accession to the COTIF Convention<sup>1</sup> is open to any state on the territory of which railway infrastructure is operated<sup>2</sup> and also to Regional Economic Integration Organisations which have competence to adopt their own legislation in this area<sup>3</sup>. The Intergovernmental Organisation for International Carriage by Rail ('OTIF') maintains a list of its member states on which it also records their status as regards the revised Convention<sup>4</sup>. At the date at which this volume states the law OTIF listed 42 member states<sup>5</sup>, in relation to 36 of whom<sup>6</sup> the revised Convention had entered into force.

The OTIF member states agree to adopt all appropriate measures in order to facilitate and accelerate international rail traffic, to which end each member state undertakes, to the extent possible, to eliminate any useless procedure, simplify and standardise the formalities already required, and simplify frontier checks<sup>7</sup>. In order to facilitate and improve international rail traffic, the member states also agree to lend their support to attain the highest possible degree of uniformity in the regulations, standards, procedures and methods of organisation relating to railway vehicles, railway personnel, railway infrastructure and auxiliary services<sup>8</sup>, and agree to facilitate the conclusion of agreements between infrastructure managers intended to optimise international rail traffic<sup>9</sup>.

1 The Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999: see PARA 683.

2 COTIF Convention art 37.1.

3 See the COTIF Convention art 38.

4 The Secretary of State is required to publish in such manner as he thinks fit information concerning any change to the list of parties to the Convention, any declaration, objection or reservation by a party to the Convention and the suspension of part of the Convention in relation to a party: Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 4(a)-(c). As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

5 Albania; Algeria; Austria; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Iran; Iraq; Ireland; Italy; Latvia; Lebanon; Liechtenstein; Lithuania; Luxembourg; FYR Macedonia; Morocco; Monaco; Netherlands; Norway; Poland; Portugal; Romania; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Syria; Tunisia; Turkey; Ukraine; and the United Kingdom.

6 The excluding Iraq; Ireland; Italy; Lebanon; Morocco; and Sweden.

7 COTIF Convention art 5.1.

8 COTIF Convention art 5.2.

9 COTIF Convention art 5.3.

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### **685. Applicability of uniform rules.**

The uniform rules concerning the international carriage of passengers by rail<sup>1</sup> apply to every contract of carriage of passengers by rail for reward or free of charge, when the place of departure and the place of destination are situated in two different member states<sup>2</sup>, and the uniform rules concerning the international carriage of goods by rail<sup>3</sup> apply to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are either situated in two different member states or are situated in two different states of which at least one is a member state and the parties to the contract agree

that the contract is subject to the uniform rules<sup>4</sup>. In each case the rules apply irrespective of the domicile, place of business and nationality of the parties to the contract<sup>5</sup>. Both sets of rules also apply when international carriage which is the subject of a single contract includes carriage by road or inland waterway in internal traffic of a member state as a supplement to transfrontier carriage by rail<sup>6</sup> or includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail<sup>7</sup>, and the rules relating to passengers<sup>8</sup> also apply, as far as the liability of the carrier<sup>9</sup> in case of death of or personal injury to passengers is concerned, to persons accompanying a consignment whose carriage is effected in accordance with the Rules relating to goods<sup>10</sup>. However, neither set of rules applies to carriage performed between stations situated on the territory of neighbouring states when the infrastructure of those stations is managed by one or more infrastructure managers subject to only one of those states<sup>11</sup>.

1 The CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)): see PARA 683.

2 COTIF Convention Appendix A (CIV) art 1.1. Note that 'member state' in the context of these provisions refers to a member state of the Intergovernmental Organisation for International Carriage by Rail ('OTIF') (as to which see PARA 684) and not to a member state of the European Community.

3 The CIM Rules (Appendix B to the COTIF Convention): see PARA 683. Carriage to which the CIM Rules apply remains subject to the prescriptions of public law, in particular the prescriptions relating to the carriage of dangerous goods as well as the prescriptions of customs law and those relating to the protection of animals: Appendix B (CIM) art 2.

4 COTIF Convention Appendix B (CIM) arts 1.1, 1.2.

5 COTIF Convention Appendix A (CIV) art 1.1, Appendix B (CIM) art 1.1.

6 COTIF Convention Appendix A (CIV) art 1.2, Appendix B (CIM) art 1.3.

7 COTIF Convention Appendix A (CIV) art 1.3, Appendix B (CIM) art 1.4. In this instance the uniform rules apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in the Appendix A (CIV) art 24.1 (see PARA 710) or the Appendix B (CIM) art 24.1 (see PARA 716), as the case may be: Appendix A (CIV) art 1.3, Appendix B (CIM) art 1.4.

8 See note 1.

9 'Carrier' means the contractual carrier with whom the passenger or consignor has concluded the contract of carriage pursuant to either the CIV or CIM Rules, or a successive or subsequent carrier who is liable on the basis of such contract: COTIF Convention Appendix A (CIV) art 3(a), Appendix B (CIM) art 3(a).

10 COTIF Convention Appendix A (CIV) art 1.4.

11 COTIF Convention Appendix A (CIV) art 1.5, Appendix B (CIM) art 1.5.

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## **686. Carrier's liability for servants and third parties.**

Carriers<sup>1</sup> are liable for their servants and other persons whose services they make use of for the performance of the carriage, when these servants and other persons are acting within the scope of their functions<sup>2</sup>. The managers of the railway infrastructure on which the carriage is performed are considered to be persons whose services the carrier makes use of for the performance of the carriage<sup>3</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 COTIF Convention Appendix A (CIV) art 51, Appendix B (CIM) art 40. As to the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

3 COTIF Convention Appendix A (CIV) art 51, Appendix B (CIM) art 40.

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### **687. Successive and substitute carriers.**

If carriage governed by a single contract is performed by several successive carriers<sup>1</sup>, each carrier, by the very act of taking over the goods with the consignment note<sup>2</sup>, the luggage with the luggage registration voucher<sup>3</sup> or the vehicle with the carriage voucher<sup>4</sup>, becomes a party to the contract of carriage<sup>5</sup> and assumes the obligations arising therefrom<sup>6</sup>. In such a case each carrier is responsible in respect of carriage over the entire route up to delivery<sup>7</sup>.

Where the carrier has entrusted the performance of the carriage, in whole or in part, to a substitute carrier<sup>8</sup>, whether or not in pursuance of a right under the contract of carriage to do so, the carrier remains liable in respect of the entire carriage<sup>9</sup> and all the provisions of the CIV Rules and the CIM Rules governing the liability of the carrier also apply to the liability of the substitute carrier for the carriage performed by him<sup>10</sup>. Any special agreement under which the carrier assumes obligations not imposed by the CIV Rules and the CIM Rules or waives rights conferred by those rules will be of no effect in respect of the substitute carrier who has not accepted it expressly and in writing<sup>11</sup>. These provisions do not prejudice rights of recourse which may exist between the carrier and the substitute carrier<sup>12</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 As to the consignment note see PARAS 691-695.

3 As to the taking over of luggage and the luggage registration voucher see PARAS 707-708.

4 As to the carriage of vehicles and carriage vouchers see PARA 710. As to the meaning of 'vehicle' see PARA 703 note 2.

5 A carrier of goods becomes a party to the contract of carriage in accordance with the terms of the consignment note and a carrier of passengers, luggage and vehicles becomes a party to the contract of carriage in accordance with the terms of the luggage registration voucher or the vehicle carriage voucher: COTIF Convention Appendix A (CIV) art 38, Appendix B (CIM) art 26. As to the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

6 COTIF Convention Appendix A (CIV) art 38, Appendix B (CIM) art 26.

7 COTIF Convention Appendix A (CIV) art 38, Appendix B (CIM) art 26.

8 A 'substitute carrier' is a carrier who has not concluded the contract of carriage with the consignor but to whom the carrier has entrusted, in whole or in part, the performance of the carriage by rail: COTIF Convention Appendix A (CIV) art 3(b), Appendix B (CIM) art 3(b).

9 COTIF Convention Appendix A (CIV) art 39.1, Appendix B (CIM) art 27.1.

10 COTIF Convention Appendix A (CIV) art 39.2, Appendix B (CIM) art 27.2. Where and to the extent that both the carrier and the substitute carrier are liable, their liability is joint and several (Appendix A (CIV) art 39.4, Appendix B (CIM) art 27.4), and the aggregate amount of compensation payable by the carrier, the substitute carrier and their servants and other persons whose services they make use of for the performance of the carriage may not exceed the limits provided for in the CIV Rules and the CIM Rules (Appendix A (CIV) art 39.5, Appendix B (CIM) art 27.5). The provisions concerning the loss of the right to invoke limits of liability (ie Appendix A (CIV) art 48 and Appendix B (CIM) art 36: see PARA 722) and the bringing of actions against carriers generally (ie Appendix A (CIV) art 52 and Appendix B (CIM) art 41: see PARA 739) apply if an action is brought against the servants and any other persons whose services the substitute carrier makes use of for the performance of the carriage: Appendix A (CIV) art 39.2, Appendix B (CIM) art 27.2.

Note that the terms 'action' and 'claim' in the CIV Rules and the CIM Rules are not synonymous or interchangeable and their respective usage does not correspond to the usage of those terms in civil procedure in England and Wales under the Civil Procedure Rules; rather, they should be given their natural meaning. As to the bringing of claims and actions see PARA 735 et seq.

11 COTIF Convention Appendix A (CIV) art 39.3, Appendix B (CIM) art 27.3. Whether or not the substitute carrier has accepted it, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement: Appendix A (CIV) art 39.3, Appendix B (CIM) art 27.3.

12 COTIF Convention Appendix A (CIV) art 39.6, Appendix B (CIM) art 27.6.

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### **688. Resolution of disputes by arbitration.**

Disputes between member states<sup>1</sup> arising from the interpretation or application of the COTIF Convention<sup>2</sup>, and other disputes arising from the interpretation or application of the Convention and of other conventions if not settled amicably or brought before the ordinary courts or tribunals, may at the request of one of the parties be referred to an arbitration tribunal<sup>3</sup>. Parties must conclude an agreement to refer to arbitration which must, in particular, specify the subject matter of the dispute, the composition of the tribunal<sup>4</sup> and the period agreed for nomination of the arbitrator or arbitrators, and the place where it is agreed that the tribunal is to sit<sup>5</sup>.

1 As to 'member state' see PARA 685 note 2.

2 As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) see PARA 683.

3 COTIF Convention arts 28.1, 28.2. States may, on acceding to the Convention, reserve the right not to apply the arbitration provisions: see arts 28.2, 28.4.

4 The parties may freely determine the composition of the arbitration tribunal and the arbitration procedure: COTIF Convention art 28.1.

5 COTIF Convention art 29. The agreement to refer to arbitration must be communicated to OTIF: art 29. Provision is made for the composition of the tribunal and costs: see arts 30, 31.

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### **689. Customs and other administrative formalities.**

Under the CIV Rules<sup>1</sup> the passenger is required to comply with the formalities required by customs or other administrative authorities both on being carried as a passenger alone and when, on being carried, he has articles (that is, hand luggage, registered luggage<sup>2</sup>, vehicles<sup>3</sup> including their loading) or animals<sup>4</sup>. He must be present at the inspection of these articles unless otherwise provided by the laws and prescriptions of each state<sup>5</sup>.

Under the CIM Rules<sup>6</sup>, with a view to the completion of the formalities required by customs and other administrative authorities to be completed before delivery of goods, the consignor must attach the necessary documents to the consignment note<sup>7</sup> or make them available to the carrier and furnish him with all the requisite information<sup>8</sup>. The carrier is not obliged to check whether these documents and this information are correct and sufficient, and the consignor will be liable to the carrier for any loss or damage resulting from the absence or insufficiency of, or any irregularity in, such documents and information, save in the case of fault of the carrier<sup>9</sup>.

The consignor may ask<sup>10</sup>:

- 59 (1) to be present himself or to be represented by an agent when the customs or other administrative formalities are carried out, for the purpose of furnishing any information or explanation required<sup>11</sup>;
- 60 (2) to complete the customs or other administrative formalities himself or to have them completed by an agent, in so far as the laws and prescriptions of the state in which they are to be carried out so permit<sup>12</sup>; and
- 61 (3) to pay customs duties and other charges, when he or his agent is present at or completes the customs or other administrative formalities, in so far as the laws and prescriptions of the state in which they are carried out permit such payment<sup>13</sup>,

and in such circumstances neither the consignor, nor the consignee who has the right of disposal, nor the agent of either may take possession of the goods<sup>14</sup>.

If, for the completion of the customs or other administrative formalities, the consignor has designated a place where the prescriptions in force do not permit their completion, or if he has stipulated for the purpose any other procedure which cannot be followed, the carrier must act in the manner which appears to him to be the most favourable to the interests of the person entitled and shall inform the consignor of the measures taken<sup>15</sup>. If the consignor has undertaken to pay customs duties, the carrier shall have the choice of completing customs formalities either in transit or at the destination place<sup>16</sup>.

1 As to the CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

2 As to the consignment of hand luggage and animals as registered luggage see PARA 707.

3 As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.

4 COTIF Convention Appendix A (CIV) arts 10, 14. The passenger is liable to the carrier for any loss or damage arising from failure to fulfil these obligations (Appendix A (CIV) art 53(a)) unless he proves that the loss or damage was caused by circumstances that he could not avoid and the consequences of which he was unable to prevent, despite the fact that he exercised the diligence required of a conscientious passenger (Appendix A (CIV) art 53). The imposition of a liability on the passenger under this provision does not affect the liability of the carrier pursuant to Appendix A (CIV) art 26 (see PARA 724) and Appendix A (CIV) art 33.1 (see PARA 729); Appendix A (CIV) art 53. For the circumstances in which the right to invoke this limitation on liability may be lost see Appendix A (CIV) art 48; and PARA 728. As to the meaning of 'carrier' see PARA 685 note 9.

5 COTIF Convention Appendix A (CIV) art 14.

6 As to the CIM Rules (Appendix B to the COTIF Convention) see PARA 683.

7 As to the consignment note see PARAS 691-695.

8 COTIF Convention Appendix B (CIM) art 15.1. The carrier is liable for any consequences arising from the loss or misuse of the documents referred to in the consignment note and accompanying it or deposited with the carrier, unless the loss of the documents or the loss or damage caused by the misuse of the documents has been caused by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent; any compensation payable may not exceed that provided for in the event of loss of the goods: Appendix B (CIM) art 15.3. For the circumstances in which the right to invoke this limitation on liability may be lost see Appendix B (CIM) art 36; and PARA 722.

9 COTIF Convention Appendix B (CIM) art 15.2.

10 Ie by so indicating in the consignment note or by the consignee by giving orders as provided for in the COTIF Convention Appendix B (CIM) art 18.3 (as to which see PARA 700).

11 COTIF Convention Appendix B (CIM) art 15.4(a).

12 COTIF Convention Appendix B (CIM) art 15.4(b).

13 COTIF Convention Appendix B (CIM) art 15.4(c).

14 COTIF Convention Appendix B (CIM) art 15.4.

15 COTIF Convention Appendix B (CIM) art 15.5. However, the carrier may proceed in accordance with Appendix B (CIM) art 15.5 if the consignee has not taken possession of the consignment note within the period fixed by the prescriptions in force at the destination place: Appendix B (CIM) art 15.7.

16 COTIF Convention Appendix B (CIM) art 15.6.

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### **690. Derogation and contracting out.**

Unless provided otherwise in the uniform rules concerning the international carriage of passengers and goods by rail<sup>1</sup>, any stipulation which, directly or indirectly, would derogate from those rules is null and void, although the nullity of such a stipulation does not involve the nullity of the other provisions of the contract of carriage<sup>2</sup>. However, a carrier<sup>3</sup> may assume a liability greater and obligations more burdensome than those provided for in the rules<sup>4</sup>, and member states<sup>5</sup> may conclude agreements<sup>6</sup> which derogate from the rules for carriage performed exclusively between two stations on either side of the frontier when there is no other station between them<sup>7</sup>, and for carriage performed between two member states which passes through a non-member state<sup>8</sup>. Provision is also made for parties to comparable sets of rules to apply the rules only to specified parts of their railway infrastructure<sup>9</sup>.

Regarding the rules concerning the carriage of passengers<sup>10</sup>, any state may at any time declare that it will not apply to passengers involved in accidents occurring on its territory the whole of the provisions concerning the liability of the carrier in case of death or personal injury when such passengers are nationals of, or have their usual place of residence in, that state<sup>11</sup>. Two or more member states may also set between themselves conditions under which carriers are subject to the obligation to carry passengers, luggage, animals and vehicles in traffic between those states<sup>12</sup>.

1 Ie the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)): see PARA 683.

2 COTIF Convention art 10, Appendix A (CIV) art 5, Appendix B (CIM) art 5.

3 As to the meaning of 'carrier' see PARA 685 note 9.

4 COTIF Convention Appendix A (CIV) art 5, Appendix B (CIM) art 5.

5 As to 'member state' see PARA 685 note 2.

6 All such agreements and their coming into force must be notified to OTIF, which must notify the member states and interested undertakings accordingly: COTIF Convention Appendix A (CIV) art 4.4, Appendix B (CIM) art 4.3.

7 COTIF Convention Appendix A (CIV) art 4.1, Appendix B (CIM) art 4.1. Parties may also agree supplementary provisions to the rules: art 10.

8 COTIF Convention Appendix A (CIV) art 4.2, Appendix B (CIM) art 4.2.

9 See COTIF Convention Appendix A (CIV) art 1.6 and Appendix B (CIM) art 1.6, which provide that any state which is a party to a convention concerning international through carriage of passengers by rail comparable with either the CIV or the CIM Rules may, when it makes an application for accession to the COTIF Convention, declare that it will apply the uniform rules only to carriage performed on a part of the railway infrastructure situated on its territory, which must be precisely defined and connected to the railway infrastructure of a member state. When a state has made such a declaration, the uniform rules apply only on the condition that the place of departure or of destination or the place of taking over of the goods or designated for delivery, as well as the route designated in the contract of carriage, is situated on the specified infrastructure, or that the specified infrastructure connects the infrastructure of two member states and that it has been designated in the contract of carriage as a route for transit carriage: Appendix A (CIV) art 1.6, Appendix B (CIM) art 1.6. A state which has made such a reservation may withdraw it at any time by notification to OTIF, and such withdrawal will take effect one month after the day on which OTIF notifies it to the member states: Appendix A (CIV) art 1.7, Appendix B (CIM) art 1.7. The declaration will also cease to have effect when the comparable convention ceases to be in force: Appendix A (CIV) art 1.7, Appendix B (CIM) art 1.7.

10 I.e. the CIV Rules: see note 1.

11 COTIF Convention Appendix A (CIV) art 2.1. A state which has made such a reservation may withdraw it at any time by notification to OTIF, and such withdrawal will take effect one month after the day on which OTIF notifies it to the member states: Appendix A (CIV) art 2.2.

12 COTIF Convention Appendix A (CIV) art 4.3.

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## **(ii) Conclusion and Performance of the Contract**

### **A. CARRIAGE OF GOODS**

#### **691. Requirement for consignment note.**

The contract of carriage<sup>1</sup> must be confirmed by a consignment note, signed by the consignor and the carrier<sup>2</sup>, which accords with a uniform model<sup>3</sup>. Consignment notes do not have effect as bills of lading<sup>4</sup>. A new note must be made out for each consignment and may not, absent contrary agreement between the consignor and the carrier, relate to more than one wagon load<sup>5</sup>. The carrier must certify the taking over of the goods on the duplicate of the consignment note in an appropriate manner and must return the duplicate to the consignor<sup>6</sup>.

In the case of carriage which enters the customs territory of the European Community or the territory on which the common transit procedure<sup>7</sup> is applied, each consignment must be accompanied by a consignment note satisfying the applicable requirements<sup>8</sup>.

- 1 By the contract of carriage the carrier undertakes to carry the goods for reward to the place of destination and to deliver them there to the consignee: COTIF Convention Appendix B (CIM) art 6.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to the meaning of 'carrier' see PARA 685 note 9.
- 2 COTIF Convention Appendix B (CIM) art 6.3. The signature may be replaced by a stamp, by an accounting machine entry or in any other appropriate manner: Appendix B (CIM) art 6.3.
- 3 COTIF Convention Appendix B (CIM) art 6.2. However, the absence, irregularity or loss of the consignment note does not affect the existence or validity of the contract which remains subject to the rules contained in the CIM Convention: see Appendix B (CIM) art 6.2; and PARA 694. See further PARAS 692-693 (form and wording of note) and PARA 695 (evidential value of note). The international associations of carriers must establish uniform model consignment notes in agreement with the customers' international associations and the bodies having competence for customs matters in the member states as well as any intergovernmental regional economic integration organisation having competence to adopt its own customs legislation: Appendix B (CIM) art 6.8. As to 'member state' see PARA 685 note 2; and as to the member states themselves see PARA 684.
- 4 COTIF Convention Appendix B (CIM) art 6.5. As to bills of lading see PARA 313 et seq.
- 5 COTIF Convention Appendix B (CIM) art 6.6.
- 6 COTIF Convention Appendix B (CIM) art 6.4.
- 7 As to community transit and the common transit procedure see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARAS 108-142.
- 8 COTIF Convention Appendix B (CIM) art 6.7. The 'applicable requirements' are the requirements of Appendix B (CIM) art 7; as to which see PARA 693.

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## **692. Form of consignment note.**

The consignment note and its duplicate<sup>1</sup> may be established in the form of electronic data registration which can be transformed into legible written symbols<sup>2</sup>. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the consignment note represented by those data<sup>3</sup>.

- 1 As to the consignment note and its duplicate see PARA 691. As to the wording of the consignment note see PARA 693; as to irregularities in the consignment note see PARA 694; as to the evidential value of the note see PARA 695.
- 2 COTIF Convention Appendix B (CIM) art 6.9. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683.
- 3 COTIF Convention Appendix B (CIM) art 6.9.

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Conclusion and Performance of the Contract/A. CARRIAGE OF GOODS/693. Wording of consignment note.

### 693. Wording of consignment note.

The consignment note<sup>1</sup> must contain the following particulars:

- 62 (1) the place at which and the day on which it is made out<sup>2</sup>;
- 63 (2) the name and address of the consignor<sup>3</sup>;
- 64 (3) the name and address of the carrier<sup>4</sup> who has concluded the contract of carriage<sup>5</sup>;
- 65 (4) the name and address of the person to whom the goods have effectively been handed over if he is not the carrier referred to above<sup>6</sup>;
- 66 (5) the place and the day of taking over of the goods<sup>7</sup>;
- 67 (6) the place of delivery<sup>8</sup>;
- 68 (7) the name and address of the consignee<sup>9</sup>;
- 69 (8) the description of the nature of the goods and the method of packing, and, in case of dangerous goods, the description provided for in the Regulation concerning the International Carriage of Dangerous Goods by Rail<sup>10</sup>;
- 70 (9) the number of packages and the special marks and numbers necessary for the identification of consignments in less than full wagon loads<sup>11</sup>;
- 71 (10) the number of the wagon in the case of carriage of full wagon loads<sup>12</sup>;
- 72 (11) the number of the railway vehicle running on its own wheels, if it is handed over for carriage as goods<sup>13</sup>;
- 73 (12) in addition, in the case of intermodal transport units<sup>14</sup>, the category, the number or other characteristics necessary for their identification<sup>15</sup>;
- 74 (13) the gross mass or the quantity of the goods expressed in other ways<sup>16</sup>;
- 75 (14) a detailed list of the documents which are required by customs or other administrative authorities and are attached to the consignment note or held at the disposal of the carrier at the offices of a duly designated authority or a body designated in the contract<sup>17</sup>;
- 76 (15) the costs relating to carriage<sup>18</sup> in so far as they must be paid by the consignee or any other statement that the costs are payable by the consignee<sup>19</sup>; and
- 77 (16) a statement that the carriage is subject, notwithstanding any clause to the contrary, to the CIM Rules<sup>20</sup>.

Where applicable the consignment note must also contain the following particulars:

- 78 (a) in the case of carriage by successive carriers, the carrier who must deliver the goods when he has consented to this entry in the consignment note<sup>21</sup>;
- 79 (b) the costs which the consignor undertakes to pay<sup>22</sup>;
- 80 (c) the amount of the cash on delivery charge<sup>23</sup>;
- 81 (d) the declaration of the value of the goods and the amount representing the special interest in delivery<sup>24</sup>;
- 82 (e) the agreed transit period<sup>25</sup>;
- 83 (f) the agreed route<sup>26</sup>;
- 84 (g) a list of the documents not mentioned under head (14) above handed over to the carrier<sup>27</sup>; and
- 85 (h) the entries made by the consignor concerning the number and description of seals he has affixed to the wagon<sup>28</sup>.

The parties to the contract may also enter on the consignment note any other particulars they consider useful<sup>29</sup>.

1 As to the consignment note and its duplicate see PARA 691; as to the form of the consignment note see PARA 692; as to irregularities in the consignment note see PARA 694; as to the evidential value of the note see PARA 695.

2 COTIF Convention Appendix B (CIM) art 7.1(a). As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683.

3 COTIF Convention Appendix B (CIM) 7.1(b).

4 As to the meaning of 'carrier' see PARA 685 note 9.

5 COTIF Convention Appendix B (CIM) art 7.1(c).

6 COTIF Convention Appendix B (CIM) art 7.1(d).

7 COTIF Convention Appendix B (CIM) art 7.1(e).

8 COTIF Convention Appendix B (CIM) art 7.1(f).

9 COTIF Convention Appendix B (CIM) art 7.1(g).

10 COTIF Convention Appendix B (CIM) art 7.1(h). As to the Regulation concerning the International Carriage of Dangerous Goods by Rail ('RID') see PARAS 748-751. If the consignor has failed to make the entries prescribed by RID, the carrier may at any time unload or destroy the goods or render them innocuous, as the circumstances may require, without payment of compensation, save when he was aware of their dangerous nature on taking them over: Appendix B (CIM) art 9.

11 COTIF Convention Appendix B (CIM) art 7.1(i).

12 COTIF Convention Appendix B (CIM) art 7.1(j).

13 COTIF Convention Appendix B (CIM) art 7.1(k).

14 'Intermodal transport unit' means a container, swap body, semi-trailer or other comparable loading unit used in intermodal transport: COTIF Convention Appendix B (CIM) art 3(d).

15 COTIF Convention Appendix B (CIM) art 7.1(l).

16 COTIF Convention Appendix B (CIM) art 7.1(m).

17 COTIF Convention Appendix B (CIM) art 7.1(n).

18 Ie the carriage charge, incidental costs, customs duties and other costs incurred from the conclusion of the contract until delivery: COTIF Convention Appendix B (CIM) art 7.1(o).

19 COTIF Convention Appendix B (CIM) art 7.1(o).

20 COTIF Convention Appendix B (CIM) art 7.1(p).

21 COTIF Convention Appendix B (CIM) art 7.2(a).

22 COTIF Convention Appendix B (CIM) art 7.2(b).

23 COTIF Convention Appendix B (CIM) art 7.2(c).

24 COTIF Convention Appendix B (CIM) art 7.2(d).

25 COTIF Convention Appendix B (CIM) art 7.2(e). Provision in connection with the agreement of the transit period and the prescribed transit periods absent agreement is made by the COTIF Convention Appendix B (CIM) art 16.

26 COTIF Convention Appendix B (CIM) art 7.2(f).

- 27 COTIF Convention Appendix B (CIM) art 7.2(g).
- 28 COTIF Convention Appendix B (CIM) art 7.2(h).
- 29 COTIF Convention Appendix B (CIM) art 7.3.

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#### **694. Irregularities in the consignment note.**

The consignor is responsible for all costs, loss or damage sustained by the carrier<sup>1</sup> by reason of the entries made by the consignor<sup>2</sup> in the consignment note being irregular, incorrect, incomplete or made elsewhere than in the allotted space or the consignor omitting to make the entries prescribed by RID<sup>3</sup>, and the carrier is liable for all costs, loss or damage sustained through the omission from the consignment note of the statement<sup>4</sup> that the carriage is subject to the CIM Rules<sup>5</sup>.

The absence, irregularity or loss of the consignment note does not, however, affect the existence or validity of the contract which remains subject to the CIM rules<sup>6</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 If, at the request of the consignor, the carrier makes entries on the consignment note, he is deemed, unless the contrary is proved, to have done so on behalf of the consignor: COTIF Convention Appendix B (CIM) art 8.2. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to the consignment note and its duplicate see PARA 691; as to the form and content of the consignment note see PARAS 692, 693; as to the evidential value of the note see PARA 695.

3 COTIF Convention Appendix B (CIM) art 8.1. As to RID (ie the Regulation concerning the International Carriage of Dangerous Goods by Rail) see PARAS 748-751. See further PARA 693 note 10.

4 ie the statement required by the COTIF Convention Appendix B (CIM) art 7.1(p) (see PARA 693).

5 COTIF Convention Appendix B (CIM) art 8.3.

6 COTIF Convention Appendix B (CIM) art 6.2.

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#### **695. Evidential value of the consignment note.**

The consignment note<sup>1</sup> is prima facie evidence of the conclusion and the conditions of the contract of carriage and the taking over of the goods by the carrier<sup>2</sup>. Where the goods have been loaded (by either the consignor or the carrier) the consignment note is prima facie evidence of the condition of the goods and their packaging indicated on the note or, in the absence of such indications, of their apparently good condition and of the accuracy of the statements in the note concerning the number of packages, their marks and numbers as well

as the gross mass of the goods or their quantity otherwise expressed<sup>3</sup>. However, the consignment note will not be prima facie evidence in a case where it bears a reasoned reservation<sup>4</sup>.

1 As to the consignment note and its duplicate see PARA 691; as to the form and content of the consignment note see PARAS 692, 693; as to irregularities in the consignment note see PARA 694.

2 COTIF Convention Appendix B (CIM) art 12.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to the meaning of 'carrier' see PARA 685 note 9; note that these provisions (ie Appendix B (CIM) art 12) also apply to the relations between successive carriers: Appendix B (CIM) art 49.2.

3 COTIF Convention Appendix B (CIM) arts 12.2, 12.3. Where the goods have been loaded by the carrier, the note will be evidence of the apparent good condition of the goods only at the moment they were taken over by the carrier, and where the consignor has loaded the goods, the note will be evidence of the accuracy of the statements referred to in the text solely in the case where the carrier has examined them and recorded on the consignment note a result of his examination which tallies: Appendix B (CIM) arts 12.2, 12.3.

4 COTIF Convention Appendix B (CIM) art 12.4. A reason for a reservation could be that the carrier does not have the appropriate means to examine whether the consignment corresponds to the entries in the consignment note: Appendix B (CIM) art 12.4.

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#### **696. Liability for costs of carriage.**

The costs of carriage<sup>1</sup> must be paid by the consignor unless otherwise agreed between the consignor and the carrier<sup>2</sup>. When by virtue of such an agreement the costs are payable by the consignee and the consignee has not taken possession of the consignment note<sup>3</sup>, asserted his rights to delivery<sup>4</sup> or modified the contract of carriage<sup>5</sup>, the consignor remains liable to pay the costs<sup>6</sup>.

Any carrier who has collected or ought to have collected, either at departure or on arrival, charges or other costs arising out of the contract of carriage must pay to the carriers concerned their respective shares<sup>7</sup>.

1 Ie the carriage charge, incidental costs, customs duties and other costs incurred from the time of the conclusion of the contract to the time of delivery: COTIF Convention Appendix B (CIM) art 10.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683.

2 COTIF Convention Appendix B (CIM) art 10.1. As to the meaning of 'carrier' see PARA 685 note 9.

3 As to the consignment note see PARAS 691-695.

4 Ie in accordance with the COTIF Convention Appendix B (CIM) art 17.3 (as to which see PARA 699).

5 Ie in accordance with the COTIF Convention Appendix B (CIM) art 18 (as to which see PARA 700).

6 COTIF Convention Appendix B (CIM) art 10.2.

7 COTIF Convention Appendix B (CIM) art 49.1. The methods of payment will be fixed by agreement between the carriers: Appendix B (CIM) art 49.1.

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### **697. Loading, unloading and packing.**

The consignor and the carrier<sup>1</sup> must agree who is responsible for the loading and unloading of the goods; in the absence of such an agreement, for packages the loading and unloading is the responsibility of the carrier whereas for full wagon loads loading is the responsibility of the consignor and unloading, after delivery, the responsibility of the consignee<sup>2</sup>. The consignor is liable for all the consequences of defective loading carried out by him<sup>3</sup> and for any loss or damage and costs due to the absence of, or defects in, the packing of goods, unless the defectiveness was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it<sup>4</sup>.

The consignor must comply with the prescriptions of customs or other administrative authorities with respect to the packing and sheeting of the goods<sup>5</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 COTIF Convention Appendix B (CIM) art 13.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683.

3 COTIF Convention Appendix B (CIM) art 13.2. The consignor must in particular compensate the carrier for the loss or damage sustained in consequence by him: Appendix B (CIM) art 13.2. The burden of proof of defective loading lies on the carrier: Appendix B (CIM) art 13.2.

4 COTIF Convention Appendix B (CIM) art 14.

5 COTIF Convention Appendix B (CIM) art 15.8. If the consignor has not packed or sheeted the goods in accordance with such prescriptions the carrier is entitled to do so; the resulting cost will be charged against the goods: Appendix B (CIM) art 15.8.

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### **698. Examination of goods.**

The carrier<sup>1</sup> has the right to examine at any time whether the conditions of carriage have been complied with and whether the consignment corresponds with the entries in the consignment note made by the consignor<sup>2</sup>. If the examination concerns the contents of the consignment, it must be carried out as far as possible in the presence of the person entitled; where this is not possible, the carrier must require the presence of two independent witnesses, unless the laws and prescriptions of the state where the examination takes place provide otherwise<sup>3</sup>. If the consignment does not correspond with the entries in the consignment note or if the provisions relating to the carriage of goods accepted subject to conditions have not been complied with, the result of the examination must be entered in the copy of the consignment note which

accompanies the goods, and also in the duplicate of the consignment note, if it is still held by the carrier<sup>4</sup>.

When the consignor loads the goods, he is entitled to require the carrier to examine the condition of the goods and their packaging as well as the accuracy of statements on the consignment note as to the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed<sup>5</sup>. The result of this examination must be entered on the consignment note<sup>6</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 COTIF Convention Appendix B (CIM) art 11.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to the consignment note see PARAS 691-695.

3 COTIF Convention Appendix B (CIM) art 11.1.

4 COTIF Convention Appendix B (CIM) art 11.2. In this case the costs of the examination must be charged against the goods, if they have not been paid immediately: Appendix B (CIM) art 11.2.

5 COTIF Convention Appendix B (CIM) art 11.3. The carrier is obliged to proceed with this examination only if he has appropriate means of carrying it out, and may demand the payment of the costs of the examination: Appendix B (CIM) art 11.3.

6 COTIF Convention Appendix B (CIM) art 11.3.

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### **699. Delivery of goods and assertion of consignee's rights.**

The carrier<sup>1</sup> must hand over the consignment note<sup>2</sup> and deliver the goods to the consignee at the place designated for delivery against receipt and payment of the amounts due according to the contract of carriage<sup>3</sup>. After the arrival of the goods at the place of destination the consignee may ask the carrier to hand over the consignment note and deliver the goods to him<sup>4</sup>; if the loss of the goods is established or if the goods have not arrived on the expiry of the period provided for in cases of presumed loss<sup>5</sup> the consignee may assert, in his own name, his rights against the carrier under the contract of carriage<sup>6</sup>.

The person entitled may refuse to accept the goods, even when he has received the consignment note and paid the charges resulting from the contract of carriage, so long as an examination<sup>7</sup> which he has demanded in order to establish alleged loss or damage has not been carried out<sup>8</sup>.

In other respects, delivery of the goods must be carried out in accordance with the prescriptions in force at the place of destination<sup>9</sup>. If the goods have been delivered without prior collection of a cash on delivery charge, the carrier is obliged to compensate the consignor up to the amount of the cash on delivery charge without prejudice to his right of recourse against the consignee<sup>10</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 As to the consignment note see PARAS 691-695.

3 COTIF Convention Appendix B (CIM) art 17.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. It is equivalent to delivery to the consignee if, in accordance with the prescriptions in force at the place of destination, the goods have been handed over to customs or octroi authorities at their premises or warehouses, when these are not subject to the carrier's supervision, or the goods have been deposited for storage with the carrier, with a forwarding agent or in a public warehouse: Appendix B (CIM) art 17.2.

4 COTIF Convention Appendix B (CIM) art 17.3.

5 le the period provided for in the COTIF Convention Appendix B (CIM) art 29.1.

6 COTIF Convention Appendix B (CIM) art 17.3.

7 As to examinations see PARA 698.

8 COTIF Convention Appendix B (CIM) art 17.4.

9 COTIF Convention Appendix B (CIM) art 17.5.

10 COTIF Convention Appendix B (CIM) art 17.6.

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#### **700. Disposal of goods and modification of the contract.**

The consignor is entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders<sup>1</sup>, and the consignee has the right to modify the contract from the time when the consignment note is drawn up, unless the consignor indicates to the contrary on the consignment note<sup>2</sup>. However, the consignor's<sup>3</sup> and consignee's rights to modify the contract are extinguished in cases where the consignee has taken possession of the consignment note<sup>4</sup>, accepted the goods<sup>5</sup> or asserted his rights<sup>6</sup> to delivery of the goods<sup>7</sup>; the consignee's rights to modify are also extinguished if he has given instructions for delivery of the goods to another person and that person has asserted his rights<sup>8</sup> to delivery of the goods<sup>9</sup>; and the consignor's rights are also extinguished where he is entitled<sup>10</sup> to give orders<sup>11</sup>.

If the consignor or<sup>12</sup> the consignee wishes to modify the contract of carriage by giving subsequent orders, he must produce to the carrier the duplicate of the consignment note<sup>13</sup> on which the modifications have to be entered<sup>14</sup>. The carrying out of the modifications must be possible, lawful and reasonable to require at the time when the orders reach the person who is to carry them out<sup>15</sup>, must in particular neither interfere with the normal working of the carrier's undertaking nor prejudice the consignors or consignees of other consignments<sup>16</sup>, and must not have the effect of splitting the consignment<sup>17</sup>; compensation is also payable<sup>18</sup>.

1 COTIF Convention Appendix B (CIM) art 18.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. The consignee may in particular ask the carrier to discontinue the carriage or delay delivery of the goods or to deliver the goods to a consignee or place of destination different from the one entered on the consignment note: Appendix B (CIM) art 18.1(a)-(d). As to the meaning of 'carrier' see PARA 685 note 9. As to the consignment note see PARAS 691-695.

2 COTIF Convention Appendix B (CIM) art 18.3.

3 The extinguishment of the consignor's rights under these provisions will happen notwithstanding that he is in possession of the duplicate of the consignment note: COTIF Convention Appendix B (CIM) art 18.2.

- 4 COTIF Convention Appendix B (CIM) arts 18.2(a), 18.4(a).
- 5 COTIF Convention Appendix B (CIM) arts 18.2(b), 18.4(b).
- 6 Ie under the COTIF Convention Appendix B (CIM) art 17.3 (see PARA 699).
- 7 COTIF Convention Appendix B (CIM) arts 18.2(c), 18.4(c).
- 8 See note 6.
- 9 COTIF Convention Appendix B (CIM) art 18.4(d). Where the consignee has given such instructions, the person to whom the instructions have been given is not entitled to modify the contract: Appendix B (CIM) art 18.5.
- 10 Ie in accordance with the COTIF Convention Appendix B (CIM) art 18.3 (see the text and note 2).
- 11 COTIF Convention Appendix B (CIM) art 18.2(d). From that time onwards, the carrier must comply with the orders and instructions of the consignee: Appendix B (CIM) art 18.2(d).
- 12 Ie in the case referred to in the COTIF Convention Appendix B (CIM) art 18.3 (see the text and note 2).
- 13 As to the consignment note see PARAS 691-695.
- 14 COTIF Convention Appendix B (CIM) art 19.1. If the carrier implements the consignor's subsequent modifications without requiring the production of the duplicate of the consignment note he is liable to the consignee for any loss or damage sustained by him if the duplicate has been passed on to the consignee, although any compensation payable must not exceed that provided for in case of loss of the goods: Appendix B (CIM) art 19.7. For the circumstances in which the right to invoke this limitation on liability may be lost see Appendix B (CIM) art 36; and PARA 722.
- 15 If by reason of these conditions the carrier cannot carry out the orders which he receives he must immediately notify the person from whom the orders emanate: Appendix B (CIM) art 19.5.
- 16 COTIF Convention Appendix B (CIM) art 19.3.
- 17 COTIF Convention Appendix B (CIM) art 19.4.
- 18 The consignor or, in the case referred to in COTIF Convention Appendix B (CIM) art 18.3 (see the text and note 2), the consignee must compensate the carrier for the costs and the prejudice arising from the carrying out of subsequent modifications: Appendix B (CIM) art 19.2. In the case of fault of the carrier he is liable for the consequences of failure to carry out an order or failure to carry it out properly, although any compensation payable must not exceed that provided for in case of loss of the goods: Appendix B (CIM) art 19.6. For the circumstances in which the right to invoke this limitation on liability may be lost see Appendix B (CIM) art 36; and PARA 722.

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### **701. Circumstances preventing carriage or delivery.**

When circumstances prevent the carriage of goods the carrier<sup>1</sup> must decide whether it is preferable to carry the goods as a matter of course by modifying the route or whether it is advisable, in the interest of the person entitled, to ask him for instructions while giving him any relevant information available to the carrier<sup>2</sup>. If it is impossible to continue carrying the goods, the carrier must ask for instructions from the person who has the right to dispose of the goods, and if he is unable to obtain instructions within a reasonable time he must take such steps as seem to him to be in the best interests of the person entitled to dispose of the goods<sup>3</sup>.

When circumstances prevent delivery, the carrier must without delay inform the consignor and ask him for instructions, save where the consignor has requested, by an entry in the

consignment note<sup>4</sup>, that the goods be returned to him as a matter of course in the event of circumstances preventing delivery<sup>5</sup>. When the circumstances preventing delivery cease to exist before arrival of instructions from the consignor to the carrier the goods must be delivered to the consignee, and the consignor must be notified without delay<sup>6</sup>.

The carrier may proceed to the sale of the goods, without awaiting instructions from the person entitled, if this is justified by the perishable nature or the condition of the goods or if the costs of storage would be out of proportion to the value of the goods; he may also proceed to the sale of the goods if within a reasonable time he has not received from the person entitled instructions to the contrary which he may reasonably be required to carry out<sup>7</sup>.

If the consignor, in the case of circumstances preventing carriage or delivery, fails to give instructions within a reasonable time and if the circumstances preventing carriage or delivery cannot be eliminated<sup>8</sup>, the carrier may return the goods to the consignor or, if it is justified, destroy them, at the cost of the consignor<sup>9</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 COTIF Convention Appendix B (CIM) art 20.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. The carrier is entitled to recover the costs occasioned by his request for instructions, the carrying out of instructions received, the fact that instructions requested do not reach him or do not reach him in time and the fact that he has taken a decision in accordance with Appendix B (CIM) art 20.1 without having asked for instructions, unless such costs were caused by his fault: Appendix B (CIM) art 22.1. The carrier may in particular recover the carriage charge applicable to the route followed and will be allowed the transit periods applicable to such route: Appendix B (CIM) art 22.1.

3 COTIF Convention Appendix B (CIM) art 20.2. In the cases referred to in Appendix B (CIM) arts 20.2, 21.1 (see the text and notes 4-5) the carrier may immediately unload the goods at the cost of the person entitled, and the carriage will be deemed to be at an end and the carrier will be in charge of the goods on behalf of the person entitled: Appendix B (CIM) art 22.2. He may, however, entrust them to a third party, and will then be responsible only for the exercise of reasonable care in the choice of such third party: Appendix B (CIM) art 22.2. The charges due under the contract of carriage and all other costs will remain chargeable against the goods: Appendix B (CIM) art 22.2.

4 As to the consignment note see PARAS 691-695.

5 COTIF Convention Appendix B (CIM) art 21.1. See note 3. When the circumstances preventing delivery arise after the consignee has modified the contract of carriage in accordance with Appendix B (CIM) art 18.3, 18.4 or 18.5 (see PARA 700) the carrier must notify the consignee: Appendix B (CIM) art 21.4.

6 COTIF Convention Appendix B (CIM) art 21.2. If the consignee refuses the goods, the consignor is entitled to give instructions even if he is unable to produce the duplicate of the consignment note: Appendix B (CIM) art 21.3.

7 COTIF Convention Appendix B (CIM) art 22.3. If the goods have been sold, the proceeds of sale, after deduction of the costs chargeable against the goods, must be placed at the disposal of the person entitled, and if the proceeds of sale are less than those costs the consignor must pay the difference: Appendix B (CIM) art 22.4. The procedure in the case of sale will be determined by the laws and prescriptions in force at, or by the custom of, the place where the goods are situated: Appendix B (CIM) art 22.5.

8 Ie in accordance with the COTIF Convention Appendix B (CIM) arts 22.2, 22.3 (see the text and notes 3, 7).

9 COTIF Convention Appendix B (CIM) art 22.6.

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## **702. The Uniform Customs and Practice for Documentary Credits.**

Commercial letters of credit (that is, bank undertakings to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit) generally incorporate the Uniform Customs and Practice for Documentary Credits<sup>1</sup>, which make specific provision in connection with the content of rail transport documents. Such a document, however named, must appear to:

- 86 (1) indicate the name of the carrier<sup>2</sup>;
- 87 (2) indicate the date of shipment or the date the goods have been received for shipment, dispatch or carriage at the place stated in the credit<sup>3</sup>;
- 88 (3) indicate the place of shipment and the place of destination stated in the credit<sup>4</sup>;
- 89 (4) be signed by the carrier or a named agent for or on behalf of the carrier<sup>5</sup>; and
- 90 (5) indicate receipt of the goods by signature, stamp or notation by a carrier or named agent for or on behalf of the carrier<sup>6</sup>.

A rail transport document will be accepted as an original whether marked as an original or not, and a rail transport document marked 'duplicate' will be accepted as an original<sup>7</sup>.

Where a transport document covers two or more different modes of transport (a 'multimodal or combined transport document'), the requirements relating to that document are virtually identical to those which apply in connection with the content of bills of lading and sea waybills<sup>8</sup>. Provision is also made in connection with transshipments<sup>9</sup>.

1    I.e. the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600), as drafted and published by the International Chamber of Commerce: see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 925. As to the nature and operation of credits generally and under the Uniform Customs and Practice for Documentary Credits see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 923-966.

2    Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(i).

3    Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(ii). Unless the transport document contains a dated reception stamp, an indication of the date of receipt or a date of shipment, the date of issuance of the transport document will be deemed to be the date of shipment: art 24(a)(ii).

4    Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(iii).

5    Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(i). Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent, and any signature, stamp or notation of receipt of the goods by an agent must indicate that the agent has signed for or on behalf of the carrier: art 24(a)(i). If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier: art 24(a)(i).

6    Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a)(i). See note 5.

7    Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(b)(ii), (iii). In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set: art 24(c).

8    See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 19; PARA 366; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 925.

9    See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(d), (e).

Conclusion and Performance of the Contract/B. CARRIAGE OF PASSENGERS/703. Tickets and charges.

## **B. CARRIAGE OF PASSENGERS**

### **703. Tickets and charges.**

By the contract of carriage the carrier<sup>1</sup> undertakes to carry the passenger as well as, where appropriate, luggage and vehicles<sup>2</sup> to the place of destination and to deliver the luggage and vehicles at the place of destination<sup>3</sup>. The contract of carriage must be confirmed by one or more tickets issued to the passenger<sup>4</sup>, who must ensure, on receipt of the ticket, that it has been made out in accordance with his instructions<sup>5</sup>. The passenger must also be in possession of a valid ticket from the start of his journey and must produce it on the inspection of tickets<sup>6</sup>. The ticket is transferable if it has not been made out in the passenger's name and if the journey has not begun<sup>7</sup>, and is prima facie evidence of the conclusion and the contents of the contract of carriage<sup>8</sup>.

Subject to a contrary agreement between the passenger and the carrier, the carriage charge is payable in advance<sup>9</sup>, although refunds may be made<sup>10</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 'Vehicle' means a motor vehicle or a trailer carried on the occasion of the carriage of passengers: COTIF Convention Appendix A (CIV) art 3(d). As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the carriage of luggage and vehicles see PARA 729 et seq.

3 COTIF Convention Appendix A (CIV) art 6.1.

4 COTIF Convention Appendix A (CIV) art 6.2. The absence, irregularity or loss of the ticket does not affect the existence or validity of the contract of carriage, which remains subject to the CIV Rules: Appendix A (CIV) art 6.2. This is, however, subject to Appendix A (CIV) art 9 (form and content of tickets: see the text and note 6; and PARA 704).

5 COTIF Convention Appendix A (CIV) art 7.3.

6 COTIF Convention Appendix A (CIV) art 9.1. The General Conditions of Carriage may provide that a passenger who does not produce a valid ticket must pay, in addition to the carriage charge (see the text and note 9), a surcharge, and that a passenger who refuses to pay the surcharge upon demand may be required to discontinue his journey: Appendix A (CIV) art 8.1(a), (b). The General Conditions of Carriage may also provide for a refund of the surcharge under specified conditions: Appendix A (CIV) art 8.1(c). The 'General Conditions of Carriage' are the conditions of the carrier in the form of general conditions or tariffs legally in force in each member state and which have become, by the conclusion of the contract of carriage, an integral part of it: Appendix A (CIV) art 3(c); Appendix B (CIM) art 3(c). As to 'member state' see PARA 685 note 2.

7 COTIF Convention Appendix A (CIV) art 7.4.

8 COTIF Convention Appendix A (CIV) art 6.3. Note that Appendix A (CIV) art 6.3 also applies to the relations between successive carriers: Appendix A (CIV) art 61.2. As to successive carriers see PARA 687.

9 COTIF Convention Appendix A (CIV) art 8.1. The General Conditions of Carriage may provide that a passenger who refuses to pay the carriage charge upon demand may be required to discontinue his journey: Appendix A (CIV) art 8.1(b). Any carrier who has collected or ought to have collected a carriage charge must pay to the carriers concerned their respective shares of such a charge: Appendix A (CIV) art 61.1. The methods of payment will be fixed by agreement between the carriers: Appendix A (CIV) art 61.1.

10 The conditions under which a refund of the carriage charge may be made are determined by the General Conditions of Carriage: Appendix A (CIV) art 8.2.

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#### **704. Form and content of tickets.**

The form and content of tickets<sup>1</sup> as well as the language and characters in which they are to be printed and made out are to be determined by the General Conditions of Carriage<sup>2</sup>, although the following, at least, must be entered on the ticket:

- 91 (1) the carrier or carriers<sup>3</sup>;
- 92 (2) a statement that the carriage is subject, notwithstanding any clause to the contrary, to the CIV Rules<sup>4</sup>; and
- 93 (3) any other statement necessary to prove the conclusion and contents of the contract of carriage and enabling the passenger to assert the rights resulting from the contract<sup>5</sup>.

The carrier must also, where necessary, certify on the ticket that the train has been cancelled or the connection missed<sup>6</sup>.

The ticket may be established in the form of electronic data registration, which can be transformed into legible written symbols<sup>7</sup>. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the ticket represented by those data<sup>8</sup>.

1 As to the requirement for tickets see PARA 703.

2 COTIF Convention Appendix A (CIV) art 7.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the General Conditions of Carriage see PARA 703 note 6.

3 COTIF Convention Appendix A (CIV) art 7.2(a). As to the meaning of 'carrier' see PARA 685 note 9.

4 COTIF Convention Appendix A (CIV) art 7.2(b). This may be indicated by the acronym 'CIV': Appendix A (CIV) art 7.2(b).

5 COTIF Convention Appendix A (CIV) art 7.2(c).

6 COTIF Convention Appendix A (CIV) art 11.

7 COTIF Convention Appendix A (CIV) art 7.5.

8 COTIF Convention Appendix A (CIV) art 7.5. As to the evidential value of the ticket see PARA 703.

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#### **705. Limitations on the right to be carried.**

The General Conditions of Carriage<sup>1</sup> may provide for passengers who present a danger to safety and the good functioning of the operations or for the safety of other passengers, or who

inconvenience other passengers in an intolerable manner, to be excluded from carriage or to be required to discontinue their journey<sup>2</sup>.

1 As to the General Conditions of Carriage see PARA 703 note 6.

2 COTIF Convention Appendix A (CIV) art 9.2. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. The General Conditions of Carriage may further provide that any such persons will not be entitled to a refund of their carriage charge or of any charge for the carriage of registered luggage they may have paid: Appendix A (CIV) art 9.2.

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### ***C. CARRIAGE OF LUGGAGE, VEHICLES AND OTHER ITEMS***

#### **706. Hand luggage and animals.**

The passenger may take with him hand luggage (that is, articles which can be handled easily), cumbersome articles, and live animals<sup>1</sup>. It is the passenger's responsibility to supervise the hand luggage and animals that he takes with him<sup>2</sup> and any articles and animals likely to annoy or inconvenience passengers or cause damage are not allowed as hand luggage<sup>3</sup>. The passenger is liable to the carrier<sup>4</sup> for any loss or damage caused by articles or animals that he brings with him<sup>5</sup>.

1 COTIF Convention Appendix A (CIV) art 12.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. The bringing of articles and animals pursuant to these provisions must be done in accordance with the General Conditions of Carriage: Appendix A (CIV) art 12.1. As to the General Conditions of Carriage see PARA 703 note 6. Articles and animals may be consigned as registered luggage (see Appendix A (CIV) art 12.2; and PARA 707), and dangerous goods may only be carried in accordance with the Regulation concerning the Carriage of Dangerous Goods by Rail ('RID') (see Appendix A (CIV) art 12.4; and PARAS 748-751).

2 COTIF Convention Appendix A (CIV) art 15.

3 COTIF Convention Appendix A (CIV) art 12.1.

4 As to the meaning of 'carrier' see PARA 685 note 9.

5 COTIF Convention Appendix A (CIV) art 53(b). The passenger will not be liable under this provision if he proves that the loss or damage was caused by circumstances that he could not avoid and the consequences of which he was unable to prevent, despite the fact that he exercised the diligence required of a conscientious passenger: Appendix A (CIV) art 53. The imposition of a liability on the passenger under this provision does not affect the liability of the carrier pursuant to Appendix A (CIV) art 26 (see PARA 724) and Appendix A (CIV) art 33.1 (see PARA 729): Appendix A (CIV) art 53.

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### **707. Consignment of hand luggage and animals as registered luggage.**

The passenger may consign articles and animals as registered luggage in accordance with the general conditions of carriage<sup>1</sup>. The contractual obligations relating to the forwarding of registered luggage must be established by a luggage registration voucher issued to the passenger<sup>2</sup>, who must ensure, on receipt of the voucher, that it has been made out in accordance with his instructions<sup>3</sup>. The voucher is prima facie evidence of the registration of the luggage and the conditions of its carriage<sup>4</sup>, although the absence, irregularity or loss of the voucher does not affect the existence or the validity of the agreements concerning the forwarding of the registered luggage, which remain subject to the CIV Rules<sup>5</sup>.

Subject to a contrary agreement between the passenger and the carrier, the charge for the carriage of registered luggage is payable on registration<sup>6</sup>.

1 COTIF Convention Appendix A (CIV) art 12.2. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the General Conditions of Carriage see PARA 703 note 6. The principal significance of consigning articles and animals as registered luggage is that the compensation payable for loss or damage is greater: see PARA 732.

2 COTIF Convention Appendix A (CIV) art 16.1.

3 COTIF Convention Appendix A (CIV) art 17.3.

4 COTIF Convention Appendix A (CIV) art 16.3.

5 COTIF Convention Appendix A (CIV) art 16.2. This is, however, subject to Appendix A (CIV) art 22 (see PARA 713).

6 COTIF Convention Appendix A (CIV) art 19.

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### **708. Form and content of luggage registration voucher.**

The form and content of the luggage registration voucher<sup>1</sup> as well as the language and characters in which it is to be printed and made out are to be determined by the General Conditions of Carriage<sup>2</sup>, although the following, at least, must be entered on the voucher:

- 94 (1) the carrier or carriers<sup>3</sup>;
- 95 (2) a statement that the carriage is subject, notwithstanding any clause to the contrary, to the CIV Rules<sup>4</sup>; and
- 96 (3) any other statement necessary to prove the contractual obligations relating to the forwarding of the registered luggage and enabling the passenger to assert the rights resulting from the contract<sup>5</sup>.

The voucher may be established in the form of electronic data registration, which can be transformed into legible written symbols<sup>6</sup>. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the voucher represented by those data<sup>7</sup>.

- 1 As to the requirement for a luggage registration voucher see PARA 707.
- 2 COTIF Convention Appendix A (CIV) art 17.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the General Conditions of Carriage see PARA 703 note 6.
- 3 COTIF Convention Appendix A (CIV) art 17.2(a). As to the meaning of 'carrier' see PARA 685 note 9.
- 4 COTIF Convention Appendix A (CIV) art 17.2(b). This may be indicated by the acronym 'CIV': Appendix A (CIV) art 17.2(b).
- 5 COTIF Convention Appendix A (CIV) art 17.2(c).
- 6 COTIF Convention Appendix A (CIV) arts 7.5, 17.1.
- 7 COTIF Convention Appendix A (CIV) art 7.5. As to the evidential value of the voucher see PARA 707.

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### **709. Marking of registered luggage.**

The passenger must indicate on each item of registered luggage<sup>1</sup>, in a clearly visible place and in a sufficiently durable and legible manner, his name and address and the place of destination<sup>2</sup>, and is liable to the carrier<sup>3</sup> for any loss or damage arising from failure to fulfil these obligations<sup>4</sup>.

- 1 As to the consignment of hand luggage and animals as registered luggage see PARA 707.
- 2 COTIF Convention Appendix A (CIV) art 20. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.
- 3 As to the meaning of 'carrier' see PARA 685 note 9. The imposition of a liability on the passenger under this provision does not affect the liability of the carrier pursuant to Appendix A (CIV) art 26 (see PARA 724) and Appendix A (CIV) art 33.1 (see PARA 729): Appendix A (CIV) art 53.
- 4 COTIF Convention Appendix A (CIV) art 53(a). The passenger will not be liable under these provisions if he proves that the loss or damage was caused by circumstances that he could not avoid and the consequences of which he was unable to prevent, despite the fact that he exercised the diligence required of a conscientious passenger: Appendix A (CIV) art 53.

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### **710. Carriage of vehicles.**

The carrier<sup>1</sup> may allow the carriage of vehicles on the occasion of the carriage of passengers<sup>2</sup>. The contractual obligations relating to the carriage of vehicles must be established by a carriage voucher issued to the passenger<sup>3</sup>, who must ensure, on receipt of the voucher, that it

has been made out in accordance with his instructions<sup>4</sup>. The form and content of the voucher, as well as the language and characters in which it is to be printed and made out, are to be determined by the General Conditions of Carriage<sup>5</sup>, and the following, at least, must be entered on the voucher:

- 97 (1) the carrier or carriers<sup>6</sup>;
- 98 (2) a statement that the carriage is subject, notwithstanding any clause to the contrary, to the CIV Rules<sup>7</sup>; and
- 99 (3) any other statement necessary to prove the contractual obligations relating to the carriage and enabling the passenger to assert the rights resulting from the contract<sup>8</sup>.

The voucher may be established in the form of electronic data registration, which can be transformed into legible written symbols<sup>9</sup>. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the voucher represented by those data<sup>10</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 COTIF Convention Appendix A (CIV) art 12.3. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the meaning of 'vehicle' see PARA 703 note 2. The bringing of vehicles pursuant to these provisions must be done in accordance with special provisions contained in the General Conditions of Carriage, which must specify in particular the conditions governing acceptance for carriage, registration, loading and carriage, unloading and delivery as well as the obligations of the passenger: Appendix A (CIV) arts 12.3, 23. As to the General Conditions of Carriage see PARA 703 note 6. Dangerous goods in vehicles may only be carried in accordance with the Regulation concerning the Carriage of Dangerous Goods by Rail ('RID') (see Appendix A (CIV) art 12.4; and PARAS 748-751).

The passenger is liable to the carrier for any loss or damage resulting from failure to fulfil his obligations pursuant to the special provisions for the carriage of vehicles contained in the General Conditions of Carriage or the Regulation concerning the International Carriage of Dangerous Goods by Rail ('RID'), unless he proves that the loss or damage was caused by circumstances that he could not avoid and the consequences of which he was unable to prevent, despite the fact that he exercised the diligence required of a conscientious passenger: Appendix A (CIV) art 53(a). The imposition of a liability on the passenger under this provision does not affect the liability of the carrier pursuant to Appendix A (CIV) art 26 (see PARA 724) and Appendix A (CIV) art 33.1 (see PARA 729): Appendix A (CIV) art 53.

3 COTIF Convention Appendix A (CIV) art 24.1. The carriage voucher may be integrated into the passenger's ticket: Appendix A (CIV) art 24.1.

4 COTIF Convention Appendix A (CIV) art 24.3.

5 COTIF Convention Appendix A (CIV) art 24.2. As to the General Conditions of Carriage see PARA 703 note 6. The form and content of the carriage voucher, as well as the language and characters in which it is to be printed and made out, are to be determined in accordance with the special provisions governing the carriage of vehicles contained in the General Conditions of Carriage: Appendix A (CIV) art 24.2.

6 COTIF Convention Appendix A (CIV) art 24.3(a).

7 COTIF Convention Appendix A (CIV) art 24.2(b). This may be indicated by the acronym 'CIV': Appendix A (CIV) art 24.2(b).

8 COTIF Convention Appendix A (CIV) art 24.2(c).

9 COTIF Convention Appendix A (CIV) arts 7.5, 24.2.

10 COTIF Convention Appendix A (CIV) art 7.5.

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### **711. Extent of passenger's right to have luggage and vehicles carried.**

Luggage may in general be registered<sup>1</sup>, and vehicles accepted for carriage<sup>2</sup>, only on production of a ticket valid at least as far as the destination of the luggage or vehicle, although the General Conditions of Carriage may provide otherwise<sup>3</sup>. In other respects the registration of luggage and the carriage of vehicles may be carried out in accordance with the prescriptions in force at the place of consignment<sup>4</sup>. The carrier<sup>5</sup> can also forward the registered luggage or vehicle by another train or by another mode of transport and by a different route from that taken by the passenger<sup>6</sup>.

1   le under the COTIF Convention Appendix A (CIV) art 12.2: see PARA 707. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the carriage of hand luggage and animals generally see PARA 706. The consignment of articles and animals as registered luggage pursuant to these provisions must be done in accordance with the General Conditions of Carriage: Appendix A (CIV) art 12.2. As to the General Conditions of Carriage see PARA 703 note 6.

2   As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.

3   COTIF Convention Appendix A (CIV) arts 18.1, 25. When the General Conditions of Carriage provide that luggage may be accepted for carriage without production of a ticket, the provisions of the CIV Rules determining the rights and obligations of the passenger in respect of his registered luggage apply mutatis mutandis to the consignor of registered luggage: Appendix A (CIV) art 18.2.

4   COTIF Convention Appendix A (CIV) art 18.1.

5   As to the meaning of 'carrier' see PARA 685 note 9.

6   COTIF Convention Appendix A (CIV) art 18.3.

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### **712. Cancelling the carriage and modifying the place of destination.**

If circumstances permit and if customs requirements or the requirements of other administrative authorities are not thereby contravened, the passenger can request luggage or vehicles<sup>1</sup> to be handed back at the place of consignment<sup>2</sup> on surrender of the luggage registration voucher<sup>3</sup> or vehicle carriage voucher and, if the General Conditions of Carriage<sup>4</sup> so require, on production of the ticket<sup>5</sup>. The General Conditions of Carriage may contain other provisions concerning the right to dispose of registered luggage or vehicles, in particular modifications of the place of destination and the possible financial consequences to be borne by the passenger<sup>6</sup>.

1   As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.

2   As to the consignment of hand luggage and animals as registered luggage see PARA 707.

- 3 As to the luggage registration voucher see PARA 708.
- 4 As to the General Conditions of Carriage see PARA 703 note 6.
- 5 COTIF Convention Appendix A (CIV) arts 21.1, 25. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.
- 6 COTIF Convention Appendix A (CIV) art 21.2.

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### **713. Delivery of registered luggage and vehicles.**

Registered luggage<sup>1</sup> and vehicles<sup>2</sup> are delivered on surrender of the luggage registration voucher or vehicle carriage voucher<sup>3</sup> and, where appropriate, on payment of the amounts chargeable against the consignment or vehicle<sup>4</sup>; failing surrender of the voucher, the carrier is only obliged to deliver the luggage or vehicle to the person proving his right thereto<sup>5</sup>. The holder of the luggage registration voucher or vehicle carriage voucher may require delivery of the luggage or vehicle at the place of destination<sup>6</sup> as soon as the agreed time and, where appropriate, the time necessary for the operations carried out by customs or other administrative authorities, has elapsed<sup>7</sup>. In all other respects delivery of luggage and vehicles must be carried out in accordance with the prescriptions in force at the place of destination<sup>8</sup>.

- 1 As to the consignment of hand luggage and animals as registered luggage see PARA 707.
- 2 As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.
- 3 As to the luggage registration voucher see PARA 708; as to the vehicle carriage voucher see PARA 710. The carrier is entitled, but not obliged, to examine whether the holder of the voucher is entitled to take delivery: COTIF Convention Appendix A (CIV) arts 22.1, 25. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the meaning of 'carrier' see PARA 685 note 9.
- 4 COTIF Convention Appendix A (CIV) art 22.1. It is equivalent to delivery to the holder of the luggage registration voucher or the vehicle carriage voucher if, in accordance with the prescriptions in force at the place of destination the luggage or vehicle has been handed over to the customs or octroi authorities at their premises or warehouses, when these are not subject to the carrier's supervision, or live animals have been handed over to third parties: Appendix A (CIV) art 22.2.
- 5 COTIF Convention Appendix A (CIV) art 22.4. If the proof offered appears insufficient, the carrier may require security to be given: Appendix A (CIV) art 22.4. The person entitled may refuse to accept the luggage if the carrier does not comply with his request to carry out an examination of the registered luggage in order to establish alleged damage: Appendix A (CIV) art 22.7.
- 6 Luggage and vehicles must be delivered at the place of destination for which they have been registered or consigned: COTIF Convention Appendix A (CIV) art 22.5. The person entitled may, without being required to furnish further proof, consider an item of luggage or a vehicle as lost when it has not been delivered or placed at his disposal within 14 days after the making of a request for delivery: see the COTIF Convention Appendix A (CIV) arts 40.1, 47; and PARA 730.
- 7 COTIF Convention Appendix A (CIV) art 22.3. The holder of a luggage registration voucher whose luggage has not been delivered may require the day and time to be endorsed on the voucher when he requested delivery in accordance with Appendix A (CIV) art 22.3: Appendix A (CIV) art 22.6.
- 8 COTIF Convention Appendix A (CIV) art 22.8.

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#### **714. Condition of luggage and vehicles.**

Subject to evidence to the contrary it will be presumed that when the carrier<sup>1</sup> took over the registered luggage<sup>2</sup> or vehicle<sup>3</sup> it was apparently in a good condition and in a form corresponding to the entries on the luggage registration voucher<sup>4</sup> or the vehicle carriage voucher<sup>5</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 As to the consignment of hand luggage and animals as registered luggage see PARA 707.

3 As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.

4 As to the luggage registration voucher see PARA 708.

5 COTIF Convention Appendix A (CIV) arts 16.4, 25. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the vehicle carriage voucher see PARA 710. In the case of luggage, the number and the mass of the items of luggage must correspond to the entries on the luggage registration voucher: Appendix A (CIV) art 16.4.

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#### **715. Examination of luggage and vehicles to determine compliance with contract.**

When there is good reason to suspect a failure to observe the conditions of carriage, the carrier<sup>1</sup> has the right to examine whether the articles (hand luggage, registered luggage, vehicles<sup>2</sup> including their loading) and animals carried comply with the conditions of carriage, unless the laws and prescriptions of the state in which the examination would take place prohibit such examination<sup>3</sup>. The passenger must be invited to attend the examination, and if he does not appear or cannot be reached the carrier must require the presence of two independent witnesses<sup>4</sup>. If it is established that the conditions of carriage have not been respected, the carrier may require the passenger to pay the costs arising from the examination<sup>5</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9.

2 As to the meaning of 'vehicle' see PARA 703 note 2.

3 COTIF Convention Appendix A (CIV) art 13.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

4 COTIF Convention Appendix A (CIV) art 13.1.

5 COTIF Convention Appendix A (CIV) art 13.2.

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### **(iii) Carriers' Liability**

#### **A. CARRIAGE OF GOODS**

##### **716. Basis of liability and relief from liability.**

The carrier of goods<sup>1</sup> is liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over of the goods and the time of delivery and for the loss or damage resulting from the transit period being exceeded, whatever the railway infrastructure used<sup>2</sup>. This includes liability for wastage in transit<sup>3</sup>. The carrier will, however, be relieved of his liability:

- 100 (1) to the extent that the loss or damage or the exceeding of the transit period was caused by the person entitled<sup>4</sup>, by an inherent defect in the goods or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent<sup>5</sup>; and
- 101 (2) to the extent that the loss or damage arises from the special risks inherent in one or more of<sup>6</sup>:
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- 1. (a) carriage in open wagons<sup>7</sup>;
- 2. (b) absence or inadequacy of packaging<sup>8</sup>;
- 3. (c) loading of the goods by the consignor or unloading by the consignee<sup>9</sup>;
- 4. (d) the nature of certain goods which particularly exposes them to total or partial loss or damage<sup>10</sup>;
- 5. (e) irregular, incorrect or incomplete description or numbering of packages<sup>11</sup>;
- 6. (f) carriage of live animals<sup>12</sup>; and
- 7. (g) carriage which, pursuant to applicable provisions or agreements made between the consignor and the carrier and entered on the consignment note, must be accompanied by an attendant<sup>13</sup>.
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A modified version of these provisions applies in the case of carriage of railway vehicles running on their own wheels and consigned as goods<sup>14</sup>, and additional provision is made in respect of rail-sea services<sup>15</sup>. A carrier will also be relieved of liability pursuant to the CIM Rules for loss or damage caused by a nuclear incident<sup>16</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

2 COTIF Convention Appendix B (CIM) art 23.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to the carrier's liability for loss, damage and delay, and compensation, see further PARA 718 et seq.

When partial loss or damage is discovered or presumed by the carrier or alleged by the person entitled the carrier must without delay, and if possible in the presence of the person entitled, draw up a report stating, according to the nature of the loss or damage, the condition of the goods, their mass and, as far as possible, the

extent of the loss or damage, its cause and the time of its occurrence: Appendix B (CIM) art 42.1. A copy of that report must be supplied free of charge to the person entitled who, should he not accept the findings in the report, may request that the condition and mass of the goods and the cause and amount of the loss or damage be ascertained by an expert appointed either by the parties to the contract of carriage or by a court or tribunal: Appendix B (CIM) arts 42.2, 42.3. The procedure to be followed will be governed by the laws and prescriptions of the state in which such ascertainment takes place: Appendix B (CIM) art 42.3.

3 See the COTIF Convention Appendix B (CIM) art 31; and PARA 721.

4 If the loss or damage or the exceeding of the transit period was caused by the fault of the person entitled or by an order given by that person other than as a result of the fault of the carrier: COTIF Convention Appendix B (CIM) art 23.2. The burden of proving that the loss, damage or exceeding of the transit period was due to one of the causes specified in Appendix B (CIM) art 23.2 lies on the carrier: Appendix B (CIM) art 25.1.

5 COTIF Convention Appendix B (CIM) art 23.2. As to the burden of proof see note 4.

6 When the carrier establishes that, having regard to the circumstances of a particular case, the loss or damage could have arisen from one or more of the special risks referred to in the COTIF Convention Appendix B (CIM) art 23.3 (see the text and notes 7-13), it will be presumed that it did so arise, although the person entitled has the right to prove that the loss or damage was not attributable either wholly or in part to one of those risks: Appendix B (CIM) art 25.2.

7 If carriage in open wagons pursuant to the General Conditions of Carriage or when it has been expressly agreed and entered in the consignment note: COTIF Convention Appendix B (CIM) art 23.3(a). Subject to damage sustained by the goods because of atmospheric influences, goods carried in intermodal transport units and in closed road vehicles carried on wagons are not considered as being carried in open wagons; and if, for the carriage of goods in open wagons, the consignor uses sheets, the carrier must assume the same liability as falls to him for carriage in open wagons without sheeting, even in respect of goods which, according to the General Conditions of Carriage, are not carried in open wagons: Appendix B (CIM) art 23.3(a). As to the consignment note see PARAS 691-695. As to the General Conditions of Carriage see PARA 703 note 6. As to the meaning of 'intermodal transport unit' see PARA 693 note 14.

The presumption of the loss or damage arising from the specified risk (see note 6) will not apply in a case falling within these circumstances if an abnormally large quantity has been lost or if a package has been lost: Appendix B (CIM) art 25.3.

8 If in the case of goods which by their nature are liable to loss or damage when not packed or when not packed properly: COTIF Convention Appendix B (CIM) art 23.3(b).

9 COTIF Convention Appendix B (CIM) art 23.3(c).

10 If especially through breakage, rust, interior and spontaneous decay, desiccation or wastage: COTIF Convention Appendix B (CIM) art 23.3(d).

11 COTIF Convention Appendix B (CIM) art 23.3(e).

12 COTIF Convention Appendix B (CIM) art 23.3(f).

13 If the loss or damage results from a risk which the attendant was intended to avert: COTIF Convention Appendix B (CIM) art 23.3(g).

14 In case of carriage of railway vehicles running on their own wheels and consigned as goods, the carrier is liable for the loss or damage resulting from the loss of, or damage to, the vehicle or to its removable parts arising between the time of taking over for carriage and the time of delivery and for loss or damage resulting from exceeding the transit period, unless he proves that the loss or damage was not caused by his fault: COTIF Convention Appendix B (CIM) art 24.1. The carrier shall not be liable for loss or damage resulting from the loss of accessories which are not mentioned on both sides of the vehicle or in the inventory which accompanies it: Appendix B (CIM) art 24.2.

15 In rail-sea carriage by the services referred to in the COTIF Convention art 24.1 any member state may, by requesting that a suitable note be included in the list of services to which the CIM Rules apply, add the following grounds for exemption from liability in their entirety to those provided for in Appendix B (CIM) art 23: (1) fire, if the carrier proves that it was not caused by his act or default, or that of the master, a mariner, the pilot or the carrier's servants (Appendix B (CIM) art 38.1(a)); (2) saving or attempting to save life or property at sea (Appendix B (CIM) art 38.1(b)); (3) loading of goods on the deck of the ship, if they are so loaded with the consent of the consignor given on the consignment note and are not in wagons (Appendix B (CIM) art 38.1(c)); and (4) perils, dangers and accidents of the sea or other navigable waters (Appendix B (CIM) art 38.1(d)). The carrier may avail himself of these grounds for exemption only if he proves that the loss, damage or exceeding the transit period occurred in the course of the journey by sea between the time when the goods were loaded

on board the ship and the time when they were unloaded from the ship (Appendix B (CIM) art 38.2), and when the carrier relies on these grounds he nevertheless remains liable if the person entitled proves that the loss, damage or exceeding the transit period was due to the fault of the carrier, the master, a mariner, the pilot or the carrier's servants (Appendix B (CIM) art 38.3). Where a sea route is served by several undertakings included in the list of services in accordance with the COTIF Convention art 24.1, the liability regime applicable to that route must be the same for all those undertakings, and where those undertakings have been included in the list at the request of several member states, the adoption of such regime must be the subject of prior agreement between those states: Appendix B (CIM) art 38.4. The measures taken in accordance with Appendix B (CIM) arts 38.1, 38.4 must be notified to OTIF and will come into force at the earliest at the expiry of a period of 30 days from the day on which OTIF notifies them to the other member states: Appendix B (CIM) art 38.5. Consignments already in transit will not be affected by such measures: Appendix B (CIM) art 38.5. As to 'member state' see PARA 685 note 2.

16 COTIF Convention Appendix B (CIM) art 39. The carrier will be relieved of liability only where when the operator of a nuclear installation or another person who is substituted for him is liable for the loss or damage pursuant to the laws and prescriptions of a state governing liability in the field of nuclear energy: Appendix B (CIM) art 39.

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### **717. Presumption of loss or damage.**

The person entitled may, without being required to furnish further proof, consider goods as lost when they have not been delivered to the consignee or placed at his disposal within 30 days after the expiry of the transit periods<sup>1</sup>.

When a consignment consigned in accordance with the CIM Rules has been reconsigned subject to those rules and partial loss or damage has been ascertained after that reconsignment, it is presumed that it occurred under the latest contract of carriage if the consignment remained in the charge of the carrier<sup>2</sup> and was reconsigned in the same condition as when it arrived at the place from which it was reconsigned<sup>3</sup>.

1 COTIF Convention Appendix B (CIM) art 29.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to compensation for loss see PARA 718.

2 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

3 COTIF Convention Appendix B (CIM) art 28.1. This presumption also applies: (1) when the contract of carriage prior to the reconsignment was not subject to the CIM Rules if those Rules would have applied in the case of a through consignment from the first place of consignment to the final place of destination (Appendix B (CIM) art 28.2); and (2) when the contract of carriage prior to the reconsignment was subject to a convention concerning international through carriage of goods by rail comparable with the CIM Rules and when such convention contains the same presumption of law in favour of consignments consigned in accordance with the CIM Rules (Appendix B (CIM) art 28.3). As to the reporting of partial loss or damage see PARA 716 note 2.

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### **718. Compensation for loss.**

In case of total or partial<sup>1</sup> loss of the goods, the carrier<sup>2</sup> must pay, to the exclusion of all other damages, compensation calculated:

- 102 (1) according to the commodity exchange quotation<sup>3</sup>; or
- 103 (2) if there is no such quotation, according to the current market price<sup>4</sup>; or
- 104 (3) if there is neither such quotation nor such price, according to the usual value of goods of the same kind and quality on the day and at the place where the goods were taken over<sup>5</sup>.

Compensation may not exceed 17 units of account<sup>6</sup> per kilogramme of gross mass short<sup>7</sup>, although the consignor and the carrier may agree for the consignor to declare in the consignment note<sup>8</sup> a value for the goods exceeding this limit, in which case the compensation may not exceed the declared amount<sup>9</sup>, and the carrier must also refund the carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost<sup>10</sup>. The carrier may lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part<sup>11</sup>, and additional compensation may also be claimed where the consignor has declared a special interest in delivery<sup>12</sup>.

Different limits apply in the case of the loss of a railway vehicle running on its own wheels and consigned as goods, and of intermodal transport units<sup>13</sup>.

1 As to the reporting of partial loss or damage see PARA 716 note 2.

2 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

3 COTIF Convention Appendix B (CIM) art 30.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to liability for loss see PARA 716.

4 COTIF Convention Appendix B (CIM) art 30.1.

5 COTIF Convention Appendix B (CIM) art 30.1.

6 The unit of account referred to in both the CIM Rules and the CIV Rules (as to which see PARA 683) is the Special Drawing Right as defined by the International Monetary Fund: COTIF Convention art 9.1. Provision is also made for the valuation of Special Drawing Rights (see arts 9.2-9.6) and for the conversion of Special Drawing Rights into sterling and other currencies (see the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 7; and the COTIF Convention Appendix A (CIV) art 49, Appendix B (CIM) art 37.

7 COTIF Convention Appendix B (CIM) art 30.2. Where delay or wastage is a factor in the loss, compensation under these provisions is payable in conjunction with the provisions of Appendix B (CIM) art 31 (limitation on liability for wastage) and Appendix B (CIM) art 33 (compensation for delay): see PARAS 720-721.

8 As to the consignment note see PARAS 691-695.

9 COTIF Convention Appendix B (CIM) art 34.

10 COTIF Convention Appendix B (CIM) art 30.4. Excise duties for goods carried under a procedure suspending the listed duties are excluded: Appendix B (CIM) art 30.4.

11 See the COTIF Convention Appendix B (CIM) art 36; and PARA 722.

12 The consignor and the carrier may agree that the consignor may declare, by entering an amount in figures in the consignment note, a special interest in delivery in the case of loss, damage or exceeding of the transit period, and if such a declaration is made further compensation for loss or damage proved may be claimed, up to the amount declared, in addition to the compensation provided for in the COTIF Convention Appendix B (CIM) arts 30, 32 and 33 (see the text and notes 1-10; and PARAS 719-720): Appendix B (CIM) art 35.

13 In the case of the loss of a railway vehicle running on its own wheels and consigned as goods, or of an intermodal transport unit, or of their removable parts, the compensation is limited, to the exclusion of all other

damages, to the usual value of the vehicle or the intermodal transport unit, or their removable parts, on the day and at the place of loss: COTIF Convention Appendix B (CIM) art 30.3. If it is impossible to ascertain the day or the place of the loss, the compensation will be limited to the usual value on the day and at the place where the vehicle has been taken over by the carrier: Appendix B (CIM) art 30.3. As to the meaning of 'intermodal transport unit' see PARA 693 note 14.

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### 719. Compensation for damage.

In the case of damage to goods, the carrier<sup>1</sup> must pay, to the exclusion of all other damages, compensation equivalent to the loss in value of the goods calculated:

- 105 (1) according to the commodity exchange quotation<sup>2</sup>; or
- 106 (2) if there is no such quotation, according to the current market price<sup>3</sup>; or
- 107 (3) if there is neither such quotation nor such price, according to the usual value of goods of the same kind and quality on the day and at the place where the goods were taken over<sup>4</sup>,

and applying to the value of the goods so defined the percentage of loss in value noted at the place of destination<sup>5</sup>. The compensation may not exceed either the amount which would have been payable in the case of total or partial loss<sup>6</sup>, but the carrier must also refund the carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost<sup>7</sup>. The carrier may lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part<sup>8</sup>, and additional compensation may also be claimed where the consignor has declared a special interest in delivery<sup>9</sup>.

Different limits apply in the case of the loss of a railway vehicle running on its own wheels and consigned as goods, and of intermodal transport units<sup>10</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

2 COTIF Convention Appendix B (CIM) arts 30.1, 32.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to liability for damage see PARA 716.

3 COTIF Convention Appendix B (CIM) art 30.1.

4 COTIF Convention Appendix B (CIM) art 30.1.

5 COTIF Convention Appendix B (CIM) art 32.1.

6 Thus the compensation may not exceed: (1) if the whole consignment has lost value through damage, the amount which would have been payable in the case of total loss; and (2) if only part of the consignment has lost value through damage, the amount which would have been payable had that part been lost: COTIF Convention Appendix B (CIM) art 32.2. Where delay or wastage is a factor in the loss, compensation under these provisions is payable in conjunction with the provisions of Appendix B (CIM) art 31 (limitation on liability for wastage) and Appendix B (CIM) art 33 (compensation for delay): see PARAS 720, 721. As to the reporting of partial loss or damage see PARA 716 note 2.

7 COTIF Convention Appendix B (CIM) arts 30.4, 32.4. Excise duties for goods carried under a procedure suspending the listed duties are excluded: Appendix B (CIM) art 30.4.

8 See the COTIF Convention Appendix B (CIM) art 36; and PARA 722.

9 See the COTIF Convention Appendix B (CIM) art 35; and PARA 718 note 12.

10 In the case of damage to a railway vehicle running on its own wheels and consigned as goods, or of an intermodal transport unit, or of their removable parts, the compensation will be limited, to the exclusion of all other damages, to the cost of repair, and may not exceed the amount payable in case of loss: COTIF Convention Appendix B (CIM) art 32.3. As to the meaning of 'intermodal transport unit' see PARA 693 note 14.

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## **720. Compensation for delay.**

If loss or damage results from the transit period being exceeded, the carrier<sup>1</sup> must pay compensation not exceeding four times the carriage charge<sup>2</sup>, although any such payments will be affected by any other payments made under the CIM Rules in respect of loss or damage to the goods<sup>3</sup>. Where the consignor and the carrier have established the transit period by agreement<sup>4</sup>, other forms of compensation may also be so agreed<sup>5</sup>, and additional compensation may be claimed where the consignor has declared a special interest in delivery<sup>6</sup>; the carrier may also lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part<sup>7</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

2 COTIF Convention Appendix B (CIM) art 33.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to liability for delay see PARA 716.

3 In the case of total loss of the goods, the compensation provided for under these provisions is not payable in addition to that provided for in COTIF Convention Appendix B (CIM) art 30 (compensation for loss: see PARA 718), and in case of partial loss of the goods the compensation provided for under these provisions may not exceed four times the carriage charge in respect of that part of the consignment which has not been lost: Appendix B (CIM) arts 33.2, 33.3. In the case of damage to the goods, not resulting from the transit period being exceeded, the compensation provided for under these provisions may, where appropriate, be payable in addition to that provided for in Appendix B (CIM) art 32 (compensation for damage: see PARA 719): Appendix B (CIM) art 33.4. In no case may the total of compensation provided for under these provisions together with that provided for in Appendix B (CIM) arts 30, 32 exceed the compensation which would be payable in case of total loss of the goods: Appendix B (CIM) art 33.5. As to the reporting of partial loss or damage see PARA 716 note 2.

4 In accordance with the COTIF Convention Appendix B (CIM) art 16.1 (see PARA 693).

5 See the COTIF Convention Appendix B (CIM) art 33.6.

6 See the COTIF Convention Appendix B (CIM) art 35; and PARA 718 note 12.

7 See the COTIF Convention Appendix B (CIM) art 36; and PARA 722.

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## **721. Limitation of liability for wastage.**

In respect of goods which, by reason of their nature, are generally subject to wastage in transit by the sole fact of carriage, the carrier<sup>1</sup> is liable only to the extent that the wastage exceeds (whatever the length of the route) either 2 per cent of the mass for liquid goods or goods consigned in a moist condition or 1 per cent of the mass for dry goods<sup>2</sup>. Where several packages are carried under a single consignment note<sup>3</sup>, the wastage in transit must be calculated separately for each package if its mass on consignment is shown separately on the consignment note or can be ascertained otherwise<sup>4</sup>. In the case of total loss of goods or loss of a package, no deduction for wastage in transit may be made in calculating the compensation<sup>5</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

2 COTIF Convention Appendix B (CIM) art 31.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. As to liability generally see PARA 716. This limitation may not be invoked if, having regard to the circumstances of a particular case, it is proved that the loss was not due to causes which would justify the allowance: Appendix B (CIM) art 31.2. Appendix B (CIM) art 31 does not derogate from Appendix B (CIM) arts 23, 25 (basis of liability and burden of proof: see PARA 716): Appendix B (CIM) art 31.5.

3 As to the consignment note see PARAS 691-695.

4 COTIF Convention Appendix B (CIM) art 31.3.

5 COTIF Convention Appendix B (CIM) art 31.4.

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## 722. Loss of right to invoke limits of liability.

The limits of liability in respect of:

- 108 (1) the loss or misuse of documents relating to the consignment note<sup>1</sup>;
- 109 (2) the carrier's implementation of the modification of the contract of carriage<sup>2</sup>;
- 110 (3) the payment of compensation for the loss of goods<sup>3</sup>;
- 111 (4) the payment of compensation for damage to goods<sup>4</sup>; and
- 112 (5) the payment of compensation for delay<sup>5</sup>,

do not apply if it is proved that the loss or damage resulted from an act or omission which the carrier<sup>6</sup> has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result<sup>7</sup>.

1 Ie the limits of liability provided for in the COTIF Convention Appendix B (CIM) art 15.3 (see PARA 689). As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683.

2 Ie the limits of liability provided for in the COTIF Convention Appendix B (CIM) arts 19.6, 19.7 (see PARA 700).

3 Ie the limits of liability provided for in the COTIF Convention Appendix B (CIM) arts 30, 34, 35 (see PARA 718).

4 Ie the limits of liability provided for in the COTIF Convention Appendix B (CIM) arts 32, 35 (see PARA 719).

5 le the limits of liability provided for in the COTIF Convention Appendix B (CIM) arts 33, 35 (see PARA 720).

6 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

7 COTIF Convention Appendix B (CIM) art 36.

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### **723. Recovery of lost goods.**

The person entitled may, on receipt of the payment of compensation for lost goods<sup>1</sup>, make a written request to be notified without delay should the goods be recovered within one year after the payment of compensation<sup>2</sup>, and within 30 days after receipt of any such notification may require the goods to be delivered to him<sup>3</sup>. In the absence of such a request or of instructions given within the 30-day period, or where the goods are recovered more than one year after the payment of compensation, the carrier may dispose of them in accordance with the laws and prescriptions in force at the place where the goods are situated<sup>4</sup>.

1 As to compensation for loss see PARA 718. As to the presumption of loss see PARA 717.

2 COTIF Convention Appendix B (CIM) art 29.2. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683. The carrier must acknowledge such request in writing. As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

3 COTIF Convention Appendix B (CIM) art 29.3. Such delivery will be against payment of the costs resulting from the contract of carriage and against refund of the compensation received, less, where appropriate, costs which may have been included therein, although the person entitled retains his rights to claim compensation for exceeding the transit period provided for in Appendix B (CIM) arts 33, 35 (see PARA 720): Appendix B (CIM) art 29.3.

4 COTIF Convention Appendix B (CIM) art 29.4.

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## ***B. CARRIAGE OF PASSENGERS***

### **724. Basis of liability and relief from liability.**

A carrier of passengers<sup>1</sup> is liable for the loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used<sup>2</sup>, although he will be relieved of this liability:

- 113 (1) if the accident has been caused by circumstances not connected with the operation of the railway and which the carrier, in spite of having taken the care

- required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent<sup>3</sup>;
- 114 (2) to the extent that the accident is due to the fault of the passenger<sup>4</sup>; and
- 115 (3) if the accident is due to the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent<sup>5</sup>.

The provisions relating to the liability of the carrier in case of death of, or personal injury to, passengers do not apply to loss or damage arising in the course of carriage which, in accordance with the contract of carriage, was not carriage by rail<sup>6</sup>, although the carrier will be liable pursuant to these provisions where because of exceptional circumstances the operation of the railway is temporarily suspended and the passengers are carried by another mode of transport<sup>7</sup>. The carrier may lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part<sup>8</sup>, but will be relieved of liability pursuant to the CIV Rules for loss or damage caused by a nuclear incident<sup>9</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. If carriage governed by a single contract of carriage is performed by successive carriers, the carrier bound pursuant to the contract of carriage to provide the service of carriage in the course of which the accident happened is liable under these provisions, and when the service has not been provided by the carrier but by a substitute carrier, the two carriers are jointly and severally liable: COTIF Convention Appendix A (CIV) art 26.5. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers generally see PARAS 686-687. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

2 COTIF Convention Appendix A (CIV) art 26.1. The CIV Rules do not affect any liability which may be incurred by the carrier in cases not provided for in Appendix A (CIV) art 26.1: Appendix A (CIV) art 26.4.

3 COTIF Convention Appendix A (CIV) art 26.2(a).

4 COTIF Convention Appendix A (CIV) art 26.2(b).

5 COTIF Convention Appendix A (CIV) art 26.2(c). Another undertaking using the same railway infrastructure will not be considered as a third party for these purposes and the right of recourse is not affected: Appendix A (CIV) art 26.2(c). If the accident is due to the behaviour of a third party and if, in spite of that, the carrier is not entirely relieved of his liability in accordance with Appendix A (CIV) art 26.2(c), he will be liable in full up to the limits laid down in the CIV Rules (as to which see PARA 683) but without prejudice to any right of recourse which the carrier may have against the third party: Appendix A (CIV) art 26.3.

6 COTIF Convention Appendix A (CIV) art 31.1. Where railway vehicles are carried by ferry the provisions relating to liability in the case of death of or personal injury to passengers apply to loss or damage referred to in Appendix A (CIV) art 26.1 (see the text and notes 1-2) and Appendix A (CIV) art 33.1 (see PARA 729), caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from the said vehicles: Appendix A (CIV) art 31.2.

7 COTIF Convention Appendix A (CIV) art 31.3.

8 See the COTIF Convention Appendix A (CIV) art 48; and PARA 728.

9 A carrier is relieved of liability pursuant to the CIV Rules for loss or damage caused by a nuclear incident when the operator of a nuclear installation or another person who is substituted for him is liable for the loss or damage pursuant to the laws and prescriptions of a state governing liability in the field of nuclear energy: COTIF Convention Appendix A (CIV) art 50.

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## **725. Damages for personal injury and death.**

In the case of personal injury or any other physical or mental harm to a passenger<sup>1</sup> the damages comprise:

- 116 (1) any necessary costs, in particular those of treatment and transport<sup>2</sup>; and
- 117 (2) compensation for financial loss, due to total or partial incapacity to work, or to increased needs<sup>3</sup>.

In the case of the death of a passenger the damages comprise:

- 118 (a) any necessary costs following the death, in particular those of transport of the body and the funeral expenses<sup>4</sup>; and
- 119 (b) if death does not occur at once, the damages provided for in heads (1) to (2) above in the case of personal injury or other physical or mental harm<sup>5</sup>.

Whether, and to what extent, a carrier must pay damages for bodily harm other than that for which the CIV Rules make provision<sup>6</sup> is a matter for national law<sup>7</sup>.

1 As to the carrier's liability for the injury or death of a passenger see PARA 724.

2 COTIF Convention Appendix A (CIV) art 28(a). As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

3 COTIF Convention Appendix A (CIV) art 28(b). Such damages must be awarded in the form of a lump sum unless national law permits payment of an annuity, in which case the damages must be awarded in that form if so requested by the injured passenger: Appendix A (CIV) art 30.1. The amount of damages to be awarded pursuant to this provision must be determined in accordance with national law, although for the purposes of the CIV Rules the upper limit per passenger is set at 175,000 units of account as a lump sum or as an annual annuity corresponding to that sum, where national law provides for an upper limit of less than that amount: Appendix A (CIV) art 30.2. The carrier may lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part: see Appendix A (CIV) art 48; and PARA 728. As to the unit of account see PARA 718 note 6.

4 COTIF Convention Appendix A (CIV) art 27(a).

5 COTIF Convention Appendix A (CIV) art 27(b).

6 Ie bodily harm other than that for which there is provision in the COTIF Convention Appendix A (CIV) arts 27, 28 (see the text and notes 1-5; and PARA 726).

7 COTIF Convention Appendix A (CIV) art 29. As to 'national law' see PARA 683 note 2.

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## **726. Payments to dependants on death of passenger.**

If through the death of a passenger persons whom that passenger had, or would have had, a legal duty to maintain are deprived of their support, those persons are entitled to be compensated for that loss<sup>1</sup>. Such damages must be awarded in the form of a lump sum unless national law permits payment of an annuity, in which case the damages must be awarded in that form if so requested by the entitled persons<sup>2</sup>.

1 COTIF Convention Appendix A (CIV) art 27.2. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

Where a person has a right of action in respect of the death of a passenger by reason of his being a person whom the passenger was under a legal duty to maintain no action in respect of the passenger's death may be brought for the benefit of that person under the Fatal Accidents Act 1976 (Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 5(1)(a); COTIF Convention Appendix A (CIV) art 27.2), although this does not affect the right of any person to claim damages for bereavement under the Fatal Accidents Act 1976 s 1A (see **DAMAGES** vol 12(1) (Reissue) PARA 938; **NEGLIGENCE** vol 78 (2010) PARA 25), and nothing in s 2(3) (not more than one action in respect of the same subject matter of complaint: see **NEGLIGENCE** vol 78 (2010) PARA 26) prevents an action being brought under that Act for the benefit of any other person (Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 5(1)(b), (2)). The Fatal Accidents Act 1976 s 4 (exclusion of certain benefits in assessment of damages: see **DAMAGES** vol 12(1) (Reissue) PARA 935) applies in relation to an action brought by any person under the CIV Rules as it applies in relation to an action under the Fatal Accidents Act 1976: Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 5(3). Where separate proceedings are brought under the CIV Rules and under the Fatal Accidents Act 1976 in respect of the death of a passenger a court, in awarding damages under the Act, must take into account any damages awarded in the proceedings brought under the CIV Rules and has jurisdiction to make any part of its award conditional on the result of those proceedings: Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 5(4). As to the bringing of actions generally see PARA 738 et seq. As to the terms 'action' and 'claim' see PARA 687 note 10.

2 The amount of damages to be awarded pursuant to this provision must be determined in accordance with national law, although for the purposes of the CIV Rules the upper limit per passenger is set at 175,000 units of account as a lump sum or as an annual annuity corresponding to that sum, where national law provides for an upper limit of less than that amount: Appendix A (CIV) art 30.2. The carrier may lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part: see Appendix A (CIV) art 48; and PARA 728. As to the unit of account see PARA 718 note 6. As to 'national law' see note 1; and PARA 683 note 2.

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## 727. Liability for cancellation, late running and missed connections.

Carriers<sup>1</sup> are liable to passengers for loss or damage resulting from the fact that, by reason of cancellation, the late running of a train or a missed connection, his journey cannot be continued the same day, or that a continuation of the journey the same day could not reasonably be required because of given circumstances<sup>2</sup>, although a carrier will be relieved of his liability when the cancellation, late running or missed connection is attributable to:

- 120 (1) circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent<sup>3</sup>;
- 121 (2) fault on the part of the passenger<sup>4</sup>; or
- 122 (3) the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent<sup>5</sup>.

The damages payable comprise the reasonable costs of accommodation as well as the reasonable costs occasioned by having to notify persons expecting the passenger<sup>6</sup>. Whether, and to what extent, a carrier must pay damages for harm other than that for which the CIV Rules make provision<sup>7</sup> is a matter for national law<sup>8</sup>.

The carrier may lose the right to invoke limits on liability where he is responsible for the loss in whole or in part<sup>9</sup>.

- 1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers generally see PARAS 686-687.
- 2 COTIF Convention Appendix A (CIV) art 32.1. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. These provisions are without prejudice to Appendix A (CIV) art 44 (compensation for delay in the carriage of vehicles: see PARA 733): Appendix A (CIV) art 32.3.
- 3 COTIF Convention Appendix A (CIV) art 32.2(a).
- 4 COTIF Convention Appendix A (CIV) art 32.2(b).
- 5 COTIF Convention Appendix A (CIV) art 32.2(c). Another undertaking using the same railway infrastructure is not a third party for these purposes, and the right of recourse is not affected: Appendix A (CIV) art 32.2(c).
- 6 COTIF Convention Appendix A (CIV) art 32.1.
- 7 The harm other than that for which there is provision in the COTIF Convention Appendix A (CIV) art 32.1 (see the text and notes 1-2).
- 8 COTIF Convention Appendix A (CIV) art 32.3. As to 'national law' see PARA 683 note 2.
- 9 See the COTIF Convention Appendix A (CIV) art 48; and PARA 728.

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## **728. Loss of right to invoke limits of liability.**

The limits of liability provided for in the CIV Rules<sup>1</sup> as well as the provisions of national law<sup>2</sup>, which limit the compensation to a fixed amount do not apply if it is proved that the loss or damage results from an act or omission which the carrier<sup>3</sup> has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result<sup>4</sup>.

- 1 As to the CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.
- 2 As to 'national law' see PARA 683 note 2.
- 3 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers generally see PARAS 686-687. See also note 4.
- 4 COTIF Convention Appendix A (CIV) art 48. All the provisions of the CIV Rules governing the liability of the carrier apply also to the liability of the substitute carrier for the carriage performed by him, and Appendix A (CIV) art 48 also applies if an action is brought against the servants or any other persons whose services the substitute carrier makes use of for the performance of the carriage: Appendix A (CIV) art 39.2.

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Carriers' Liability/C. CARRIAGE OF LUGGAGE, VEHICLES AND OTHER ITEMS/729. Liability in respect of loss of or damage to luggage and animals.

### **C. CARRIAGE OF LUGGAGE, VEHICLES AND OTHER ITEMS**

#### **729. Liability in respect of loss of or damage to luggage and animals.**

Where a carrier of passengers<sup>1</sup> is liable for loss or damage resulting from the death of or injury to a passenger<sup>2</sup> he will also be liable for loss or damage resulting from the total or partial loss of, or damage to, articles which the passenger had on him or with him as hand luggage and for the loss of, or damage to, animals which the passenger had brought with him<sup>3</sup>, although he will be relieved of this liability:

- 123 (1) if the accident has been caused by circumstances not connected with the operation of the railway and which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent<sup>4</sup>;
- 124 (2) to the extent that the accident is due to the fault of the passenger<sup>5</sup>;
- 125 (3) if the accident is due to the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent<sup>6</sup>; or
- 126 (4) if the supervision of the articles, luggage or animals in question is the responsibility of the passenger<sup>7</sup>, unless this loss or damage is caused by the fault of the carrier<sup>8</sup>.

A carrier may lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part<sup>9</sup>, but will be relieved of liability pursuant to the CIV Rules for loss or damage caused by a nuclear incident<sup>10</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. If carriage governed by a single contract of carriage is performed by successive carriers, the carrier bound pursuant to the contract of carriage to provide the service of carriage in the course of which the accident happened is liable under these provisions, and when the service has not been provided by the carrier but by a substitute carrier, the two carriers are jointly and severally liable: COTIF Convention Appendix A (CIV) arts 26.5, 33.1. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers generally see PARAS 686-687. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

2 Ie pursuant to the COTIF Convention Appendix A (CIV) art 26; as to which see PARA 724.

3 COTIF Convention Appendix A (CIV) art 33.1. The carrier is not, however, liable to the passenger for loss or damage arising from the fact that the passenger does not conform to the formalities required by customs or other administrative authorities: Appendix A (CIV) art 35. The CIV Rules also do not affect any liability which may be incurred by the carrier in cases not provided for in Appendix A (CIV) arts 26.1, 33: Appendix A (CIV) art 26.4. Particular provision is made in respect of liability for registered luggage and vehicles: see PARA 731.

When partial loss or damage to an article carried in the charge of the carrier (ie luggage and vehicles) is discovered or presumed by the carrier or alleged by the person entitled the carrier must without delay, and if possible in the presence of the person entitled, draw up a report stating, according to the nature of the loss or damage, the condition of the goods, their mass and, as far as possible, the extent of the loss or damage, its cause and the time of its occurrence: Appendix A (CIV) art 54.1. A copy of that report must be supplied free of charge to the person entitled who, should he not accept the findings in the report, may request that the condition of the luggage or vehicle and the cause and amount of the loss or damage be ascertained by an expert appointed either by the parties to the contract of carriage or by a court or tribunal: Appendix A (CIV) arts 54.2, 54.3. The procedure to be followed will be governed by the laws and prescriptions of the state in which such ascertainment takes place: Appendix B (CIM) art 54.3.

4 COTIF Convention Appendix A (CIV) art 26.2(a).

- 5 COTIF Convention Appendix A (CIV) art 26.2(b).
- 6 COTIF Convention Appendix A (CIV) art 26.2(c). Another undertaking using the same railway infrastructure will not be considered as a third party for these purposes and the right of recourse is not affected: Appendix A (CIV) art 26.2(c). If the accident is due to the behaviour of a third party and if, in spite of that, the carrier is not entirely relieved of his liability in accordance with Appendix A (CIV) art 26.2(c), he will be liable in full up to the limits laid down in the CIV Rules (as to which see PARA 683) but without prejudice to any right of recourse which the carrier may have against the third party: Appendix A (CIV) art 26.3.
- 7 Ie in accordance with the COTIF Convention Appendix A (CIV) art 15; as to which see PARA 706.
- 8 COTIF Convention Appendix A (CIV) art 33.2.
- 9 See the COTIF Convention Appendix A (CIV) art 48; and PARA 728.
- 10 See COTIF Convention Appendix A (CIV) art 50; and PARA 724 note 9.

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### **730. Presumption of loss.**

The person entitled may, without being required to furnish further proof, consider an item of luggage or a vehicle<sup>1</sup> as lost when it has not been delivered or placed at his disposal within 14 days after the making<sup>2</sup> of a request for delivery<sup>3</sup>.

- 1 As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.
- 2 Ie under the COTIF Convention Appendix A (CIV) art 22.3 (see PARA 713). As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.
- 3 COTIF Convention Appendix A (CIV) arts 40.1, 47. As to compensation for loss see PARA 732.

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### **731. Liability for registered luggage and vehicles.**

The carrier<sup>1</sup> is liable for loss or damage resulting from the total or partial loss of, or damage to, registered luggage<sup>2</sup> and vehicles<sup>3</sup> between the time of taking over by the carrier and the time of delivery, as well as from delay in delivery<sup>4</sup>. The carrier will, however, be relieved of his liability:

- 127 (1) to the extent that the loss, damage or delay was caused by the fault of the passenger, by an order given by the passenger other than as a result of the fault of the carrier, by an inherent defect in the registered luggage or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent<sup>5</sup>; and

128 (2) to the extent that the loss or damage arises from the special risks inherent in one or more of<sup>6</sup>:

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8. (a) absence or inadequacy of packing<sup>7</sup>;

9. (b) the special nature of the luggage<sup>8</sup>; or

10. (c) the consignment as luggage of articles not acceptable for carriage<sup>9</sup>.

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The carrier may lose the right to invoke limits on liability where he is responsible for the loss in whole or in part<sup>10</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

2 As to the consignment of hand luggage and animals as registered luggage see PARA 707.

3 As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.

4 COTIF Convention Appendix A (CIV) arts 36.1, 47. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683. As to the reporting of partial loss or damage see PARA 729 note 3.

5 COTIF Convention Appendix A (CIV) art 36.2. The burden of proving that the loss, damage or delay in delivery was due to one of the causes specified in Appendix A (CIV) art 36.2 lies on the carrier: Appendix A (CIV) art 37.1.

6 When the carrier establishes that, having regard to the circumstances of a particular case, the loss or damage could have arisen from one or more of the special risks referred to in the COTIF Convention Appendix A (CIV) art 36.3 (see the text and notes 7-9), it will be presumed that it did so arise, although the person entitled has the right to prove that the loss or damage was not attributable either wholly or in part to one of those risks: Appendix A (CIV) art 37.2.

7 COTIF Convention Appendix A (CIV) art 36.3(a).

8 COTIF Convention Appendix A (CIV) art 36.3(b).

9 COTIF Convention Appendix A (CIV) art 36.3(c).

10 See the COTIF Convention Appendix A (CIV) art 48; and PARA 728.

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### **732. Compensation for loss or damage.**

When the carrier<sup>1</sup> is liable for the loss of or damage to luggage or animals<sup>2</sup> he must pay compensation up to a limit of 1,400 units of account per passenger<sup>3</sup>.

Different limits apply in respect of registered luggage<sup>4</sup>. In the case of total or partial loss<sup>5</sup> the carrier must pay, to the exclusion of all other damages, either compensation equal to the proved amount of the loss or damage suffered<sup>6</sup> or, if the amount of the loss or damage suffered is not established, liquidated damages<sup>7</sup>, although in each case the amount payable is subject to an upper limit<sup>8</sup>. The carrier must also refund the charge for the carriage of luggage and the other sums paid in relation to the carriage of the lost item as well as the customs duties and

excise duties already paid<sup>9</sup>. In case of damage to registered luggage, the carrier must pay compensation equivalent to the loss in value of the luggage, to the exclusion of all other damages but again subject to an upper limit<sup>10</sup>. Where compensation is payable for loss and damage and for delay, an upper limit is applicable to the combined payments<sup>11</sup>.

In the case of the total or partial loss of a vehicle<sup>12</sup> the compensation payable to the person entitled for the loss or damage proved will be calculated on the basis of the usual value of the vehicle, again subject to an upper limit<sup>13</sup>. In respect of articles left inside the vehicle or situated in boxes fixed to the vehicle<sup>14</sup> the carrier is liable only for loss or damage caused by his fault, and the level of compensation is subject to an upper limit<sup>15</sup>. The carrier may, however, lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part<sup>16</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

2 I.e. under the COTIF Convention Appendix A (CIV) art 33.1 (see PARA 729). As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

3 COTIF Convention Appendix A (CIV) art 34. As to the unit of account see PARA 718 note 6.

4 As to the consignment of hand luggage and animals as registered luggage see PARA 707.

5 As to the reporting of partial loss or damage see PARA 729 note 3.

6 COTIF Convention Appendix A (CIV) art 41.1(a).

7 COTIF Convention Appendix A (CIV) art 41.1(b).

8 If the amount of the loss or damage suffered is proved, compensation may not exceed 80 units of account per kilogram of gross mass short or 1200 units of account per item of luggage, and if the amount of the loss or damage suffered is not established, liquidated damages are payable of 20 units of account per kilogram of gross mass short or 300 units of account per item of luggage: COTIF Convention Appendix A (CIV) art 41.1. The method of compensation, by kilogram missing or by item of luggage, is determined by the General Conditions of Carriage: Appendix A (CIV) art 41.1. As to the General Conditions of Carriage see PARA 703 note 6.

9 COTIF Convention Appendix A (CIV) art 41.2.

10 COTIF Convention Appendix A (CIV) art 42.1. The compensation may not exceed: (1) if all the luggage has lost value through damage, the amount which would have been payable in case of total loss (Appendix A (CIV) art 42.2(a)); or (2) if only part of the luggage has lost value through damage, the amount which would have been payable had that part been lost (Appendix A (CIV) art 42.2(b)).

11 See the COTIF Convention Appendix A (CIV) art 43.5; and PARA 733.

12 As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710. For the purposes of calculating compensation for loss or damage a loaded or unloaded trailer is considered as a separate vehicle: COTIF Convention Appendix A (CIV) art 45.

13 COTIF Convention Appendix A (CIV) art 45. Compensation may not exceed 8000 units of account: Appendix A (CIV) art 45.

14 The carrier is liable in respect of articles placed or stowed on the outside of the vehicle, including for example articles stowed in luggage or ski boxes, only if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such a loss or damage or recklessly and with knowledge that such loss or damage would probably result: COTIF Convention Appendix A (CIV) art 46.2.

15 COTIF Convention Appendix A (CIV) art 46.1. The total compensation payable may not exceed 1400 units of account: Appendix A (CIV) art 46.1.

16 See the COTIF Convention Appendix A (CIV) art 48; and PARA 728.

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### 733. Compensation for delay.

Compensation for delay is payable only in respect of registered luggage<sup>1</sup> and vehicles<sup>2</sup>. In the case of delay in delivery of registered luggage the carrier<sup>3</sup> must pay in respect of each whole period of 24 hours after delivery has been requested either compensation equal to the proved amount of the loss or damage suffered<sup>4</sup> or, if the loss or damage suffered is not proved, liquidated damages<sup>5</sup>, although in each case the amount payable is subject to an upper limit<sup>6</sup> and the period for which compensation is payable is subject to a maximum of 14 days<sup>7</sup>. Compensation for delay is not payable in addition to compensation for lost luggage<sup>8</sup> but may be payable in addition to compensation for damaged luggage<sup>9</sup>, although the total of compensation for delay together with that payable for loss or damage cannot exceed the compensation which would be payable in case of total loss<sup>10</sup>.

Where a delay in loading a vehicle is for a reason attributable to the carrier or the delivery of a vehicle is delayed for any reason the carrier must, if the person entitled proves that loss or damage has been suffered thereby, pay compensation not exceeding the amount of the carriage charge<sup>11</sup>. If the delay in loading is for a reason attributable to the carrier and the person entitled elects not to proceed with the contract of carriage, the carriage charge must be refunded to him, and the person may also, if he proves that loss or damage has been suffered as a result of the delay, claim compensation not exceeding the carriage charge<sup>12</sup>. The carrier may, however, lose the right to invoke the limits on liability where he is responsible for the loss in whole or in part<sup>13</sup>.

1 As to the consignment of hand luggage and animals as registered luggage see PARA 707.

2 As to the meaning of 'vehicle' see PARA 703 note 2. As to the carriage of vehicles see PARA 710.

3 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

4 COTIF Convention Appendix A (CIV) art 43.1(a). As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

5 COTIF Convention Appendix A (CIV) art 43.1(b).

6 If the amount of the loss or damage suffered is proved, compensation may not exceed 0.80 units of account per kilogram of gross mass of the luggage or 14 units of account per item of luggage delivered late, and if the amount of the loss or damage suffered is not proved, liquidated damages are payable of 0.14 units of account per kilogram of gross mass of the luggage or 2.80 units of account per item of luggage delivered late: COTIF Convention Appendix A (CIV) art 43.1. The method of compensation, by kilogram missing or by item of luggage, is determined by the General Conditions of Carriage: Appendix A (CIV) art 43.1. As to the unit of account see PARA 718 note 6. As to the General Conditions of Carriage see PARA 703 note 6.

7 COTIF Convention Appendix A (CIV) art 43.1.

8 In case of total loss of luggage, the compensation provided for in the COTIF Convention Appendix A (CIV) art 43.1 (see the text and notes 3-7) is not payable in addition to that provided for in Appendix A (CIV) art 41 (see PARA 732) and in case of partial loss of luggage the compensation provided for in Appendix A (CIV) art 43.1 is payable only in respect of that part of the luggage which has not been lost: Appendix A (CIV) arts 43.2, 43.3. As to the reporting of partial loss or damage see PARA 729 note 3.

9 In the case of damage to luggage not resulting from delay in delivery the compensation provided for in Appendix A (CIV) art 43.1 will, where appropriate, be payable in addition to that provided for in Appendix A (CIV) art 42 (see PARA 732): Appendix A (CIV) art 43.4.

10 COTIF Convention Appendix A (CIV) art 43.5.

11 COTIF Convention Appendix A (CIV) art 44.1.

12 COTIF Convention Appendix A (CIV) art 44.2.

13 See the COTIF Convention Appendix A (CIV) art 48; and PARA 728.

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### **734. Recovery of lost luggage and vehicles.**

If an item of luggage or a vehicle deemed to have been lost<sup>1</sup> is recovered within one year after the request for delivery, the carrier<sup>2</sup> must notify the person entitled if his address is known or can be ascertained<sup>3</sup>, and within 30 days after receipt of any such notification the person entitled may require the luggage or vehicle to be delivered to him<sup>4</sup>. In the absence of such a claim made within the 30-day period, or where the luggage or vehicle is recovered more than one year after the request for delivery, the carrier may dispose of it in accordance with the laws and prescriptions in force at the place where the luggage or vehicle is situated<sup>5</sup>.

1 As to compensation for loss see PARA 732. As to the presumption of loss see PARA 730.

2 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

3 COTIF Convention Appendix A (CIV) arts 40.2, 47. As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIV Rules see PARA 683.

4 COTIF Convention Appendix A (CIV) art 40.3. Such delivery will be against payment of the charges in respect of the carriage of the item from the place of consignment to the place where delivery is effected and against refund of the compensation received, less, where appropriate, any costs which may have been included therein, although the person entitled retains his rights to claim compensation for delay provided for in Appendix A (CIV) art 43 (see PARA 733): Appendix A (CIV) art 40.3.

5 COTIF Convention Appendix A (CIV) art 40.4.

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## **(iv) Claims and Proceedings**

### **A. PROCEDURE FOR MAKING CLAIMS**

#### **735. Making claims under the CIV Rules.**

Claims<sup>1</sup> under the CIV Rules<sup>2</sup> relating to the liability of the carrier<sup>3</sup> in case of death of, or personal injury to, passengers must be addressed in writing to the carrier against whom a claim may be brought<sup>4</sup>. In the case of a carriage governed by a single contract and performed by successive carriers the claims may also be addressed to the first or the last carrier as well as to the carrier having his principal place of business or the branch or agency which concluded the contract of carriage in the state where the passenger is domiciled or habitually resident<sup>5</sup>. Other claims relating to the contract of carriage must be addressed in writing to either the first carrier, the last carrier or the carrier having performed the part of carriage on which the event giving rise to the proceedings occurred<sup>6</sup> or, in the case of carriage performed by successive carriers, the carrier who must deliver the luggage or the vehicle<sup>7</sup>. Provision is also made in connection with the documentation required to accompany claims<sup>8</sup>.

1 Note that the terms 'action' and 'claim' in the CIV Rules and the CIM Rules are not synonymous or interchangeable and their respective usage does not correspond to the usage of those terms in civil procedure in England and Wales under the Civil Procedure Rules; rather, they should be given their natural meaning.

2 As to the CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

3 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

4 COTIF Convention Appendix A (CIV) art 55.1.

5 COTIF Convention Appendix A (CIV) art 55.1.

6 COTIF Convention Appendix A (CIV) arts 55.2, 56.2.

7 COTIF Convention Appendix A (CIV) art 56.3. Claims may be addressed to this carrier if he is entered with his consent on the luggage registration voucher or the carriage voucher, even if he has not received the luggage or the vehicle: Appendix A (CIV) art 56.3. As to the luggage registration voucher see PARAS 707-708. As to the vehicle carriage voucher see PARA 710.

8 See PARA 737.

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### **736. Making claims under the CIM Rules.**

Claims<sup>1</sup> relating to the contract of carriage under the CIM Rules<sup>2</sup> may be made by persons who have the right to bring an action<sup>3</sup> against the carrier<sup>4</sup> and must be addressed in writing to the carrier against whom an action may be brought<sup>5</sup>. Where the consignor makes a claim he must produce the duplicate of the consignment note<sup>6</sup> or, failing this, produce an authorisation from the consignee or furnish proof that the consignee has refused to accept the goods<sup>7</sup>, and where the consignee makes a claim he must produce the consignment note if it has been handed over to him<sup>8</sup>.

1 As to the meanings of 'claim' and 'action' see PARA 735 note 1.

2 As to the CIM Rules (Appendix B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

3 See note 1.

4 COTIF Convention Appendix B (CIM) art 43.2. As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687. As to the persons who have the right to bring an action against the carrier under the CIM Rules see PARA 740.

5 COTIF Convention Appendix B (CIM) art 43.1.

6 As to the consignment note see PARAS 691-695. As to the documentation accompanying claims generally see PARA 737.

7 COTIF Convention Appendix B (CIM) art 43.3.

8 COTIF Convention Appendix B (CIM) art 43.4.

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### **737. Documents accompanying claims.**

Where a claim is made under the CIV Rules<sup>1</sup> documents which the person entitled thinks fit to submit with the claim must be produced either in the original or as copies, where appropriate, the copies duly certified if the carrier<sup>2</sup> so requires<sup>3</sup>. On settlement of the claim, the carrier may require the surrender of the ticket<sup>4</sup>, the luggage registration voucher<sup>5</sup> and the carriage voucher<sup>6</sup>.

Where a claim is made under the CIM Rules<sup>7</sup> the consignment note<sup>8</sup>, the duplicate and any other documents which the person entitled thinks fit to submit with the claim must be produced either in the original or as copies, the copies, where appropriate, duly certified if the carrier so requests<sup>9</sup>. On settlement of the claim the carrier may require the production, in the original form, of the consignment note, the duplicate or the cash on delivery voucher so that they may be endorsed to the effect that settlement has been made<sup>10</sup>.

1 As to the meanings of 'claim' and 'action' see PARA 735 note 1. As to the CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683. As to the making of claims under the CIV Rules see PARA 735.

2 As to the meaning of 'carrier' see PARA 685 note 9.

3 COTIF Convention Appendix A (CIV) art 55.3.

4 As to the ticket see PARA 703.

5 As to the luggage registration voucher see PARA 707.

6 COTIF Convention Appendix A (CIV) art 55.3. As to the vehicle carriage voucher see PARA 710.

7 As to the CIM Rules (Appendix B to the COTIF Convention) see PARA 683.

8 As to the consignment note see PARAS 691-695.

9 COTIF Convention Appendix B (CIM) art 43.5.

10 COTIF Convention Appendix B (CIM) art 43.6.

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## **B. PROCEDURE FOR BRINGING ACTIONS**

### **738. Basis for action.**

In all cases where the CIV Rules and the CIM Rules apply<sup>1</sup> any action<sup>2</sup> in respect of liability, on whatever grounds, may be brought against the carrier<sup>3</sup> only subject to the conditions and limitations laid down in those rules<sup>4</sup>. This includes any action brought against the servants and other persons for whom the carrier is<sup>5</sup> liable<sup>6</sup> and also covers actions against the servants or agents of substitute carriers<sup>7</sup>.

1 As to the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

2 As to the meaning of 'action' see PARA 735 note 1.

3 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

4 COTIF Convention Appendix A (CIV) art 52.1, Appendix B (CIM) art 41.1.

5 I.e. pursuant to the COTIF Convention Appendix A (CIV) art 51, Appendix B (CIM) art 40 (see PARA 686).

6 COTIF Convention Appendix A (CIV) art 52.2, Appendix B (CIM) art 41.2.

7 The COTIF Convention Appendix A (CIV) art 52 and Appendix B (CIM) art 41 (see the text and notes 1-5) apply if an action is brought against the servants or any other persons whose services the substitute carrier makes use of for the performance of the carriage: Appendix A (CIV) art 39.2, Appendix B (CIM) art 27.2. As to the liability of substitute carriers see PARA 687.

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### **739. Jurisdictions in which actions may be brought.**

Actions<sup>1</sup> based on the CIV Rules or the CIM Rules<sup>2</sup> may be brought before the courts or tribunals of member states<sup>3</sup> designated by agreement between the parties or before the courts or tribunals of the state in whose territory:

- 129 (1) the defendant has his domicile or habitual residence, his principal place of business or the branch or agency which concluded the contract of carriage<sup>4</sup>; or
- 130 (2) in the case of an action under the CIM Rules only, the place where the goods were taken over by the carrier<sup>5</sup> or the place designated for delivery is situated<sup>6</sup>.

English courts may take into account the fact that proceedings have been or are likely to be commenced in the United Kingdom or elsewhere, and in such a case the court can make any order that it thinks just and equitable<sup>7</sup>. Other courts or tribunals may not be seised<sup>8</sup>.

- 1 As to the meaning of 'action' see PARA 735 note 1.
- 2 As to the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.
- 3 As to 'member state' see PARA 685 note 2; and as to the OTIF member states themselves see PARA 684.
- 4 COTIF Convention Appendix A (CIV) art 57.1, Appendix B (CIM) art 46.1(a).
- 5 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.
- 6 COTIF Convention Appendix B (CIM) art 46.1(b).
- 7 A court before which proceedings are brought to enforce a liability which is limited by the CIV Rules or the CIM Rules may at any stage of the proceedings make any such order as appears to be just and equitable in view of those provisions and of any other proceedings which have been, or are likely to be, commenced in the United Kingdom or elsewhere to enforce the liability in whole or in part: Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 6(1). Without prejudice to this, a court before which proceedings are brought to enforce a liability which is so limited, where the liability is, or may be, partly enforceable in other proceedings in the United Kingdom or elsewhere, has jurisdiction to award an amount less than it would have awarded if the limitation applied solely to the proceedings before it, or to make any part of its award conditional on the result of any other proceedings: reg 6(2).
- 8 COTIF Convention Appendix A (CIV) art 57.1, Appendix B (CIM) art 46.1.

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#### **740. Who may bring an action.**

The consignor may bring an action<sup>1</sup> under the CIM Rules<sup>2</sup> until such time as the consignee has taken possession of the consignment note<sup>3</sup>, accepted the goods or asserted his rights to take delivery of the goods<sup>4</sup> or to modify the contract<sup>5</sup>; after that time the consignee may bring an action<sup>6</sup>, although his right to do so is not unlimited<sup>7</sup>. An action for the recovery of a sum paid pursuant to the contract of carriage may only be brought by the person who made the payment<sup>8</sup>, and an action in respect of cash on delivery payments may only be brought by the consignor<sup>9</sup>.

No corresponding provision is made in respect of actions under the CIV Rules<sup>10</sup>, although special provision is made in respect of the bringing of actions by dependants following the death of a passenger<sup>11</sup>.

- 1 As to the meaning of 'action' see PARA 735 note 1.
- 2 As to the CIM Rules (Appendix B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.
- 3 As to the consignment note see PARAS 691-695.
- 4 I.e. under the COTIF Convention Appendix B (CIM) art 17.3 (see PARA 699).
- 5 I.e. under the COTIF Convention Appendix B (CIM) art 18.3 (see PARA 700). In order to bring an action the consignor must produce the duplicate of the consignment note or, failing this, must produce an authorisation

from the consignee or furnish proof that the consignee has refused to accept the goods: Appendix B (CIM) art 44.5. If necessary, the consignor must prove the absence or the loss of the consignment note: Appendix B (CIM) art 44.5.

6 COTIF Convention Appendix B (CIM) art 44.1. In order to bring an action the consignee must produce the consignment note if it has been handed over to him: Appendix B (CIM) art 44.6.

7 The right of the consignee to bring an action will be extinguished from the time when the person designated by the consignee in accordance with the COTIF Convention Appendix B (CIM) art 18.5 (see PARA 700) has taken possession of the consignment note, accepted the goods or asserted his rights pursuant to Appendix B (CIM) art 17.3 (see PARA 699): Appendix B (CIM) art 44.2.

8 COTIF Convention Appendix B (CIM) art 44.3.

9 COTIF Convention Appendix B (CIM) art 44.4.

10 As to the CIV Rules (Appendix A to the COTIF Convention) see PARA 683.

11 See the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 5; and PARA 726.

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#### **741. Carriers against whom actions may be brought.**

An action<sup>1</sup> under the CIV Rules<sup>2</sup> based on the liability of the carrier<sup>3</sup> in case of death of, or personal injury to, passengers may only be brought against the carrier who is<sup>4</sup> liable<sup>5</sup>, while actions under either the CIV Rules or the CIM Rules<sup>6</sup> based on the contract of carriage may be brought only against the first carrier, the last carrier or the carrier having performed the part of carriage on which the event giving rise to the proceedings occurred<sup>7</sup>. An action under either the CIV Rules or the CIM Rules for the recovery of a sum paid pursuant to the contract of carriage may be brought against the carrier who has collected that sum or against the carrier on whose behalf it was collected<sup>8</sup>, and an action under the CIM Rules in respect of cash on delivery payments may be brought only against the carrier who has taken over the goods at the place of consignment<sup>9</sup>.

An action (other than a death or personal injury action) may be brought against a carrier other than those specified above when instituted by way of counter-claim or by way of exception in proceedings relating to a principal claim based on the same contract of carriage<sup>10</sup>, and to the extent that the CIV Rules or the CIM Rules apply to a substitute carrier<sup>11</sup>, an action may also be brought against him<sup>12</sup>.

1 As to the meaning of 'action' see PARA 735 note 1.

2 As to the CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

3 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

4 I.e. under the COTIF Convention Appendix A (CIV) art 26.5 (see PARA 724).

5 COTIF Convention Appendix A (CIV) art 56.1.

6 As to the CIM Rules (Appendix B to the COTIF Convention) see PARA 683.

7 COTIF Convention Appendix A (CIV) art 56.2, Appendix B (CIM) art 45.1. When, in the case of carriage performed by successive carriers, the carrier who must deliver the goods, luggage or vehicle is entered with his consent on the consignment note, luggage registration voucher or carriage voucher, an action may be brought against him in accordance with these provisions even if he has not received the goods, luggage, vehicle or consignment note, as the case may be: Appendix A (CIV) art 56.3, Appendix B (CIM) art 45.2.

If the person bringing the action has a choice between several carriers, his right to choose will be extinguished as soon as he brings an action against one of them; this will also be the case if the person has a choice between one or more carriers and a substitute carrier: Appendix A (CIV) art 56.7, Appendix B (CIM) art 45.7.

8 COTIF Convention Appendix A (CIV) art 56.4, Appendix B (CIM) art 45.3. As to the extinguishing of the right to choose between several carriers see note 7.

9 COTIF Convention Appendix B (CIM) art 45.4.

10 COTIF Convention Appendix A (CIV) art 56.5, Appendix B (CIM) art 45.5.

11 See PARA 687.

12 COTIF Convention Appendix A (CIV) art 56.6, Appendix B (CIM) art 45.6.

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#### **742. Extinction of right of action.**

Any right of action<sup>1</sup> under the CIV Rules<sup>2</sup> based on the liability of the carrier<sup>3</sup> in the case of death of, or personal injury to, passengers will be extinguished if notice of the accident to the passenger is not given<sup>4</sup> within 12 months of the person entitled becoming aware of the loss or damage<sup>5</sup>, unless:

- 131 (1) within that period the person entitled has addressed a claim to one of the designated carriers<sup>6</sup>;
- 132 (2) within that period the carrier who is liable has learned of the accident to the passenger in some other way<sup>7</sup>;
- 133 (3) notice of the accident has not been given, or has been given late, as a result of circumstances not attributable to the person entitled<sup>8</sup>; or
- 134 (4) the person entitled proves that the accident was caused by fault on the part of the carrier<sup>9</sup>.

A right of action for partial loss, damage or delay arising from a contract for the carriage of luggage under the CIV Rules<sup>10</sup> or a contract for the carriage of goods under the CIM Rules<sup>11</sup> will be extinguished by acceptance of the luggage or goods<sup>12</sup> unless:

- 135 (a) partial loss or damage was ascertained<sup>13</sup> before acceptance or but for the fault of the carrier<sup>14</sup> would have been<sup>15</sup>;
- 136 (b) the existence of loss or damage which is not apparent is ascertained after acceptance of the goods<sup>16</sup>;
- 137 (c) in the case of delay in delivery or exceeding the transit period, if the person entitled has<sup>17</sup> asserted his rights against one of the specified carriers<sup>18</sup>;
- 138 (d) (under the CIV Rules only) if the person entitled proves that the loss or damage was caused by fault on the part of the carrier<sup>19</sup>; or

139 (e) (under the CIM Rules only) if the person entitled proves that the loss or damage results from an act or omission, done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result<sup>20</sup>.

1 As to the meaning of 'action' see PARA 735 note 1.

2 As to the CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

3 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

4 Is given by the person entitled to one of the carriers to whom a claim may be addressed in accordance with the COTIF Convention Appendix A (CIV) art 55.1 (see PARA 735).

5 COTIF Convention Appendix A (CIV) art 58.1. Where the person entitled gives oral notice of the accident to the carrier, the carrier must furnish him with an acknowledgement of such oral notice: Appendix A (CIV) art 58.1.

6 COTIF Convention Appendix A (CIV) art 58.2(a). The 'designated carriers' are the carriers designated in Appendix A (CIV) art 55.1 (see PARA 735).

7 COTIF Convention Appendix A (CIV) art 58.2(b).

8 COTIF Convention Appendix A (CIV) art 58.2(c).

9 COTIF Convention Appendix A (CIV) art 58.2(d).

10 See PARA 729 et seq.

11 See PARA 716 et seq. As to the CIM Rules (Appendix B to the COTIF Convention) see PARA 683. If the goods have been reconsigned in accordance with Appendix B (CIM) art 28 (see PARA 717) rights of action in case of partial loss or in case of damage, arising from one of the previous contracts of carriage, will be extinguished as if there had been only a single contract of carriage: Appendix B (CIM) art 47.3.

12 COTIF Convention Appendix A (CIV) art 59.1, Appendix B (CIM) art 47.1.

13 Is in accordance with the COTIF Convention Appendix A (CIV) art 54 (see PARA 729) or Appendix B (CIM) art 42 (see PARA 716), as the case may be.

14 Is where the ascertainment which should have been carried out under the COTIF Convention Appendix A (CIV) art 54 (see PARA 729) or Appendix B (CIM) art 42 (see PARA 716) was omitted solely through the fault of the carrier.

15 COTIF Convention Appendix A (CIV) art 59.2(a), Appendix B (CIM) art 47.2(a).

16 This exception applies where the person entitled asks for ascertainment in accordance with the COTIF Convention Appendix A (CIV) art 54 (see PARA 729) or Appendix B (CIM) art 42 (see PARA 716) immediately after discovery of the loss or damage and not later than three days (under the CIV Rules) or seven days (under the CIM Rules) after the acceptance of the luggage and proves that the loss or damage occurred between the time of taking over by the carrier and the time of delivery: Appendix A (CIV) art 59.2(b), Appendix B (CIM) art 47.2(b).

17 Is within 21 days under the CIV Rules or 60 days under the CIM Rules.

18 COTIF Convention Appendix A (CIV) art 59.2(c), Appendix B (CIM) art 47.2(c). The 'specified carriers' are those specified in Appendix A (CIV) art 56.3 or Appendix B (CIM) art 45.1 (see PARA 741): Appendix A (CIV) art 59.2(c), Appendix B (CIM) art 47.2(c).

19 COTIF Convention Appendix A (CIV) art 59.2(d).

20 COTIF Convention Appendix B (CIM) art 47.2(d).

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### 743. Limitation of actions.

The periods of limitation of actions<sup>1</sup> for damages based on the liability of the carrier<sup>2</sup> under the CIV Rules<sup>3</sup> in the case of death of, or personal injury to, passengers are:

- 140 (1) three years from the day after the accident (in the case of a passenger)<sup>4</sup>; and
- 141 (2) three years from the day after the death of the passenger, subject to a maximum of five years from the day after the accident (in the case of other persons entitled)<sup>5</sup>,

and the period of limitation for other actions arising from the contract of carriage under the CIV Rules is one year, or two years where the carrier's act was intentional or reckless<sup>6</sup>.

The period of limitation for an action arising from the contract of carriage under the CIM Rules<sup>7</sup> is one year, or two years in the case of an action:

- 142 (a) to recover a cash on delivery payment collected by the carrier from the consignee<sup>8</sup>;
- 143 (b) to recover the proceeds of a sale effected by the carrier<sup>9</sup>;
- 144 (c) where the carrier's act was intentional or reckless<sup>10</sup>;
- 145 (d) based on one of the contracts of carriage prior to reconsignment<sup>11</sup>.

The limitation period may be suspended by the making of a written claim to the carrier<sup>12</sup>, and will remain suspended until the claim is rejected<sup>13</sup>. Limitation periods will also be suspended by the commencement of arbitration proceedings<sup>14</sup>. A right of action which has become time-barred may not be exercised further, even by way of counter-claim or by way of exception<sup>15</sup>. Absent the application of these provisions the suspension and interruption of periods of limitation will be governed by national law<sup>16</sup>.

1 As to the meaning of 'action' see PARA 735 note 1.

2 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

3 As to the CIV Rules (Appendix A to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

4 COTIF Convention Appendix A (CIV) art 60.1(a).

5 COTIF Convention Appendix A (CIV) art 60.1(b).

6 COTIF Convention Appendix A (CIV) art 60.2. The two-year period will apply in the case of an action for loss or damage resulting from an act or omission committed either with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result: Appendix A (CIV) art 60.2. The period of limitation provided for in Appendix A (CIV) art 60.2 runs for actions:

- 1 (1) for compensation for total loss, from the fourteenth day after the expiry of the period of time provided for in Appendix A (CIV) art 22.3 (see PARA 713) (Appendix A (CIV) art 60.3(a));
- 2 (2) for compensation for partial loss, damage or delay in delivery, from the day when delivery took place (Appendix A (CIV) art 60.3(b)); and

- 3 (3) in all other cases involving the carriage of passengers, from the day of expiry of validity of the ticket (Appendix A (CIV) art 60.3(c)).

The day indicated for the commencement of the period of limitation is not included in the period: Appendix A (CIV) art 60.3.

7 As to the CIM Rules (Appendix B to the COTIF Convention) see PARA 683. The period of limitation under the CIM Rules runs for actions:

- 4 (1) for compensation for total loss, from the thirtieth day after expiry of the transit period (Appendix B (CIM) art 48.2(a));
- 5 (2) for compensation for partial loss, damage or exceeding of the transit period, from the day when delivery took place (Appendix B (CIM) art 48.2(b)); and
- 6 (3) in all other cases, from the day when the right of action may be exercised (Appendix B (CIM) art 48.2(c)).

The day indicated for the commencement of the period of limitation is not included in the period (Appendix B (CIM) art 48.2).

8 COTIF Convention Appendix B (CIM) art 48.1(a).

9 COTIF Convention Appendix B (CIM) art 48.1(b).

10 COTIF Convention Appendix B (CIM) art 48.1(c). The two-year period will apply in the case of an action for loss or damage resulting from an act or omission done either with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result: Appendix B (CIM) art 48.1(c).

11 COTIF Convention Appendix B (CIM) art 48.1(d). This refers to an action based on one of the contracts of carriage prior to reconsignment under Appendix B (CIM) art 28 (see PARA 717).

12 Ie when a claim under the CIM Rules is addressed to a carrier in writing in accordance with the COTIF Convention Appendix A (CIV) art 55 (see PARA 735) together with the necessary supporting documents, or where a written claim under the CIM Rules is made in accordance with Appendix B (CIM) art 43 (see PARA 736): Appendix A (CIV) art 60.4, Appendix B (CIM) art 48.3.

13 COTIF Convention Appendix A (CIV) art 60.4, Appendix B (CIM) art 48.3. The limitation period will start to run again when the carrier rejects the claim by notification in writing and returns the documents submitted with it: Appendix A (CIV) art 60.4, Appendix B (CIM) art 48.3. If part of the claim is admitted, the period of limitation will run again in respect of that part of the claim still in dispute: Appendix A (CIV) art 60.4, Appendix B (CIM) art 48.3. The burden of proof of receipt of the claim or of the reply and of the return of the documents lies on the party who relies on those facts, and the period of limitation will not be suspended by further claims having the same object: Appendix A (CIV) art 60.4, Appendix B (CIM) art 48.3.

14 The commencement of arbitration proceedings (see PARA 688) has the same effect, as regards the interruption of periods of limitation, as that attributed by the applicable provisions of substantive law to the institution of an action in the ordinary courts or tribunals: COTIF Convention art 32.1.

15 COTIF Convention Appendix A (CIV) art 60.5, Appendix B (CIM) art 48.4.

16 COTIF Convention Appendix A (CIV) art 60.6, Appendix B (CIM) art 48.5. As to 'national law' see PARA 683 note 2.

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#### **744. Restriction on bringing of new actions.**

Where an action<sup>1</sup> based on the CIV Rules or the CIM Rules<sup>2</sup> is pending before a competent court or tribunal<sup>3</sup>, or where in such litigation a judgment has been delivered by such a court or

tribunal, no new action may be brought between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the state in which the new action is brought<sup>4</sup>.

1 As to the meaning of 'action' see PARA 735 note 1.

2 As to the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

3 As to the competent courts and tribunals for the purposes of the CIV Rules and the CIM Rules see PARA 739.

4 COTIF Convention Appendix A (CIV) art 57.2, Appendix B (CIM) art 46.2.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/4. INTERNATIONAL CARRIAGE BY ROAD AND RAIL/(2) INTERNATIONAL CARRIAGE BY RAIL/(iv) Claims and Proceedings/B. PROCEDURE FOR BRINGING ACTIONS/745. Rights of recourse between carriers.

#### **745. Rights of recourse between carriers.**

A carrier<sup>1</sup> who has paid compensation pursuant to the CIV Rules or the CIM Rules<sup>2</sup> has the following rights of recourse against the carriers who have taken part in the carriage:

- 146 (1) the carrier who has caused the loss or damage is solely liable for it<sup>3</sup>;
- 147 (2) when the loss or damage has been caused by several carriers each is liable for the loss or damage he has caused<sup>4</sup>; and
- 148 (3) if it cannot be proved which of the carriers has caused the loss or damage, the compensation will be apportioned between all the carriers who have taken part in the carriage except those who prove that the loss or damage was not caused by them<sup>5</sup>,

In the case of insolvency of any one of these carriers, the unpaid share due from him will be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge<sup>6</sup>.

A carrier exercising his right of recourse must present his claim in one and the same proceedings<sup>7</sup> against all the carriers with whom he has not reached a settlement<sup>8</sup>, and the court or tribunal must give its decision in one and the same judgment on all recourse claims brought before it<sup>9</sup>.

Carriers may conclude agreements which derogate from these provisions<sup>10</sup>.

1 As to the meaning of 'carrier' see PARA 685 note 9. As to the liability of servants or agents of a carrier, substitute carriers and successive carriers see PARAS 686-687.

2 As to the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683. The validity of a payment made by a carrier exercising a right of recourse pursuant to these provisions may not be disputed by the carrier against whom the right to recourse is exercised, when compensation has been determined by a court or tribunal and when the latter carrier, duly served with notice of the proceedings, has been afforded an opportunity to intervene in the proceedings: Appendix A (CIV) art 63.1, Appendix B (CIM) art 51.1. The court or tribunal seised of the principal action must determine what time will be allowed for such notification of the proceedings and for intervention in the proceedings: Appendix A (CIV) art 63.1, Appendix B (CIM) art 51.1.

- 3 COTIF Convention Appendix A (CIV) art 62.1(a), Appendix B (CIM) art 50.1(a).
- 4 COTIF Convention Appendix A (CIV) art 62.1(b), Appendix B (CIM) art 50.1(b). If such distinction is impossible the compensation will be apportioned between the carriers in accordance with head (3) in the text: Appendix A (CIV) art 62.1(b), Appendix B (CIM) art 50.1(b).
- 5 COTIF Convention Appendix A (CIV) art 62.1(c), Appendix B (CIM) art 50.1(c). Such apportionment will be in proportion to the carriers' respective shares of the carriage charge: Appendix A (CIV) art 62.1(c), Appendix B (CIM) art 50.1(c).
- 6 COTIF Convention Appendix A (CIV) art 62.2, Appendix B (CIM) art 50.2.
- 7 The carrier wishing to enforce his right of recourse may bring his action in the courts or tribunals of the state on the territory of which one of the carriers participating in the carriage has his principal place of business, or the branch or agency which concluded the contract of carriage, and when the action must be brought against several carriers the plaintiff carrier is entitled to choose the court or tribunal in which he will bring the proceedings from among those so competent: COTIF Convention Appendix A (CIV) arts 63.4, 63.5, Appendix B (CIM) arts 51.4, 51.5.
- 8 COTIF Convention Appendix A (CIV) art 63.2, Appendix B (CIM) art 51.2. A carrier who fails to act in accordance with this requirement will lose his right of recourse in the case of those against whom he has not taken proceedings: Appendix A (CIV) art 63.2, Appendix B (CIM) art 51.2.
- 9 COTIF Convention Appendix A (CIV) art 63.3, Appendix B (CIM) art 51.3.
- 10 COTIF Convention Appendix A (CIV) art 64, Appendix B (CIM) art 52.

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## **C. ENFORCEMENT**

### **746. Enforcement and execution.**

Judgments pronounced by the competent court or tribunal pursuant to the provisions of the COTIF Convention<sup>1</sup> after trial or by default will, when they have become enforceable under the law applied by that court or tribunal, become enforceable in each of the other member states<sup>2</sup> on completion of the formalities required in the state where enforcement is to take place<sup>3</sup>, although this applies neither to judgments which are provisionally enforceable, nor to awards of damages in addition to costs against a claimant who fails in his action<sup>4</sup>. Similar provisions apply in respect of the awards of arbitration tribunals<sup>5</sup>.

The merits of the case are not subject to review<sup>6</sup>.

1 As to the COTIF Convention see PARA 683. As to the competent courts for these purposes see PARA 739. These provisions apply also to judicial settlements: COTIF Convention art 12.1.

2 As to 'member state' see PARA 685 note 2.

3 COTIF Convention art 12.1. In the United Kingdom, the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 171-182) applies (subject to the omission of s 4(2), (3)), whether or not it would otherwise have applied, to any judgment which has been pronounced as mentioned in the COTIF Convention art 12.1 by a court or tribunal in a state which is a party to the Convention for the time being, other than the United Kingdom, and has become enforceable under the law applied by that court or tribunal: Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 8(1), (2). The registration of any such judgment in accordance with the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I constitutes compliance with the required formalities referred to in the COTIF Convention art 12.1: Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092,

reg 8(3). Note that the recognition of judgments pursuant to these provisions is unaffected by the provisions of the Civil Jurisdiction and Judgments Act 1982 ss 31, 32 relating to the recognition and enforcement of overseas judgments: see ss 31(3), 32(4); **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 147; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 261.

- 4 COTIF Convention art 12.2.
- 5 COTIF Convention art 32.2. As to arbitrations see PARA 688.
- 6 COTIF Convention arts 12.1, 32.2.

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### **747. Attachment of debts.**

Debts arising from a transport operation subject to the CIV Rules or the CIM Rules<sup>1</sup>, owed to one transport undertaking by another transport undertaking not under the jurisdiction of the same member state<sup>2</sup>, may only be attached under a judgment given by the judicial authority of the member state which has jurisdiction over the undertaking entitled to payment of the debt sought to be attached<sup>3</sup>. Railway vehicles may only be seized on a territory other than that of the member state in which the keeper<sup>4</sup> has its registered office, under a judgment given by the judicial authority of that state<sup>5</sup>.

1 As to the CIV Rules and the CIM Rules (Appendixes A and B to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999 (the COTIF Convention)) see PARA 683.

2 As to 'member state' see PARA 685 note 2.

3 COTIF Convention art 12.4.

4 Ie the person who, being the owner or having the right to dispose of it, exploits the railway vehicle economically in a permanent manner as a means of transport: COTIF Convention art 12.5.

5 COTIF Convention art 12.5.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/4. INTERNATIONAL CARRIAGE BY ROAD AND RAIL/(3) CARRIAGE OF DANGEROUS GOODS/748. The applicable law.

## **(3) CARRIAGE OF DANGEROUS GOODS**

### **748. The applicable law.**

The carriage of dangerous goods by road is governed by the European Agreement Concerning the International Carriage of Dangerous Goods by Road ('ADR')<sup>1</sup> and the carriage of dangerous goods by rail is governed by the Regulation Concerning the International Carriage of Dangerous Goods by Rail ('RID')<sup>2</sup>. Two Directives of the European Community set out a framework for the application of ADR and RID to both national and international carriage within the European Community<sup>3</sup>, and detailed implementation of all four of these measures in the United Kingdom is effected by statutory instrument made under the Health and Safety at Work Etc Act 1974<sup>4</sup>.

Owing to the technical nature of much of the implementing legislation, the following paragraphs are principally concerned with the application of ADR and RID in the European Community and the framework for such application as established by the Directives<sup>5</sup>.

1 The European Agreement Concerning the International Carriage of Dangerous Goods by Road (Geneva, 30 September 1957). As to the contracting parties to ADR see PARA 749.

2 The Regulation Concerning the International Carriage of Dangerous Goods by Rail forms Appendix C (RID) to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999): see PARA 683; and as to the contracting parties see PARA 684.

3 See EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) on the approximation of the laws of the member states with regard to the transport of dangerous goods by road; EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) on the approximation of the laws of the member states with regard to the transport of dangerous goods by rail; and PARAS 750-751.

4 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573; and PARA 751.

5 See PARAS 749-751.

## UPDATE

### 748 The applicable law

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 4--SI 2007/1573 replaced: Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009, SI 2009/1348.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/4. INTERNATIONAL CARRIAGE BY ROAD AND RAIL/(3) CARRIAGE OF DANGEROUS GOODS/749. Parties to ADR and RID.

### 749. Parties to ADR and RID.

At the date at which this volume states the law the United Nations Economic Commission for Europe lists 44 states as having ratified and acceded to ADR<sup>1</sup>. The parties to RID are the member states of OTIF and the parties to the COTIF Convention<sup>2</sup>.

1 Albania; Austria; Azerbaijan; Belarus; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Kazakhstan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Moldova; Montenegro; Morocco; Netherlands; Norway; Poland; Portugal; Romania; Russian Federation; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Tunisia; the former Yugoslav Republic of Macedonia; Ukraine; United Kingdom. As to ADR see PARA 748. As to the mechanisms by which countries may accede to ADR and operate their membership see arts 6-12; as to the review and modification of ADR by the members see arts 13, 14.

2 See PARAS 683-684. As to RID see PARA 748.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/4. INTERNATIONAL CARRIAGE BY ROAD AND RAIL/(3) CARRIAGE OF DANGEROUS GOODS/750. Scope and effect of ADR and RID.

## 750. Scope and effect of ADR and RID.

The effect of the implementation of ADR<sup>1</sup> and RID<sup>2</sup> in the European Community is that dangerous goods the transport<sup>3</sup> of which is prohibited by the implementing Directives<sup>4</sup> may not be transported by road or rail within the Community<sup>5</sup> and that dangerous goods which are authorised to be transported must be transported in accordance with the implementing Directives<sup>6</sup>. The restrictions apply (subject to an exclusion for the armed forces) to the transport of dangerous goods by road or rail within or between EC member states<sup>7</sup>, although they do not prevent member states from making additional national provision relating to the carriage of dangerous goods<sup>8</sup>.

1    Ie the European Agreement Concerning the International Carriage of Dangerous Goods by Road (Geneva, 30 September 1957): see PARA 748.

2    Ie Appendix C to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999): see PARA 748.

3    For the purposes of the implementation of ADR in the European Community 'transport' mean any road transport operation performed by a vehicle wholly or partly on public roads within the territory of a member state, including the activity of loading and unloading, covered by EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) on the approximation of the laws of the member states with regard to the transport of dangerous goods by road, Annexes A, B: art 2. 'Vehicle' means any motor vehicle intended for use on the road, being complete or incomplete, having at least four wheels and a maximum design speed exceeding 25 kmh, and its trailers, with the exception of vehicles which run on rails, and of agricultural and forestry tractors and all mobile machinery: art 2. For the purposes of the implementation of RID in the European Community 'transport' means any operation for the transport of dangerous goods (see note 4) by rail, conducted wholly or partially within the territory of a member state, including the activities of loading, unloading and transfer to or from another mode of transport and the stops necessitated by the circumstances of the transport, covered by EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) on the approximation of the laws of the member states with regard to the transport of dangerous goods by rail, Annex: art 2. These provisions are without prejudice to the arrangements laid down by the laws of the member states concerning liability in respect of such operations; and in each case 'transport' does not include transport wholly performed within the perimeter of an enclosed area (transport by road) or undertaking (transport by rail): EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 2; EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 2.

4    As to the implementing Directives (ie EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) on the approximation of the laws of the member states with regard to the transport of dangerous goods by road and EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) on the approximation of the laws of the member states with regard to the transport of dangerous goods by rail) see PARA 748 note 3. The implementing Directives define 'dangerous goods' as meaning those substances and articles the transport of which by road or rail is prohibited or authorised only under the circumstances or conditions set out in EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) Annexes A, B or, as the case may be, EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) Annex: EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 2; EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 2. A similar definition applies for the purposes of ADR itself (see art 1(b)) but no corresponding provision is made by the COTIF Convention Appendix C (RID).

5    EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 3.1; EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 3.1. This reflects the provision made by ADR art 2.1 and COTIF Convention Appendix C (RID) arts 1.2, 5.1(a).

6    EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 3.2; EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 3.2. This reflects the provision made by ADR art 2.2 and COTIF Convention Appendix C (RID) arts 2, 5.1(b).

7    EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 1.1; EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 1.1.

8    EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 1.2; EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 1.2. This reflects the provision made by ADR arts 3, 4 and COTIF Convention Appendix C (RID) arts 4, 5.

See further EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 4 and EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 4 (retention of national safeguards); EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 5 and EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 5 (regulation and prohibition of specified goods for national security or environmental reasons); EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 6 and EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 6 (authorisation by member states of transport of dangerous goods compliant with classification, packing and labelling requirements); EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) art 7 and EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) art 7 (carriage between Community territory and third countries).

## UPDATE

### 750 Scope and effect of ADR and RID

NOTES--Directives 94/55, 96/49 replaced with effect from 30 June 2009: European Parliament and EC Council Directive 2008/68 (OJ L260, 30.9.2008, p 13).

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/4. INTERNATIONAL CARRIAGE BY ROAD AND RAIL/(3) CARRIAGE OF DANGEROUS GOODS/751. Implementation in the United Kingdom.

### 751. Implementation in the United Kingdom.

The implementation of ADR<sup>1</sup> and RID<sup>2</sup> in the United Kingdom is effected by regulations<sup>3</sup> which make detailed provision for the implementation of those provisions within the framework laid down by the EC implementation Directives<sup>4</sup>. Subject to a number of detailed provisions establishing and limiting their scope<sup>5</sup>, the regulations apply to, and in relation to, the carriage of dangerous goods by road and rail<sup>6</sup>, and make provision for:

- 149 (1) the imposition of training and safety obligations which comply with or are derived from the relevant provisions of ADR and RID<sup>7</sup>;
- 150 (2) the classification of dangerous goods for consignment<sup>8</sup>;
- 151 (3) packaging of dangerous goods and the construction and testing of transportation vessels<sup>9</sup>;
- 152 (4) loading, unloading and handling<sup>10</sup>;
- 153 (5) vehicle crews, equipment, operation and documentation<sup>11</sup>;
- 154 (6) construction and approval of vehicles<sup>12</sup>;
- 155 (7) functions and responsibilities of the Secretary of State and the Health and Safety Executive<sup>13</sup>;
- 156 (8) the use of transportable pressure equipment<sup>14</sup>;
- 157 (9) the imposition of requirements additional or alternative to those imposed by ADR and RID<sup>15</sup>; and
- 158 (10) enforcement and proceedings<sup>16</sup>.

The regulations are supplemented by regulations concerning the marking of vehicles carrying dangerous goods<sup>17</sup>, and fees<sup>18</sup>.

<sup>1</sup> ie the European Agreement Concerning the International Carriage of Dangerous Goods by Road (Geneva, 30 September 1957): see PARA 748.

<sup>2</sup> ie Appendix C to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999): see PARA 748.

<sup>3</sup> ie the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573.

4 The EC implementation Directives are EC Council Directive 94/55 (OJ L319, 12.12.94, p 7) on the approximation of the laws of the member states with regard to the transport of dangerous goods by road and EC Council Directive 96/49 (OJ L235, 17.9.96, p 25) on the approximation of the laws of the member states with regard to the transport of dangerous goods by rail: see PARA 750. In addition to those Directives, which are the principal subjects of the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, the regulations also implement EC Council Directive 96/35 (OJ No L145, 19.6.96, p 10) on the appointment and vocational qualification of safety advisers for the transport of dangerous goods by road, rail and inland waterway; the connected Directive 2000/18 (OJ No L118, 19.5.2000, p 41) on minimum examination requirements for safety advisers for the transport of dangerous goods by road, rail or inland waterway; EC Council Directive 1999/36 (OJ No L138, 1.6.99, p 20) on transportable pressure equipment; Euratom Directive 89/618 (OJ No L357, 7.12.89, p 31) on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency, Title II art 5; and Euratom Directive 96/29 (OJ No L159, 29.6.96, p 1) laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation, Title IX, Section 1 (intervention in cases of radiological emergency) in so far as Title IX, Section 1 is relevant to carriage by road and by rail.

5 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 9-37.

6 Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, reg 8(1).

7 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 38-46, 64.

8 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 47-49.

9 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 50-61.

10 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, reg 62.

11 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, reg 63.

12 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, reg 65.

13 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 66-70. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

14 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 71-80.

15 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 81-91.

16 See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007, SI 2007/1573, regs 92, 93.

17 See the International Carriage of Dangerous Goods (Rear Marking of Motor Vehicles) Regulations 1975, SI 1975/2111.

18 See the International Carriage of Dangerous Goods by Road (Fees) Regulations 1988, SI 1988/370 (amended by SI 1997/2971; SI 2003/1811; SI 2007/634; SI 2008/1578).

## UPDATE

### 751 Implementation in the United Kingdom

TEXT AND NOTES 1-16--Replaced. See the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009, SI 2009/1348, which relate to application (reg 4); prohibitions and requirements (regs 5-10); exemptions (regs 11-18); transport pressure equipment (regs 19-23; see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARAS 555-557); radiological emergencies (reg 24); GB competent authority functions (regs 25-30); the keeping and provision of information (reg 31); and enforcement (reg 32). 'The GB competent authority' means the competent authority in Great Britain for the purposes of SI 2009/1348 as determined under reg 25, but a reference to '2007 GB Competent Authority' is a reference to the competent authority in Great Britain for the purposes of SI 2007/1573: SI 2009/1348 reg 2(5) Table. The competent authority in Great Britain for the purposes of SI 2009/1348 is (1) the Health and Safety Executive for certain class 1 goods; (2) the Secretary of State for Defence for functions in relation to certain military explosives and certain class 7 goods; (3) the traffic authority responsible for the road that passes through the tunnel in relation to certain functions; and (4) the Secretary of State for Transport for all other functions: see reg 25.

NOTE 18--SI 1988/370 further amended: SI 2009/856.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/752. Parties with whom the carrier contracts.

## **5. REMEDIES**

### **(1) REMEDIES IN GENERAL**

#### **752. Parties with whom the carrier contracts.**

Most carriage of goods by private carriers is undertaken pursuant to contract<sup>1</sup>. A contract of carriage is generally negotiated between consignor and carrier but the identity of the parties to that contract will depend on the circumstances, most notably the terms of the contract of carriage and the terms of any contract between the consignor and consignee<sup>2</sup>.

Where the consignor has the general property in the goods at the time of contracting and retains such property throughout the period of carriage<sup>3</sup> he is normally the proper party to sue on the contract and in tort<sup>4</sup>. This accords with the principle that the proper party to sue where goods are lost or damaged is the owner<sup>5</sup> and that the party having property in the goods is *prima facie* the party with whom the contract of carriage is made<sup>6</sup>.

However, the lack of property in a consignee need not be fatal to a contractual claim by him. Thus, where the Carriage of Goods by Sea Act 1924 applies, the consignee acquires right of suit on becoming the lawful holder of a bill of lading irrespective of whether he has also acquired property in the goods<sup>7</sup>. Again, a consignee who has bought goods under certain types of fob (free on board) contracts will be under a duty to make the contract of carriage and he will consequently be a party to that contract even before he comes to own the goods under a contract of sale<sup>8</sup>. Moreover, where the CIM Rules apply<sup>9</sup>, the consignee may bring an action on the contract of carriage from the time when he takes possession of the consignment note, or accepts the goods or asks the carrier for the consignment note, for the goods or for a change to the terms of the contract of carriage<sup>10</sup>. Consequently, the analysis which follows in the paragraphs below<sup>11</sup>, describing common law solutions to the common law problem of privity of contract<sup>12</sup>, are to be considered necessary to give the consignee title to sue the carrier only in those areas of carriage where the statutory solutions<sup>13</sup> to the problem of privity of contract do not apply.

It may also be possible, on appropriate facts<sup>14</sup>, to imply a contract between consignee and carrier.

1 As to the obligations of gratuitous carriers see PARA 60.

2 Whether the seller or the buyer is under a duty to make the contract of carriage will depend in large part on the terms of the sale contract: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 332, 351. See also *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 842, [1976] 3 All ER 129 at 133, HL, per Lord Diplock; *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [34]-[35], [2003] QB 1509 at [34]-[35], [2003] 2 All ER 700 at [34]-[35], per Mance LJ.

3 A consignor who remains the owner of goods throughout the period of carriage is normally shipping on his own account and will consequently be his own consignee. Alternatively, he is sending the goods to a bailee for a limited period or purpose, such as where goods are sent to a consignee on approval, in which case the consignor retains property and he alone has the right to sue if the goods are lost or damaged in transit: *Swain v Shepherd* (1832) 1 Mood & R 223. See also the Sale of Goods Act 1979 s 18 r 4; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 120. In this second case the proposed bailment between consignor and consignee may arise from a contract of sale, as where a seller delivers goods to a carrier for transmission to a buyer on title retention terms, delaying the passing of property to the buyer until payment. Although it may be possible to construe the resulting contract of carriage as one concluded by the consignor-bailor as agent for the consignee-bailee, the more probable analysis is that the consignor contracts as principal. Since the consignor remains the owner throughout the period of carriage, it appears that he is normally the proper party to sue both in tort and in contract: see the text and note 4. As to whether property passes by delivery to a carrier see the Sale of Goods Act 1979 s 18 r 5(2); *Wait v Baker* (1848) 2 Exch 1; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 127.

4 See *Sargent v Morris* (1820) 3 B & Ald 277; *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 844-845, [1976] 3 All ER 129 at 135, HL, per Lord Diplock; *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [34], [2003] QB 1509 at [34], [2003] 2 All ER 700 at [34] per Mance LJ; and see PARA 757.

5 *Fragano v Long* (1825) 4 B & C 219; and see *Dawes v Peck* (1799) 8 Term Rep 330; *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 844-845, [1976] 3 All ER 129 at 137-138, HL, per Lord Diplock. Where an owner is induced by the fraud of a third party to deliver goods to a carrier for consignment to the third party, and the goods are lost through the carrier's negligence or misdelivery, the owner may sue the carrier in contract if the owner's error constituted a fundamental mistake as to the identity of the third party, sufficient to render the contract between him and the consignee void; for in such a case the property does not leave the owner and he is therefore the proper party to sue on the contract of carriage: *Duff v Budd* (1822) 3 Brod & Bing 177 at 183 per Parke J ('a case bottomed in fraud, in which there has been no sale'); cf *Stephenson v Hart* (1828) 4 Bing 476; *McKean v Mclvor* (1870) LR 6 Exch 36; *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51; *Hoare v Great Western Rly Co* (1877) 37 LT 186; and see **CONTRACT** vol 9(1) (Reissue) PARA 706; **MISTAKE** vol 77 (2010) PARA 13. Where a lorry driver induces a carrier by a false representation to employ him as a sub-contractor and to give him a collection note to enable him to obtain the goods from the carrier's customer for carriage, the goods are to be regarded as entrusted to the carrier, who is liable for their loss when the driver disappears with them: *John Rigby (Haulage) Ltd v Reliance Marine Insurance Co Ltd* [1956] 2 QB 468, [1956] 3 All ER 1, CA.

6 *Mullinson v Carver* (1843) 1 LTOS 59; *Dickenson v Lano* (1860) 2 F & F 188 at 190 per Blackburn J; *Coats v Chaplin* (1842) 3 QB 483; *Coombs v Bristol and Exeter Rly Co* (1858) 3 H & N 510; *Bristol and Exeter Rly (Directors) v Collins* (1859) 7 HL Cas 194 at 211 per Crompton J; *Murphy v Midland Great Western Rly Co of Ireland* [1903] 2 IR 5; *Tasman Pulp and Paper Co Ltd v Brambles* [1981] 2 NZLR 225 at 228, NZ HC, per Prichard J (obiter).

7 See PARA 338.

8 See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 351.

9 As to the COTIF Convention (ie the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Cm 41), as revised by the Modifying Protocol signed at Vilnius on 3 June 1999) and the CIM Rules see PARA 683.

10 See the COTIF Convention Appendix B (CIM) art 44; and PARA 740.

11 See PARAS 753-755.

12 See **CONTRACT** vol 9(1) (Reissue) PARAS 748-750.

13 The general statutory solution to the problem of privity of contract in English law, ie the Contracts (Rights of Third Parties) Act 1999, confers no rights on a third party in the case of contracts for the carriage of goods by sea or in the case of contracts for the carriage of goods by rail, road or air which are subject to the rules of appropriate international transport conventions: see s 6(5), (8); and **CONTRACT**.

14 See PARA 348.

## UPDATE

### **752-753 Parties with whom the carrier contracts, Consignor as agent of consignee**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/753. Consignor as agent of consignee.

### **753. Consignor as agent of consignee.**

Where consignor and consignee are different parties, and property either resides in the consignee throughout the period of carriage or passes to the consignee on or before delivery to the carrier, it may be presumed that the consignor concludes the contract of carriage as agent for the consignee and that the consignor cannot sue on the contract unless specially entitled by its terms<sup>1</sup>. In such a case, the consignee, as principal, is the proper party to sue on the contract. Such a presumption certainly applies where the consignor sells goods to a consignee and property passes to the consignee, for example by the act of delivery to the carrier<sup>2</sup>. In such a case, the seller-consignor is presumed to contract as agent for the buyer-consignee rather than as a principal in his own right<sup>3</sup>, although the presumption can be rebutted by special terms in the contract of sale<sup>4</sup>. It follows that the consignee is normally the proper party to sue on the contract. A similar presumption may apply where a bailee of goods (without leaving any special property outstanding in himself<sup>5</sup>) engages a carrier to return them to the bailor on the expiry of the bailment, or where a sub-bailee of goods (again, without leaving any special property outstanding in himself) engages a carrier to return them to the principal bailee on the expiry of the sub-bailment<sup>6</sup>. Such an analysis would conform with the general rule that there can be no claim in bailment by a party who has no surviving possessory entitlement to the goods<sup>7</sup>, and would render rights to claim in contract co-extensive with those in bailment<sup>8</sup>. Again, however, the question depends ultimately on the circumstances and there are authorities which appear to favour granting the bailee or sub-bailee a right to claim against a carrier whom the bailee or sub-bailee engages to return the goods to the owner or other bailor<sup>9</sup>.

1 *Dawes v Peck* (1799) 8 Term Rep 330; *Murphy v Midland Great Western Rly Co of Ireland* [1903] 2 IR 5; and see *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. See further **AGENCY** vol 1 (2008) PARA 156. As to whether a consignor can recover substantial damages in contract from a carrier notwithstanding that property has already passed from him to the consignee when the goods are lost or damaged see *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL.

An analysis of the three relationships from which the right, as between the consignor of goods and the consignee, arises to sue the carrier for loss or damage to goods, is given by Brandon J in *The Albazero* at [1977] AC 774 at 786, [1974] 2 All ER 906 at 915, cited with approval by Lord Diplock in the House of Lords, and subsequently by Mance LJ in *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* at [34]-[35].

2 Here the presumption is supported by statute. Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer: see the Sale of Goods Act 1979 s 32(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 188. This provision supports the inference that the consignor-seller acts as the consignee-buyer's agent in concluding the contract of carriage and in delivering the goods to the carrier: see the Sale of Goods Act 1979 s 32(2); *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146 (a decision under the Carriage of Goods by Road Act 1965); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 190. A similar conclusion was reached at common law: *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774 at 842, 844, [1976] 3 All ER 129 at 133, 135, HL, per Lord Diplock (approving Brandon J: see note 1); and see *East West Corp v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [34]-[35], [2003] QB 1509 at [34]-[35], [2003] 2 All ER 700 at [34]-[35], per Mance LJ, referring with approval to the analysis of Brandon J in *The Albazero*. Where, in pursuance of a contract for the sale of unascertained or future goods by description, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract: see the Sale of Goods Act 1979 s 18 r 5(2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 127. It follows that (other than in cases where a right of disposal has been reserved: cf note 1) property passes to the consignee on delivery to the carrier and the goods are ordinarily at the consignee's risk from that time, since risk prima facie follows property: see the Sale of Goods Act 1979 s 20; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 28, 142. This provision again supports the inference that it is the buyer-consignee, as the owner of the goods, who is the proper party to sue in contract: see note 1.

3 *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774 at 842, [1976] 3 All ER 129 at 133, HL, per Lord Diplock (approving Brandon J: see note 1); *Cork Distilleries Co v Great Southern and Western Rly Co (Ireland)* (1874) LR 7 HL 269 at 278 per Mellor J; *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146 (a decision under the Carriage of Goods by Road Act 1965); *East West Corp v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [34]-[40], [2003] QB 1509 at [34]-[40], [2003] 2 All ER 700 at [34]-[40], per Mance LJ, referring with approval to the analysis of Brandon J in *The Albazero*. It makes no difference that the consignor has paid the carrier, because in the absence of any arrangement to the contrary the consignor is always bound to pay the carrier: *Moore v Wilson* (1787) 1 Term Rep 659; *King v Meredith* (1811) 2 Camp 639. The consignee may also be the proper party to sue where the consignor has delivered the goods to the carrier as agent for the consignee, notwithstanding that the property in the goods has not yet passed to the consignee: *Dawes v Peck* (1799) 8 Term Rep 330; *King v Meredith* (1811) 2 Camp 639.

4 *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774 at 843, 847-848, [1976] 3 All ER 129 at 134, 137-138, HL, per Lord Diplock (explaining *Dunlop v Lambert* (1839) 6 Cl & Fin 600, HL; and disapproving *Gardano and Giampari v Greek Petroleum George Mamidakis & Co* [1961] 3 All ER 919, [1962] 1 WLR 40); *Cork Distilleries Co v Great Southern and Western Rly Co (Ireland)* (1874) LR 7 HL 269; and see *East West Corp v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [35], [2003] QB 1509 at [35], [2003] 2 All ER 700 at [35], per Mance LJ, referring with approval to the analysis of Brandon J in *The Albazero* at [1977] AC 774 at 786, [1974] 2 All ER 906 at 915; *Davis and Jordan v James* (1770) 5 Burr 2680; *Moore v Wilson* (1787) 1 Term Rep 659; *Joseph v Knox* (1813) 3 Camp 320 (also explained in *The Albazero*). The consignor may also make a special collateral contract with the carrier as to time, place or mode of delivery and may recover substantial damages for breach of that collateral contract notwithstanding that he concludes the principal contract of carriage as agent for the consignee: see *Cork Distilleries Co v Great Southern and Western Rly Co (Ireland)*, where the principle was recognised but no such collateral contract was found to exist. Where a seller delivers goods to a carrier under an agreement that the carrier will collect the price of the goods from the buyer, the seller has a right to claim against the carrier for the price if the carrier delivers the goods without obtaining the price: *Jacobs v Nelson* (1811) 3 Taunt 423. Where articles belonging to different persons are contained in one parcel which is delivered to a carrier to be carried for them jointly, those persons may jointly sue for the loss of the goods, notwithstanding that the parcel is consigned to only one of them, and that person has to pay the carriage: *Metcalfe v London, Brighton and South Coast Rly Co* (1858) 4 CBNS 307 at 318.

5 Cf *Freeman v Birch* (1833) 3 QB 492n per Littledale J: 'If there be a complete sale, the property is out of the vendor altogether. But here the plaintiff [bailee] had a special property, which had not passed from her'.

6 *Scott Maritimes Pulp Ltd v BF Goodrich Canada Ltd* (1977) 72 DLR (3d) 680, NS SC; and see *Re Tappenbeck, ex p Banner* (1876) 2 ChD 278.

7 *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA.

8 As to claims in bailment see PARA 756.

9 *Freeman v Birch* (1833) 3 QB 492n (bailee delivering goods to carrier for retransmission to bailor; bailee could sue carrier). Littledale J relied on the fact that the bailee still had a special property: see note 5. Parke J relied on the fact that the bailee employed the carrier, that the goods were at the bailee's risk till delivery to the

consignee and that the bailee was responsible to the bailor for their safety in transit. It should be noted, however, that the mere fact that the risk in goods lies with the claimant does not under modern law suffice to ground a claim in tort for negligence in respect of the goods (see PARA 757). See also *Gwyatt v Hayes* (1871) 2 AJR 107; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA (sub-bailment).

## UPDATE

### **752-753 Parties with whom the carrier contracts, Consignor as agent of consignee**

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Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/754. Consignor as principal though property in consignee.

### **754. Consignor as principal though property in consignee.**

There may be circumstances where a contract for the carriage of goods by land is a contract between the consignor and the carrier notwithstanding the fact that the goods are to be delivered to a consignee who has the general property in them. This may occur where, though delivery to the consignee is contemplated when the contract of carriage is made, consignor and carrier make a special contract to the effect that the consignor transacts as principal<sup>1</sup>. A comparable situation may arise where the transfer of property to the consignee and the delivery of the goods to him were not contemplated by the consignor and carrier when making the contract of carriage, but occurred following a later sale of the goods by the consignor after transit began. The circumstances in which a consignor has the right to sue a carrier for substantial damages in contract where the consignor has no property in the goods at the time of their loss or damage and suffers no substantial personal loss by virtue thereof are exceptional and highly limited. Where goods are lost or damaged through the carrier's default after property has passed to the consignee (and where the goods do not remain at the consignor's risk), to award the consignor substantial damages in contract would be to award more than his actual loss, offending the general rule that damages in contract are compensatory<sup>2</sup>.

The circumstances in which a consignor can sue for such damages are therefore confined to the following principle: in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been concluded and before a breach of that contract which causes loss or damage to the goods, an original party to the contract is (if this be intended by both parties) to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in goods before such loss or damage, and can recover as damages for breach of contract the actual loss sustained by those for whose benefit the contract was concluded<sup>3</sup>. Following such recovery, it appears that the claimant must hold the residue of the damages (after deducting his personal loss or the value of his personal interest) for the actual owner<sup>4</sup>. The intention necessary to sustain this principle is negated where the contract of carriage contemplates that the carrier will conclude a separate contract of carriage with the party to whom property later passes<sup>5</sup>. Thus, for example, a charterer and shipowner will typically be taken to have contemplated the issue of bills of lading which would create separate contracts of carriage, on terms different to the charterparty, between the carrier and non-carrier or cargo-interests<sup>6</sup>. This principle cannot

normally apply where the consignor and carrier do not contemplate, at the time the contract of carriage is concluded, that the consignor will transfer property in the goods to a third party after the contract of carriage is concluded. If no such transfer is contemplated at the time the contract of carriage is made, the parties can normally have no intention to treat the consignor as entitled to recover substantial damages in contract on behalf of anyone to whom property passes before the goods are lost or damaged. In such a case, the consignor may be unable to recover substantial damages in contract but such damages may be recoverable in tort (or possibly in bailment) by the party to whom property is transferred<sup>7</sup>. The right of the party to whom property passes to sue for substantial damages may not, however, extend to every misadventure which occasions loss to a consignee; for example, in the absence of contract there may be no right to claim in respect of a delay occasioned by negligence<sup>8</sup>.

1 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 842, 847, [1976] 3 All ER 129 at 133, 137, HL, per Lord Diplock. An analysis of the three relationships from which the right, as between the consignor of goods and the consignee, arises to sue the carrier for loss or damage to goods, is given by Brandon J in *The Albazero* at [1977] AC 774 at 786, [1974] 2 All ER 906 at 915, cited with approval by Lord Diplock in the House of Lords, and subsequently by Mance LJ in *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [34]-[35], [2003] QB 1509 at [34]-[35], [2003] 2 All ER 700 at [34]-[35].

2 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 841-842, 846-847, [1976] 3 All ER 129 at 132-133, 137-138, HL, per Lord Diplock; cf *Obestain Inc v National Mineral Development Corp Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468-470 per Hobhouse J; *The Aramis* [1989] 1 Lloyd's Rep 213 at 226, CA, per Bingham LJ. See note 1.

3 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 847, [1976] 3 All ER 129 at 137-138, HL, per Lord Diplock (explaining *Dunlop v Lambert* (1839) 6 Cl & Fin 600, HL); evidently approved in *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 819, [1986] 2 All ER 145 at 156, HL, per Lord Brandon of Oakbrook; and see *The Aramis* [1989] 1 Lloyd's Rep 213 at 226, CA, per Bingham LJ.

4 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 845-846, [1976] 3 All ER 129 at 135-136, HL, per Lord Diplock (semble); and cf at 849 and 139. It further appears, by analogy with the principles governing a bailor's right to claim against a third party who damages goods while in the possession of a bailee, that when the consignor recovers from the carrier damages calculated according to the full value of the goods or the full cost of their repair or replacement, the carrier is discharged from further liability to the consignee or other owner: cf *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, CA.

5 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 847-848, [1976] 3 All ER 129 at 136-137, HL, per Lord Diplock.

6 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 848, [1976] 3 All ER 129 at 138, HL, per Lord Diplock. See PARA 355.

7 See PARAS 756-757.

8 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 846-847, [1976] 3 All ER 129 at 136-137, HL, per Lord Diplock; *BDC Ltd v Hofstrand Farms Ltd* (1986) 26 DLR (4th) 1, Can SC.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/755. Property in consignor; risk in consignee.

### **755. Property in consignor; risk in consignee.**

Where a consignor of goods retains property in them but risk is transferred to a buyer after the contract of carriage is made, the consignor can recover substantial damages in contract for defaults committed by the carrier after the risk has been transferred, though the consignor's financial loss may be nominal<sup>1</sup>. In contract, though nominal damages can be awarded, the right to recover substantial damages for the loss of or damage to goods can be proved by showing

possession or ownership of the goods; it is the loss to the proprietary or possessory interest that is compensated, not some other or different economic loss<sup>2</sup>. A consignor who recovers substantial damages by virtue of this principle, however, may be obliged to account for the residue (after deducting his personal loss) to the party at whose risk the goods were at the time of their loss or injury<sup>3</sup>. Where a consignor or consignee who has a contract with the carrier suffers substantial personal loss through breach of the contract of carriage, the consignor or consignee can recover substantial damages in contract irrespective of whether he has a proprietary or possessory interest in the goods, provided the claim satisfies general principles of remoteness of damage<sup>4</sup>.

1 *The Charlotte* [1908] P 206, CA; *R & W Paul Ltd v National Steamship Co Ltd* (1937) 43 Com Cas 68, 59 Ll L Rep 28; *Obestain Inc v National Mineral Development Corp Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465; *The Aramis* [1989] 1 Lloyd's Rep 213 at 226, CA, per Bingham LJ; *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363, NSW CA. The fact that risk has passed to the buyer does not by itself entitle him to sue the carrier in tort for negligence; to succeed in negligence he must have either the legal ownership or some possessory title to the goods at the time of the loss or damage: *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 809, [1986] 2 All ER 145 at 149, HL, per Lord Brandon of Oakbrook.

An analysis of the three relationships from which the right, as between the consignor of goods and the consignee, arises to sue the carrier for loss or damage to goods, is given by Brandon J in *The Albazero* at [1977] AC 774 at 786, [1974] 2 All ER 906 at 915, cited with approval by Lord Diplock in the House of Lords, and subsequently by Mance LJ in *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [34]-[35], [2003] QB 1509 at [34]-[35], [2003] 2 All ER 700 at [34]-[35].

2 *Obestain Inc v National Mineral Development Corp Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468 per Hobhouse J, who interpreted both *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL, and *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL, as consistent with this principle. See also *Chabbra Corp Pte Ltd v Jag Shakti (Owners)*, *The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC.

3 *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363, NSW CA.

4 See *Mead v South Eastern Rly Co* (1870) 18 WR 735.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/756. Claim in bailment.

## 756. Claim in bailment.

The contract for carriage of goods involves a bailment. The carrier is the bailee and the person on whose behalf the goods are delivered to the carrier is the bailor<sup>1</sup>. A party may be a bailor whenever he has a superior right to the possession of goods which are in the possession of another<sup>2</sup>. A bailor of goods need not be their general owner provided he has a right of possession superior to that of the current possessor<sup>3</sup>. Title to goods, or a right to their possession against the current possessor, will suffice for this purpose irrespective of whether the party entitled to possession had possession of the goods before their delivery to the bailee<sup>4</sup>. Where a carrier delegates performance of the contract of carriage to a sub-carrier while retaining a right to possession of the goods against the sub-carrier, the sub-carrier is a sub-bailee<sup>5</sup>. At common law the sub-carrier is estopped from denying the first carrier's title<sup>6</sup>, and the first carrier may recover substantial damages from the sub-carrier for breach of the sub-bailment, notwithstanding that the first carrier's personal loss (or the amount of his liability to the original bailor) is nominal<sup>7</sup>. In such a case, it is for injury to his possessory interest that the first carrier is compensated, rather than for damage to some other economic interest<sup>8</sup>. A bailment can exist without a contract<sup>9</sup>, as where a consignor of goods or other bailor to a carrier consents to their delivery to a sub-carrier under a sub-bailment<sup>10</sup>. In such a case, the consignor or other bailor to the carrier can recover substantial damages from the sub-bailee for

loss or damage occasioned by the sub-bailee's default<sup>11</sup>. Where a buyer of goods which are in transit is not a party to the contract of carriage, he may nevertheless sue the carrier in bailment for loss or damage occasioned to the goods where the carrier has attorned to him<sup>12</sup>.

If a consignor relinquishes his possessory entitlement to the goods on delivery to the carrier, leaving no possessory interest outstanding in himself, he cannot stand as the carrier's bailor and cannot sue the carrier in bailment<sup>13</sup>. This result may occur where a bailee of goods contracts with a carrier for the return of the goods to their owner, or where a sub-bailee of goods contracts with a carrier for the return of the goods to a principal bailee, although there are authorities suggesting that in particular circumstances (for example, where he retains an outstanding special property in the goods) the bailee or sub-bailee can sue the carrier<sup>14</sup>. A similar result may occur where a seller contracts with a carrier as agent for the buyer and property in the goods passes to the buyer on or before delivery to the carrier; in such a case, the bailor is presumed to be the consignee and the consignor is presumed to act as the consignee's agent not only in concluding the contract of carriage but also in concluding the bailment to the carrier<sup>15</sup>. It follows that the consignor generally has no outstanding possessory entitlement and cannot occupy the position of bailor to the carrier. A mere contractual right to the possession of goods may be sufficient to render the party thus entitled a bailor of the current possessor<sup>16</sup>.

1 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 841-842, [1976] 3 All ER 129 at 132-133, HL, per Lord Diplock; and see *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83 at [35], [2003] QB 1509 at [35], [2003] 2 All ER 700 at [35], per Mance LJ. In general circumstances, and subject to the terms of the particular contract, the bailment to a carrier may be a bailment at will: *Gordon v Harper* (1796) 7 Term Rep 9 at 12 per Grove J (obiter); *The Okehampton* [1913] P 173 at 179, CA, per Vaughan Williams LJ, and at 182 per Hamilton LJ. See also *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 134-135, CA, per Slade LJ (where the terms of the relevant contracts were not adduced and the point was not decided). The carrier, as an independent contractor, gets possession of the goods; even where the bailment to him is a bailment at will or during pleasure, possession is not retained by the consignor: *Transcontainer Express Ltd v Custodian Security Ltd* at 132 per Slade LJ. A bailment between consignor and carrier will not necessarily exist merely because the consignor transfers possession of goods to a carrier. The bailor is the person on whose behalf the goods are delivered to the carrier; this is not necessarily the person who physically delivers them to the carrier: see *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* at 841 and 132 per Lord Diplock.

An analysis of the three relationships from which the right, as between the consignor of goods and the consignee, arises to sue the carrier for loss or damage to goods, is given by Brandon J in *The Albazero* at [1977] AC 774 at 786, [1974] 2 All ER 906 at 915, cited with approval by Lord Diplock in the House of Lords, and subsequently by Mance LJ in *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* at [34]-[35].

2 See **BAILMENT** vol 3(1) (2005 Reissue) PARA 1. As to whether a mere contractual right of possession is sufficient to constitute the holder of that right a bailor see *China Pacific SA v Food Corpn of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; and see note 16.

3 *RM Campbell Vehicle Sales Pty Ltd v Machnig* (22 May 1981, unreported), NSW SC (goods in transit for delivery to hirer under finance lease; hirer could sue carrier).

4 *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210 at 217, [1970] 3 All ER 664 at 667, CA; *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 135, CA, per Slade LJ (where the point was not decided); *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215.

5 See PARA 65; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 41.

6 See PARA 67; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 82; **TORT** vol 45(2) (Reissue) PARA 644. The common law position is modified by the Torts (Interference with Goods) Act 1977 s 8(1), by which the defendant in a claim for wrongful interference with goods is entitled to show, in accordance with rules of court, that a third person has a better right than the claimant as respects all or any part of the interest claimed, or in right of which he sues; and any rule of law to the contrary (sometimes called *jus tertii*) is abolished: see further **TORT** vol 45(2) (Reissue) PARA 644.

7 See PARA 65; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 41. Cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA. The first carrier must pay the proceeds of the claim, after deducting the value of his own interest or the measure of his own loss, to the party entitled to the goods: see *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 728-729, [1965] 2 All ER 725 at 732-733, CA, per Lord Denning MR, citing *The Winkfield* [1902] P 42, CA; and see *Minichiello v Devonshire Hotel (1967) Ltd (No 2)* (1977) 79 DLR (3d) 656, BC SC (affd (1978) 4 WWR 539, BC CA).

8 Cf *Obestain Inc v National Mineral Development Corp Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468-469 per Hobhouse J.

9 See **BAILMENT** vol 3(1) (2005 Reissue) PARA 1.

10 See **BAILMENT** vol 3(1) (2005 Reissue) PARA 41.

11 See PARA 65; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 41.

12 *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 818, [1986] 2 All ER 145 at 156, HL, per Lord Brandon of Oakbrook. On attornment to a buyer, a bailee holds the goods on the same terms as those which governed the original bailment: *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* at 818 and 156 per Lord Brandon of Oakbrook (obiter) ('If the shipowners as bailees had ever attorned to the buyers, so that they became the bailors in place of the sellers, the terms of the bailment would then have taken effect as between the shipowners and the buyers'); *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 404-405, CA, per Bingham LJ (obiter); *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341; cf *The Future Express* [1992] 2 Lloyd's Rep 79 at 95-96; and see **BAILMENT** vol 3(1) (2005 Reissue) PARA 84. It may be that, even without an attornment, the buyer can sue in bailment whenever the carrier contemplated the transfer of property to the buyer and did not object to it, or whenever it is a matter of indifference to the carrier whether he holds the goods as bailee of the consignor-seller or of the consignee-buyer: cf *Makower, McBeath & Co Pty Ltd v Dalgety & Co Ltd* [1921] VLR 365, Vict SC. Where there is no bailment between an owner of goods and a carrier, and the carrier does not in consequence owe to the owner the obligations peculiar to a bailee (such as a duty to guard the goods against theft: *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700), the carrier may nevertheless be answerable to the owner in tort for breach of a general duty to take reasonable care to avoid damaging goods which belong to others: see PARA 757.

13 Cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA (where intermediate contractors never assumed possession before delivery to sub-contractors, and the terms of the relevant contracts were not adduced; it was held that the intermediate contractors had established no possessory title sufficient to enable them to sue the sub-contractors in tort); *Wincanton Ltd v P & O Trans European Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb) (substitutional bailment of pallets).

14 See the decisions cited PARA 753 notes 4, 9.

15 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 841-842, [1976] 3 All ER 129 at 132-133, HL, per Lord Diplock. See also *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

16 *China Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL (cargo owners, rather than shipowners, held to be bailors of salvors of cargo, notwithstanding shipowners' contractual right against cargo owners to resume possession of cargo for continuation of voyage); cf *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/757. Claim in tort.

## 757. Claim in tort.

To recover damages in tort for negligence in respect of loss of or damage to goods, a claimant must show that he had either the legal ownership of the goods or a possessory title to them at the time of the loss or damage<sup>1</sup>. Mere equitable property is insufficient unless accompanied by a possessory title<sup>2</sup>. For this purpose, a possessory title may include a right of possession as well as possession itself<sup>3</sup>. At common law, where a party having an immediate right to the possession of goods sues in tort in respect of that interest, he can recover damages in tort for

negligence representing the full value of the goods or the cost of their depreciation or repair, notwithstanding that the value of his personal interest is less than the full value<sup>4</sup>. In this respect the claimant's right is similar to that of a claimant having actual possession of the goods at the time of their loss or damage<sup>5</sup>. Having recovered the full value, however, the party with an immediate right of possession must account to the true owner for the residue after deducting the value of his own interest<sup>6</sup>. Where a consignor of goods has legal property in them at the time when they are lost or damaged while in the carrier's possession, the consignor can recover substantial damages in tort from the carrier, unless his claim was a bare proprietary one and did not include any right to the possession of the goods<sup>7</sup>. The right to substantial damages is unaffected by the fact that the risk has passed to the consignee, and the consignor's loss may therefore be nominal; it is the consignor's property in the goods which gives the right to substantial damages<sup>8</sup>. A similar rule applies where a consignor has a possessory title falling short of legal ownership in goods which are lost or damaged while in the carrier's possession<sup>9</sup>. In tort, the title to sue and the recovery of substantial damages are concurrent and it is the proprietary or possessory interest that is being compensated, not some other or different economic loss<sup>10</sup>. Whether the claimant could recover his loss from some other person is immaterial<sup>11</sup>. In such a case, the carrier is the bailee of the consignor and is estopped at common law from denying the consignor's title<sup>12</sup>. Where the owner or other person entitled to possession of goods recovers full damages from the carrier, however, he may be obliged to account for the residue (after deducting the value of his interest or the measure of his personal loss) to the consignee at whose risk the goods were at the material time<sup>13</sup>. Where a seller of goods consigns them to the buyer, and property passes to the buyer before the goods are lost or damaged while in the carrier's possession, the carrier is generally liable in tort to the buyer<sup>14</sup>. Such liability may co-exist with liability in contract whenever, in accordance with the general presumption, the consignor concludes the contract of carriage as the consignee's agent<sup>15</sup>. In such a case, the consignor, having no personal contract with the carrier and no surviving proprietary or possessory interest in the goods, can sue neither in contract nor in tort<sup>16</sup>. Liability in tort to the consignee may also exist independently of liability in contract in a case where, contrary to the general presumption, a consignor-seller concludes the contract of carriage as a principal on his own behalf rather than as agent for a consignee-buyer to whom property has passed<sup>17</sup>. In such a case, the consignor has no surviving proprietary or possessory interest in the goods and thus no claim in tort<sup>18</sup>. Whether he can recover substantial damages in contract depends on considerations examined above<sup>19</sup>.

1 *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 809, [1986] 2 All ER 145 at 149, HL, per Lord Brandon of Oakbrook; *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter* [1986] AC 1 at 15, [1985] 2 All ER 935 at 938, PC; *Obestain Inc v National Mineral Development Corp Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 467, 469; *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 131, CA, per Slade LJ; *O'Sullivan v Williams* [1992] 3 All ER 385 at 387, CA, per Fox LJ; *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363, NSW CA; cf *Electrical Enterprises Retail Pty Ltd v Rodgers* (1988) 15 NSWLR 473, NSW SC. Title to sue in conversion depends on the claimant's showing either the possession of goods or an immediate right to their possession: *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA. It is uncertain whether the right to possession must arise from a proprietary interest in the goods. See **TORT** vol 45(2) (Reissue) PARA 559; and cf *China Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL.

2 *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 812, [1986] 2 All ER 145 at 149, HL, per Lord Brandon of Oakbrook, who remarked that without an accompanying possessory title the equitable proprietor must join the legal owner as a party. Cf *Healey v Healey* [1915] 1 KB 938; *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA.

3 *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 138, CA, per Slade LJ (where the point was not finally decided); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. A claimant who has no immediate right to possession of goods at the time of their loss or damage but merely a deferred right of possession can recover damages in a claim on the case for permanent damage to that reversionary interest (which includes the loss of the goods beyond any reasonable prospect of recovery): *Mears v London and South Western Rly Co* (1862) 11 CBNS 850; *Moukattaf v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396 at 415 per Browne J;

*Transcontainer Express Ltd v Custodian Security Ltd* at 137 per Slade LJ (obiter); *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV*. For such damages to be recovered, however, the claimant must have suffered loss in his capacity as the owner of the chattel (or other reversioner) and not merely by virtue of some collateral contract to which he is party; in the latter event, the loss will fall to be categorised as economic and the characteristic restraints on the recovery of such loss in a claim in tort for negligence will apply: *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter* [1986] AC 1, [1985] 2 All ER 935, PC (damage suffered by reversioner in his capacity as a time charterer from the bailee; held not recoverable from third party).

4 *Chabbra Corpn Pte Ltd v Jag Shakti (Owners), The Jag Shakti* [1986] AC 337 at 345, [1986] 1 All ER 480 at 484, PC (a case of conversion, but where the principle was said to apply also to claims in tort for negligence). The common law position is modified by the Torts (Interference with Goods) Act 1977 s 8(1), by which the defendant in a claim for wrongful interference with goods is entitled to show, in accordance with rules of court, that a third person has a better right than the claimant as respects all or any part of the interest claimed, or in right of which he sues; and any rule of law to the contrary (sometimes called *jus tertii*) is abolished: see further PARA 67; and **TORT** vol 45(2) (Reissue) PARA 644.

5 *The Winkfield* [1902] P 42, CA; and see note 4; and **TORT** vol 45(2) (Reissue) PARA 644.

6 *Chabbra Corpn Pte Ltd v Jag Shakti (Owners), The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC. As to the discharge of the tortfeasor from liability when either the bailee or the bailor has recovered damages from him see *O'Sullivan v Williams* [1992] 3 All ER 385, CA; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 90.

7 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468, following *R & W Paul Ltd v National Steamship Co Ltd* (1937) 43 Com Cas 68, 59 Ll L Rep 28; *The Charlotte* [1908] P 206, CA; and see *The Aramis* [1989] 1 Lloyd's Rep 213 at 226, CA, per Bingham LJ.

8 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468 per Hobhouse J, who interpreted both *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL, and *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 812, [1986] 2 All ER 145 at 149, HL, as consistent with this principle. See also *The Aramis* [1989] 1 Lloyd's Rep 213 at 216, CA, per Bingham LJ.

9 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468 per Hobhouse J. In this event, the Torts (Interference with Goods) Act 1977 s 8(1) may apply because there is a party other than the claimant having an interest in the goods: see PARA 67; and **TORT** vol 45(2) (Reissue) PARA 644.

10 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 469; and see *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363, NSW CA.

11 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468-469; and see *The Aramis* [1989] 1 Lloyd's Rep 213 at 216, CA, per Bingham LJ. Cf *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA (conversion).

12 No question of *jus tertii* can, in any event, arise where the entire interest in the goods is vested in the consignor and only the risk in the goods has passed to a consignee. The Torts (Interference with Goods) Act 1977 s 8(1) (see PARA 67; and **TORT** vol 45(2) (Reissue) PARA 644) is also inapplicable in this situation because there is no other party having an interest in the goods.

13 *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363, NSW CA; and see *R & W Paul Ltd v National Steamship Co Ltd* (1937) 43 Com Cas 68 at 77, 59 Ll L Rep 28 at 33 (cited with approval in *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468).

14 *Hayn, Roman & Co v Culliford* (1879) 4 CPD 182, CA; *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 844, [1976] 3 All ER 129 at 135, HL, per Lord Diplock (obiter); *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

15 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 841-842, 844-845, [1976] 3 All ER 129 at 132-133, 135-136, HL, per Lord Diplock; *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; and see PARA 754.

16 Cf *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363, NSW CA.

17 Cf *Hayn, Roman & Co v Culliford* (1879) 4 CPD 182, CA; *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 844-845, [1976] 3 All ER 129 at 135-136, HL, per Lord Diplock.

18 It is possible that an unpaid seller of goods, who exercises a right of stoppage in transit in the event of the buyer's insolvency by giving the carrier notice to that effect, acquires sufficient interest in the goods to sue the carrier in tort for subsequent defaults causing the loss of or damage to the goods notwithstanding that the general property in the goods has passed to the buyer: see the Sale of Goods Act 1979 s 44; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq. A claim may also lie against the carrier in bailment: see s 46(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 272.

19 See PARA 754.

## UPDATE

### 757 Claim in tort

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/758. Persons liable to the carrier for freight.

### 758. Persons liable to the carrier for freight.

The same considerations relevant to answering the question as to whom the carrier contracts with apply to the related question as to whom the carrier can sue for unpaid freight. Thus, in the absence of statutory answers to this question<sup>1</sup>, the usual person to sue for unpaid freight will be the consignee<sup>2</sup>. In the absence of evidence to the contrary, the consignee might be regarded as impliedly promising to pay the freight in return for the carrier's surrendering his lien upon the goods by delivering them to the consignee<sup>3</sup>.

1 See PARA 752 et seq for the cargo-interest's title to sue the carrier. For an equivalent statutory provision allowing a carrier by sea to sue a cargo-interest see the Carriage of Goods by Sea Act 1924 s 3; and PARA 342.

2 *Mullinson v Carver* (1843) 1 LTOS 59; *Dickenson v Lano* (1860) 2 F & F 188 at 190; *Bristol and Exeter Rly (Directors) v Collins* (1859) 7 HL Cas 194 at 211. This is because of the presumption that the contract of carriage of goods is made between the owner of those goods and the carrier: see PARA 752. In such a case, the consignor acts merely as the consignee's agent and incurs no liability on the contract of carriage: *Great Eastern Rly Co v Nix* (1895) 39 Sol Jo 709. Cf *Great Western Rly Co v Bagge* (1885) 15 QBD 625, DC.

3 It is doubtful whether such a contract could be implied in the case of a private carrier who has neither a common law nor a contractual lien: cf *World Transport Co v Tealing & Co* [1936] 2 All ER 573. As to the carriers' lien for charges see PARA 761; and as to implied contracts of carriage see PARA 348. A right to freight on the basis of an implied contract of carriage was recognised (obiter) in *WN White & Co Ltd v Furness, Withy & Co Ltd* [1895] AC 40, HL.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/759. Claim for freight.

### 759. Claim for freight.

Until the carrier has carried and is ready and willing to deliver the goods he cannot sue for the freight<sup>1</sup>. In the absence of agreement, he can only recover a reasonable sum for carriage<sup>2</sup>. If the goods are of great value, this may be relevant in assessing what sum is reasonable<sup>3</sup>.

1 *Barnes v Marshall* (1852) 18 QB 785. For the right of a common carrier to require prior payment of charges see PARA 9.

2 See the Supply of Goods and Services Act 1982 s 15; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 99. See also **BAILMENT** vol 3(1) (2005 Reissue) PARAS 63-64. As to deduction from freight in respect of loss, damage or delay to cargo see *RH & D International Ltd v IAS Animal Air Services Ltd* [1984] 2 All ER 203, [1984] 1 WLR 573.

3 *Harris v Packwood* (1810) 3 Taunt 264.

## UPDATE

### 759-760 Claim for freight, Carrier's property in the goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/760. Carrier's property in the goods.

### 760. Carrier's property in the goods.

A carrier, being answerable for the safety of the goods carried, has such a special property in the goods as to be able to maintain civil and criminal<sup>1</sup> proceedings against any person wrongfully depriving him of them<sup>2</sup>. He may prosecute a person who obtains possession of the goods by falsely representing that he is the carrier's agent, but the fact that he brings such a prosecution does not amount to ratification of the contract and make him liable for the loss of the goods<sup>3</sup>. A carrier also has an insurable interest in goods, so as to have the right to recover from an insurer the whole value of them if goods are lost or destroyed while in his care<sup>4</sup>.

1 'Property belonging to another' includes property of which another has possession or control for the purposes of the offence of theft (see the Theft Act 1968 s 5; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 289) and also, it appears, for the purposes of the offence of obtaining property by deception under s 15 (see *Lawrence v Metropolitan Police Comr* [1972] AC 626 at 632, [1971] 2 All ER 1253 at 1255, HL). As to theft and obtaining property by deception generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 282 et seq, 310 et seq.

2 See *R v Deakin and Smith* (1800) 2 Leach 862; *Nicolls v Bastard* (1835) 2 Cr M & R 659; *The Winkfield* [1902] P 42, CA; *Chabbra Corp'n Pte Ltd v Jag Shakti (Owners), The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC. As to the rights of a bailee as regards third persons see **BAILMENT** vol 3(1) (2005 Reissue) PARA 89.

3 *Harrison v London and North Western Rly Co* [1917] 2 KB 755, 86 LJKB 1461.

4 *London and North Western Rly Co v Glyn* (1859) 1 E & E 652; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; *Ellerman Lines Ltd v Lancaster Maritime Co Ltd, The Lancaster* [1980] 2 Lloyd's Rep 497 at 502-503 per Robert Goff J; *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127 at 135, [1983] 3 All ER 35 at 41 per Lloyd J. See also PARA 69; and **INSURANCE** vol 25 (2003 Reissue) PARA 615.

## UPDATE

### 759-760 Claim for freight, Carrier's property in the goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/761. Carrier's lien.

## 761. Carrier's lien.

Every common carrier has a particular lien<sup>1</sup> on the goods carried for the freight payable<sup>2</sup>. This lien exists as against the owner of the goods, even if they were delivered to a common carrier against the owner's will, for example by a thief, for the carrier cannot refuse to accept goods tendered to him for carriage<sup>3</sup>. Apart from contract, express or implied, he has no lien on the goods for anything beyond the price of carriage<sup>4</sup>.

At common law, a common carrier has no lien on the goods carried for a general balance of account due for the carriage of other goods<sup>5</sup>, and a private carrier has, apart from contract, no lien against the owner in respect of goods carried or removed<sup>6</sup>.

A general lien may exist by contract, express or implied; but the burden of proving such a lien always lies on the person who claims it<sup>7</sup>. Where by contract such a lien exists, it can only be exercised, as against the owner of goods, for a general account owing by him; it cannot be exercised, as against the owner, for a general account owing by the consignee, who is merely the factor of the owner<sup>8</sup>. Such a lien can, however, be exercised against a receiver of the property of the owner in respect of goods coming into possession of the carrier after the appointment of the receiver<sup>9</sup>.

Where by the established usage of a certain business the consignor pays the carriage of goods, the carrier has no right to retain the goods as against a consignee who has paid for them, in respect of a general balance due by the consignor<sup>10</sup>.

A usage giving the carrier a lien for a general account owing by the consignee cannot in any way affect the consignor's right of stoppage in transit<sup>11</sup>.

1 As to liens generally see **LIEN** vol 68 (2008) PARA 801 et seq.

2 *Skinner v Upshaw* (1702) 2 Ld Raym 752. The lien may extend to charges incurred in respect of goods not delivered to the consignee; thus where goods are carried first by rail and then by sea, and in the course of their carriage some are lost on the rail journey, the lien covers charges incurred in respect of the goods so lost. The existence of such a lien in each case depends upon the particular contract: *The Hibernian* [1907] P 277, CA. As to shipowners' liens for freight see PARA 551 et seq.

3 *Exeter Carriers Case* (undated), cited in 2 Ld Raym at 867.

4 *Hirst v Page & Co* (1891) 7 TLR 537; *Lambert v Robinson* (1793) 1 Esp 119.

5 *Aspinall v Pickford* (1800) 3 Bos & P 44n; *Wright v Snell* (1822) 5 B & Ald 350; *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL; and see also *Trucks and Spares Ltd v Maritime Agencies (Southampton) Ltd* [1951] 2 All ER 982 at 983, CA, per Denning LJ.

6 *Electric Supply Stores v Gaywood* (1909) 100 LT 855.

7 *Rushforth v Hadfield* (1806) 7 East 224. An implication may arise from a long course of dealing, provided many instances can be proved. Evidence that the carrier has on previous occasions claimed the lien, and has been allowed to retain the goods, is material: *Aspinall v Pickford* (1800) 3 Bos & P 44n. As to the evidence necessary to establish a general lien by usage see *Plaice v Allcock* (1866) 4 F & F 1074; and **LIEN** vol 68 (2008) PARA 831 et seq.

8 *Wright v Snell* (1822) 5 B & Ald 350.

9 *George Barker (Transport) Ltd v Eynon* [1974] 1 All ER 900, [1974] 1 WLR 462, CA. For the position of administrators see *Bristol Airport plc v Powdrill* [1990] Ch 744, [1990] 2 All ER 493, CA.

10 *Butler v Woolcott* (1805) 2 Bos & PNR 64.

11 *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/762. When and over what goods lien is exercisable.

### **762. When and over what goods lien is exercisable.**

There can be no lien where there is an agreement, either express or implied, that the carrier is to give credit for the carriage<sup>1</sup>.

The right of a carrier to exercise either a general or a particular lien cannot arise until the transit of the goods is complete; hence in no case can he stop the goods at the commencement of a journey<sup>2</sup>.

Where separate parcels are carried at one time for the same consignee, the carriage having been paid on some and not on others, the carrier has no right, in the absence of a general lien, to retain all the parcels as security for the carriage of those for which payment has not been made<sup>3</sup>.

The delivery of part of the consignment of goods does not prevent the carrier from discontinuing delivery and retaining the remainder until the carriage of the whole consignment is paid<sup>4</sup>.

1 *Raitt v Mitchell* (1815) 4 Camp 146.

2 *Wiltshire Iron Co Ltd v Great Western Rly Co* (1871) LR 6 QB 776. See also *George Barker (Transport) Ltd v Eynon* [1974] 1 All ER 900, [1974] 1 WLR 462, CA.

3 *Prenty v Midland Great Western Rly Co* (1866) 14 WR 314.

4 *Re McLaren, ex p Cooper* (1879) 11 Ch D 68, CA.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/763. Exercise of lien.

### **763. Exercise of lien.**

When a carrier exercises his lien, he must keep the goods safely for a reasonable time, at a place reasonably convenient for the owner to obtain possession of them on tender of payment<sup>1</sup>. While he so retains them, he does so in his own interests, and therefore, apart from agreement, he ordinarily has no right to charge the owner for warehousing the goods<sup>2</sup>.

If the consignee carries away goods against the will of the carrier, while they are being retained in exercise of a lien for carriage, the lien revives on the carrier retaking the goods<sup>3</sup>.

1 *Great Western Rly Co v Crouch* (1858) 3 H & N 183.

2 *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338; *China Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; and PARA 23.

3 *Wallace v Woodgate* (1824) Ry & M 193.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/764. Storage where delivery not taken.

#### **764. Storage where delivery not taken.**

Where at the end of a transit the owner does not take delivery of his goods within a reasonable time, the carrier should take all reasonable means to preserve them safely; and though he may recover the charges to which he has been put in so preserving the goods, the lien for carriage does not extend to those charges<sup>1</sup>.

1 *Great Northern Rly Co v Swaffield* (1874) LR 9 Exch 132. See *Mitchell v Lancashire and Yorkshire Rly Co* (1875) LR 10 QB 256. Cf *China Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL. See also PARA 23.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(1) REMEDIES IN GENERAL/765. Nature of claims against carriers.

#### **765. Nature of claims against carriers.**

A claim against a carrier may be in contract, tort or bailment<sup>1</sup>. Whether a claim against a carrier is in contract or tort depends on whether the claimant must prove a contract, or whether he can show good cause independent of contract<sup>2</sup>. Thus a claim against a carrier for delivering goods to the consignee contrary to a notice by the consignor to stop in transit is a claim in tort<sup>3</sup>; but a claim for non-delivery of goods is one founded on contract<sup>4</sup>.

An employee whose personal luggage is lost by a carrier may sue the carrier in tort for damages in his own name, even though his employer paid for the ticket<sup>5</sup>.

1 See PARA 752 et seq. Although most bailments arise as a result of a contract, a relationship of bailment is not dependent on the existence of a contract between bailor and bailee: see *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 504, CA, per Bingham LJ.

2 *Turner v Stallibrass* [1898] 1 QB 56, CA; *Edwards v Mallan* [1908] 1 KB 1002, CA; cf *Jarvis v Moy, Davies, Smith Vandervell & Co* [1936] 1 KB 399, CA; *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107. The distinction is relevant in relation to the measure of damages: see eg *The Arpad* [1934] P 189, CA; *Groom v Crocker* [1939] 1 KB 194, [1938] 2 All ER 394, CA. See also PARA 773 et seq.

3 *Pontifex v Midland Rly Co* (1877) 3 QBD 23, DC.

4 *Fleming v Manchester, Sheffield, and Lincolnshire Rly Co* (1878) 4 QBD 81, CA, disapproving *Tattan v Great Western Rly Co* (1860) 2 E & E 844. See also *The Arpad* [1934] P 189 at 232, CA, per Maughan LJ.

5 *Marshall v York, Newcastle and Berwick Rly Co* (1851) 11 CB 655.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(2) STOPPAGE IN TRANSIT/766. Nature of right of stoppage in transit.

## (2) STOPPAGE IN TRANSIT

### 766. Nature of right of stoppage in transit.

The stoppage of goods in transit<sup>1</sup> is fully considered elsewhere in this work<sup>2</sup>, and is dealt with here only as it affects carriers.

The right to stop goods in the course of their transit to the buyer is one of the remedies of an unpaid seller<sup>3</sup> of the goods which may be exercised after he has parted with possession of the goods<sup>4</sup> notwithstanding that the property in the goods may have passed to the buyer<sup>5</sup>. The right arises when the buyer becomes insolvent<sup>6</sup>, and, subject to statutory provisions relating to contrary agreement, course of dealing or usage<sup>7</sup>, or certain dispositions by the buyer<sup>8</sup>, entitles the unpaid seller to resume possession of the goods as long as they are in course of transit<sup>9</sup> and to retain them until payment or tender of the price<sup>10</sup>.

1 The phrase 'in transit' replaces 'in transitu' used in the Sale of Goods Act 1893 (repealed) and in the common law cases preceding that Act.

2 See generally **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq.

3 A seller is deemed to be an unpaid seller when the whole of the price of the goods has not been paid or tendered or when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise: see the Sale of Goods Act 1979 s 38(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 238.

4 Thus losing his seller's lien under the Sale of Goods Act 1979 s 41(1): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 242 et seq.

5 See the Sale of Goods Act 1979 ss 39, 44; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 236, 237, 256.

6 See the Sale of Goods Act 1979 s 44; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256. For this purpose, a person is deemed to be insolvent who has either ceased to pay his debts in the ordinary course of business or who cannot pay his debts as they become due: see s 61(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 206.

7 See the Sale of Goods Act 1979 s 55(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 100.

8 See the Sale of Goods Act 1979 s 47; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 253, 278.

9 See PARA 767.

10 See the Sale of Goods Act 1979 s 44; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256. Cf the more extensive right of the consignor of goods by road to a destination in another country to stop the goods in transit under the CMR Convention art 12; and PARA 665. With respect to the international carriage of goods by rail cf the CIM Rules (COTIF Convention Appendix B) arts 17-22; and PARAS 699-701. As to the right of stoppage in transit in the case of carriage by air see PARA 158.

## UPDATE

### 766-773 Stoppage in Transit

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(2) STOPPAGE IN TRANSIT/767. Duration of transit.

### 767. Duration of transit.

Goods are deemed to be in the course of transit from the time they are delivered to a carrier<sup>1</sup> or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf<sup>2</sup> takes delivery<sup>3</sup> of them from that carrier or other bailee<sup>4</sup>.

If the buyer or his agent obtains delivery of the goods before their arrival at their appointed destination<sup>5</sup>, or if the carrier or other bailee for transmission to the buyer wrongfully refuses to deliver the goods to the buyer or his agent, the transit is deemed to be at an end<sup>6</sup>. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee of the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer<sup>7</sup>. If, however, the buyer rejects the goods and the carrier or other bailee retains possession of them<sup>8</sup>, the transit is not deemed to be at an end even if the seller refuses to receive them back<sup>9</sup>. The transit is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee as his agent, and not as a carrier<sup>10</sup>.

1 This refers to a carrier who is an agent of the buyer, since the seller retains his lien under the Sale of Goods Act 1979 s 41 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 242) when the carrier is the agent of the seller and no question of stoppage in transit arises. A presumption that the carrier is the agent of the buyer arises where the seller delivers the goods to the carrier without reserving a right of disposal: see s 18 r 5(2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 127.

2 Is an agent to accept delivery for the buyer and not to transmit them to him: *Dodson v Wentworth* (1842) 4 Man & G 1080; *Heinekey v Earle* (1857) 8 E & B 410 at 423; *Jobson v Eppenheim & Co* (1905) 21 TLR 468; *Johann Plischke und Söhne GmbH v Allison Bros Ltd* [1936] 2 All ER 1009; and see note 10.

3 'Delivery' means the voluntary transfer of possession by one person to another of the goods: see the Sale of Goods Act 1979 s 61(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 163. Documents of title alone are not sufficient: *Fraser v Witt* (1868) LR 7 Eq 64.

4 See the Sale of Goods Act 1979 s 45(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 259.

5 Is to a particular person at a particular place: *Re Isaacs, ex p Miles* (1885) 15 QBD 39 at 45, CA, per Brett MR.

6 See the Sale of Goods Act 1979 s 45(2), (6); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 262, 266.

7 See the Sale of Goods Act 1979 s 45(3); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 263.

8 Is unless the buyer rejects them after he or his agent has taken possession of them: *Jobson v Eppenheim & Co* (1905) 21 TLR 468.

9 See the Sale of Goods Act 1979 s 45(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 265.

10 *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 78, CA, per James LJ. In the following cases it was held that transit had ended: *Dixon v Baldwin* (1804) 5 East 175 (goods sent to forwarding agents to await buyer's orders); *Dodson v Wentworth* (1842) 4 Man & G 1080 (goods placed in warehouse used by buyer); *Valpy v Gibson* (1847) 4 CB 837 (goods off-loaded and sent for repacking by buyer's agent); *Schotsmans v Lancashire and Yorkshire Rly Co* (1867) 2 Ch App 332 (delivery to buyer's ship although bills of lading in favour of buyer and assigns were kept by seller); *Re Whitworth, ex p Gibbes* (1875) 1 ChD 101 (goods arrived at port of destination and bill of lading handed to buyer; it seems that taking part of the goods from railway trucks was

constructive assumption of possession of the whole); *Re Isaacs, ex p Miles* (1885) 15 QBD 39, CA (delivery to forwarding agent to await buyer's orders); *Jobson v Eppenheim & Co* (1905) 21 TLR 468 (goods sent to shipping agent who then forwarded them in accordance with buyer's instructions); *Reddall v Union Castle Mail Steamship Co Ltd* (1914) 84 LJB 360 (buyer intercepting goods during carriage by successive carriers before original destination reached); *Johann Plischke und Söhne GmbH v Allison Bros Ltd* [1936] 2 All ER 1009 (warehousing in accordance with buyer's instructions to do so and await orders).

In the following cases it was held that the transit had not ended: *Whitehead v Anderson* (1842) 9 M & W 518 (no actual possession taken by the buyer and no agreement by the carrier to hold the goods as the buyer's agent); *Heinekey v Earle* (1857) 8 E & B 410 at 423 per Lord Campbell (arrival at place of destination is not necessarily the end of the transit); *Coventry v Gladstone* (1868) LR 6 Eq 44 (promise to deliver to buyer when goods could be got at); *Re Love, ex p Watson* (1877) 5 ChD 35, CA (goods not arrived at agreed destination before seller demanded bills of lading); *Re Worsdell, ex p Barrow* (1877) 6 ChD 783 (goods warehoused by carrier's agent at port of destination); *Re Cock, ex p Rosevear China Clay Co* (1879) 11 ChD 560, CA (goods on ship nominated by buyer for carriage as he directed, but no bill of lading given to him); *Kemp v Falk* (1882) 7 App Cas 573, HL (indorsement of bill of lading by way of security does not affect seller's right, save that he is liable to satisfy the charge); *Bethell v Clark* (1888) 20 QBD 615, CA (goods delivered to ship nominated by buyer in transit until ship arrives at its destination); *Lyons v Hoffnung* (1890) 15 App Cas 391, PC (where goods were intended to pass direct from the seller to a carrier for carriage to a destination contemplated by the parties at the time of sale, transit continues until they reach that destination even though they are held by the carrier as the buyer's agent); *Jobson v Eppenheim & Co*; *Kemp v Ismay, Imrie & Co* (1909) 100 LT 996 (goods sold for delivery to carriers in England for shipment to Australia still in transit after shipment in accordance with buyer's orders).

## UPDATE

### 766-773 Stoppage in Transit

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(2) STOPPAGE IN TRANSIT/768. Delivery on chartered ship or hired vehicle.

### 768. Delivery on chartered ship or hired vehicle.

When the goods are delivered to a ship chartered or to a vehicle hired by the seller<sup>1</sup>, they are in transit<sup>2</sup> unless the charterparty is by way of demise<sup>3</sup> so that the master and crew are his employees, in which case he retains possession of the goods and can exercise his lien<sup>4</sup>. When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer<sup>5</sup>.

1 Goods may be in the possession of the hirer of the vehicle notwithstanding that the vehicle is in the charge of the employee of the owner of the vehicle: *Master etc of Trinity House v Clark* (1815) 4 M & S 288 at 299 per Lord Ellenborough; but see *Learoyd Bros & Co and Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142 at 148 per Sachs J.

2 *Gurney v Behrend* (1854) 3 E & B 622; *Fraser v Witt* (1868) LR 7 Eq 64; *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA.

3 See PARAS 210-212.

4 I.e. under the Sale of Goods Act 1979 s 41(1): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 242.

5 See the Sale of Goods Act 1979 s 41(5): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 269.

**UPDATE****766-773 Stoppage in Transit**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(2) STOPPAGE IN TRANSIT/769. How stoppage in transit is effected.

**769. How stoppage in transit is effected.**

An unpaid seller<sup>1</sup> may<sup>2</sup> exercise his right of stoppage in transit either by taking possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are<sup>3</sup>. This notice may be given either to the person in actual possession of the goods or to his principal, but in the latter case, to be effectual, the notice must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his employee or agent in time to prevent delivery to the buyer<sup>4</sup>.

1 As to an 'unpaid seller' see PARA 766 note 3.

2 The methods of stoppage mentioned in the text are probably not exhaustive. Thus a demand for the bill of lading of the goods (*Re Love, ex p Watson* (1877) 5 ChD 35, CA) or the taking possession of a small part of the goods (*Hutchings v Nunes and Nunes* (1863) 1 Moo PCCNS 243) have been held to be effective.

3 See the Sale of Goods Act 1979 s 46(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 271. See also *Northey and Lewis (Assignees of Leyland and Cragg) v Field* (1797) 2 Esp 613 (notice to customs officials where goods held in warehouse pending payment of duties).

4 See the Sale of Goods Act 1979 s 46(2), (3); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 271. If the goods are delivered to the buyer or his agent in that behalf (see PARA 767) through the failure of the principal to exercise reasonable diligence to communicate notice of stoppage to the person in actual possession of the goods, then the notice to the principal would be effective and he would be liable to the same extent as if he had disregarded the notice. Cf *Kemp v Falk* (1882) 7 App Cas 573 at 585, HL, per Lord Blackburn.

**UPDATE****766-773 Stoppage in Transit**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(2) STOPPAGE IN TRANSIT/770. Position of carrier who receives notice of stoppage in transit.

**770. Position of carrier who receives notice of stoppage in transit.**

As the right of stoppage in transit enables an unpaid seller whose buyer is insolvent to exercise some control over goods in which he has no property and of which he has no possession, while in the hands of a carrier with whom he has no contract, and to prevent that carrier from performing a contract to which the unpaid seller is not a party, there has been considerable difficulty in fitting in this right, derived from the custom of merchants, with the rules of common law<sup>1</sup>. Where notice of stoppage has been given, certain legal consequences are now established.

When notice of stoppage in transit is given to the carrier before the transit has ended<sup>2</sup>, he must redeliver the goods to, or according to the directions of, the seller<sup>3</sup>. The expenses of redelivery must be borne by the seller<sup>4</sup>. The seller on his part, although he is not a party to the contract of carriage, is bound to take the goods or give directions for their delivery on arrival<sup>5</sup> and to pay the carrier the amount due to him for freight charges; and, if he declines to do so, he is liable in damages to the carrier for the amount of those charges. If the seller, exercising his right of stoppage in transit, prevents the goods from being carried to their intended final destination, he is liable for the freight charges not only to the place at which transit is in fact stopped, but also to the intended destination<sup>6</sup>.

The carrier's obligation to redeliver the goods to, or according to the directions of, the seller appears to be limited to delivery at the contractual place of destination<sup>7</sup>. Were it not so limited, the seller might require the carrier to deliver at the place from which the goods were consigned or at some place far removed from the contractual route, and there is no authority that a carrier could be compelled to enter into a fresh contract of carriage, unless he were a common carrier and under a duty to carry as such<sup>8</sup>.

The seller's right to delivery of goods stopped in transit is subject to the particular lien of the carrier for the carriage of the goods, but is paramount to any general lien of the carrier against the buyer<sup>9</sup>, and to any rights of an execution creditor of the buyer<sup>10</sup>. The carrier is not therefore bound to deliver the goods to, or according to the directions of, the sender unless the amount due for freight charges is tendered or a tender is waived<sup>11</sup>.

1 See *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570 at 597, CA, per Scrutton J.

2 See PARA 767. In the context of carriage of goods by sea, a problem arises where an unpaid seller has transferred a bill of lading to a defaulting buyer, making that buyer a holder of a bill of lading under the Carriage of Goods by Sea Act 1924 s 2(1)(b): see PARA 364. It is arguable that in this situation the seller loses his right of stoppage because transit is at an end under the Sale of Goods Act 1979 s 45(6) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 266).

3 See the Sale of Goods Act 1979 s 46(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 272. If he fails to act upon the notice the carrier will be liable to a claim by the vendor for wrongful conversion: *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570, CA. See also *The Tigress* (1863) Brown & Lush 38, 32 LJPM & A 97; *Pontifex v Midland Rly Co* (1877) 3 QBD 23, DC.

4 See the Sale of Goods Act 1979 s 46(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 272.

5 The seller cannot demand actual possession during the transit against the carrier's will: *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570 at 600, CA, per Scrutton J.

6 *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570, CA.

7 *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570 at 600, CA, per Scrutton J.

8 See PARA 3. With respect to the international carriage of goods by road cf the CMR Convention art 12; and PARAS 665-667. With respect to the international carriage of goods by rail cf the CIM Rules (COTIF Convention Appendix B) arts 17-22; and PARAS 699-701. As to the right of stoppage in transit in the case of carriage by air see PARA 158.

9 *Oppenheim v Russell* (1802) 3 Bos & P 42; *Morley v Hay* (1828) 3 Man & Ry KB 396 (wharfinger's particular lien); *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL.

10 *Smith v Goss* (1808) 1 Camp 282.

11 See *Jones v Tarleton* (1842) 9 M & W 675 (claim for general lien acts as waiver of tender of amount required to discharge particular lien); *Scarfe v Morgan* (1838) 4 M & W 270 (tender not waived); *Kerford v Mondel* (1859) 28 LJEx 303 (claim on double grounds amounting to waiver of tender in respect of either); *Thompson v Trial* (1826) 6 B & C 36 (other reason given for non-delivery).

## UPDATE

### 766-773 Stoppage in Transit

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(2) STOPPAGE IN TRANSIT/771. Carrier's compliance with seller's notice of stoppage.

#### 771. Carrier's compliance with seller's notice of stoppage.

Whilst the seller's right to stop in transit and to recover possession of the goods from the carrier depends upon the existence of the facts that the seller is unpaid<sup>1</sup> and that the buyer is insolvent<sup>2</sup>, it is not necessary for the seller to prove to the carrier that such facts exist<sup>3</sup>. If the carrier complies with a seller's notice to stop goods in transit, he may find himself in a difficult position should it turn out that the seller was not entitled to stop the transit. If the buyer has demanded delivery and the carrier refuses, then he would be liable for damages for conversion<sup>4</sup> and might also be liable for damages for breach of the contract of carriage<sup>5</sup>. If the carrier redelivers the goods to the seller or to someone on his behalf before the buyer has requested delivery, he may be liable to the buyer for damages for conversion if the seller's claim proves to be ill-founded<sup>6</sup>. Where the goods are demanded by the buyer or the seller or both, the carrier may give a qualified refusal to deliver to either until he has had a reasonable opportunity of ascertaining which of them is entitled to possession<sup>7</sup>. If either party then brings proceedings against the carrier for refusal to deliver the goods, he will be entitled to interplead<sup>8</sup> and if he claims no interest in the goods save for his costs and charges he may obtain an order for payment of his costs and charges upon his dealing with the goods as the court directs<sup>9</sup>.

1 See PARA 766 note 3.

2 See PARA 766 note 6.

3 *The Tigress* (1863) Brown & Lush 38, 32 LJ PM & A 97.

4 *Syeds v Hay* (1791) 4 Term Rep 260; *Wilson v Anderton* (1830) 1 B & Ad 450; *Clendon v Dinneford* (1831) 5 C & P 13; *Verrall v Robinson* (1835) 2 Cr M & R 495; *Catterall v Kenyon* (1842) 3 QB 310; *Atkinson v Marshall* (1842) 12 LJEx 117 (setting up a jus tertii or keeping goods in order to maintain the title of a third person is evidence of conversion); *Caunce v Spanton* (1844) 7 Man & G 903; *Pillott v Wilkinson* (1864) 3 H & C 345, Ex Ch; *Wetherman v London and Liverpool Bank of Commerce Ltd* (1914) 31 TLR 20; cf *Capital Finance Co Ltd v Bray* [1964] 1 All ER 603, [1964] 1 WLR 323, CA (no liability for mere refusal to send goods to a place nominated by the owner where there is no contractual duty to do so). See further **TORT** vol 45(2) (Reissue) PARA 548 et seq.

5 The contract of carriage will usually have been made by the seller as agent for the buyer: *Cork Distilleries Co v Great Southern and Western Rly Co (Ireland)* (1874) LR 7 HL 269. See also the Sale of Goods Act 1979 s 32(2); PARA 753; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 190.

6 A carrier is not in general liable for conversion merely because he carries goods from one place to another in the belief that he does so by the authority of the owner or person entitled to possession (*Sheridan v New Quay Co* (1858) 4 CBNS 618 at 650; *Hollins v Fowler* (1875) LR 7 HL 757 at 767, 801); but in the case of stoppage in transit he necessarily has notice that the consignee has some interest in the goods even if he does not know its extent. See generally **TORT** vol 45(2) (Reissue) PARA 548 et seq.

7 *Lee v Bayes and Robinson* (1856) 18 CB 599; *Clayton v Le Roy* [1911] 2 KB 1031 at 1051, CA, per Fletcher Moulton LJ.

8 *Wilson v Anderton* (1830) 1 B & Ad 450.

9 *De Rothschild Frères v Morrison, Kekewich & Co* (1890) 24 QBD 750, CA.

## UPDATE

### 766-773 Stoppage in Transit

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(2) STOPPAGE IN TRANSIT/772. Part delivery of goods.

### 772. Part delivery of goods.

Where part delivery of the goods has been made to the buyer or his agent in that behalf<sup>1</sup>, the remainder of the goods may be stopped in transit unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods<sup>2</sup>.

1 See PARA 767 note 2.

2 See the Sale of Goods Act 1979 s 45(7); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 270. Cf *Bolton v Lancashire and Yorkshire Rly Co* (1866) LR 1 CP 431 at 440 per Willes J. See also the Sale of Goods Act 1979 s 45(4); PARA 767; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 265.

## UPDATE

### 766-773 Stoppage in Transit

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/773. Special provisions.

## (3) MEASURE OF DAMAGES

## (i) Carriage of Goods

### 773. Special provisions.

In the case of the carriage of goods by air<sup>1</sup> or by sea<sup>2</sup>, or in the case of the international carriage of goods by road or rail<sup>3</sup>, the measure of damages is governed by special statutory provisions<sup>4</sup>. Otherwise, standard forms of contract of carriage normally contain express provisions for limiting the amount of damages recoverable in the event of loss, damage or delay<sup>5</sup>. In specified circumstances, a common carrier is relieved of liability in respect of loss of or injury to articles of specified descriptions, the value of which exceeds £10, contained in a parcel or package delivered to him for carriage<sup>6</sup>.

1 See PARA 150 et seq. As to carriage by air generally see PARA 121 et seq.

2 See PARAS 238, 458-463, 560-566, 641-644.

3 See PARA 716 et seq. As to carriage by road and rail generally see PARA 650 et seq.

4 For general principles as to the measure of damages see **DAMAGES** vol 12(1) (Reissue) PARA 801 et seq.

5 See PARA 78. Such clauses may be subject to a test of reasonableness under the Unfair Contract Terms Act 1977: see PARA 80; and **CONTRACT** vol 9(1) (Reissue) PARA 831.

6 See PARA 28. This does not, however, afford protection against liability for damage resulting from delay, unless the delay is caused by loss: see PARA 28.

### UPDATE

#### 766-773 Stoppage in Transit

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/774. Loss of goods.

### 774. Loss of goods.

Where goods are entirely destroyed or lost by a common carrier, the measure of the damages recoverable from him is prima facie the value of the property lost<sup>1</sup>. The owner is entitled to the value of goods dealt in by way of trade at the place to which they were consigned<sup>2</sup>. If there is a market for that description of goods at that place, the damages are the market value of the goods there at the time when they ought to have been delivered; but if there is no market, then the damages are the cost price of the goods, together with the expenses of carriage, and such profits as might reasonably be expected to have been made in the ordinary course of business<sup>3</sup>, provided the carrier had notice that the goods were bought for resale<sup>4</sup>. If the consignor has declared the value of the goods before the carriage, he is bound by the declaration and is estopped from giving evidence that the goods have any higher value<sup>5</sup>.

1 *Crouch v London and North Western Rly Co* (1849) 2 Car & Kir 789; *Riley v Horne* (1828) 5 Bing 217 at 222. Where goods are so badly injured in transit as not to be easily repaired, the owner may reject them, and the carrier is liable for their full value: *Dick v East Coast Railways* (1901) 4 F 178, Ct of Sess. Where a consignment

of tax seals was lost, the damages were held not to include the duty which the claimant was obliged to pay on the exportation of other goods as a result of the loss: see *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108. See also *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, [1967] 3 All ER 686, HL.

2 *Rice v Baxendale* (1861) 7 H & N 96; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1049 per Devlin J; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 427, [1967] 3 All ER 686 at 719, HL, per Lord Upjohn ('where marketable goods are lost it is almost axiomatic that the market price measures the damage').

3 *O'Hanlan v Great Western Rly Co* (1865) 6 B & S 484.

4 *The Arpad* [1934] P 189, CA. The fact that the consignee is a trader does not constitute such notice: see *The Arpad* at 230 per Maugham LJ; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1049 per Devlin J.

5 *M'Cance v London and North Western Rly Co* (1864) 3 H & C 343; *Riley v Horne* (1828) 5 Bing 217.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/775. Delay generally.

### 775. Delay generally.

Where injury is caused by delay in the delivery of the goods or by non-delivery of the right goods, such damages are recoverable from the carrier as he should reasonably have contemplated would flow from his breach of duty<sup>1</sup>.

When at the time of the contract the consignor specially brings to the carrier's notice the object with which he is sending the goods, or circumstances are brought to the carrier's knowledge at the time of the contract from which that object ought reasonably to be inferred<sup>2</sup>, so that the object may fairly be taken to have been in the carrier's contemplation, damages which are the natural consequences of the failure of that object are recoverable<sup>3</sup>.

In some circumstances, the natural consequences of delay may be extremely heavy losses which are out of all proportion to the profit made by the carrier; but it is doubtful to what extent a common carrier to whom proper notice of such circumstances is brought is justified in refusing to accept liability arising from them<sup>4</sup>. An agreement by the carrier to be liable for more than the ordinary amount of damages cannot be implied from the mere fact that he received the goods with notice of extraordinary circumstances<sup>5</sup>. Thus a notice, written on a label, that the goods are being sent with a special object, is not sufficient of itself to bring that object to the carrier's knowledge<sup>6</sup>.

1 *Hadley v Baxendale* (1854) 9 Exch 341; *Horne v Midland Rly Co* (1873) LR 8 CP 131; *Simpson v London and North Western Rly Co* (1876) 1 QBD 274; *Monte Video Gas and Dry Dock Co Ltd v Clan Line Steamers Ltd* (1921) 37 TLR 866, CA; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *Panalpina International Transport Ltd v Densil Underwear Ltd* [1981] 1 Lloyd's Rep 187; and see *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196 at 220 et seq, [1949] 1 All ER 1 at 12 et seq, HL, per Lord Wright; *Romulus Films Ltd v William Dempster Ltd* [1952] 2 Lloyd's Rep 535 at 539-540 per McNair J (air carriage). In *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 415-416, [1967] 3 All ER 686 at 711-712, HL, Lord Pearce said that the whole rule in *Hadley v Baxendale* limits damages to that which may be regarded as being within the contemplation of the parties: on this limited basis of knowledge, the horizon of contemplation is confined to things 'arising naturally, ie according to the usual course of things'; additional or 'special' knowledge, however, may extend the horizon to include losses that are outside the natural course of events, and, of course, the extension of the horizon need not always increase the damages; it might introduce a knowledge of particular circumstances, eg a sub-contract, which shows that the claimant would in fact suffer less damage than a more limited view of the circumstances might lead one to expect. See also *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, [1978] 1 All ER 525, CA; *Islamic Republic of Iran Shipping Lines v Ierax Shipping Co of Panama, The Forum Craftsman* [1991] 1 Lloyd's Rep 81.

2 See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 540, [1949] 1 All ER 997 at 1003, CA, per Asquith LJ.

3 *Simpson v London and North Western Rly Co* (1876) 1 QBD 274 at 277 per Cockburn CJ; *The Parana* (1877) 2 PD 118, CA; *Monte Video Gas and Dry Dock Co Ltd v Clan Line Steamers Ltd* (1921) 37 TLR 866, CA.

4 In *Gee v Lancashire and Yorkshire Rly Co* (1860) 6 H & N 211 at 217, Pollock CB said that if a common carrier was told of extraordinary circumstances likely to lead to heavy loss if there was delay in the delivery of the goods, the carrier might refuse the goods with that responsibility unless the consignor was prepared to pay a much higher price. In *Horne v Midland Rly Co* (1873) LR 8 CP 131, some of the judges expressed opinions to the same effect, Kelly CB saying at 136 that there was no authority for the proposition that a carrier by rail is bound to receive goods with full liability for damages up to any amount, merely by reason of notice of extraordinary circumstances which made heavy damages a natural consequence of delay. Carriers by rail are not common carriers: see PARA 5. See also *Weld-Blundell v Stephens* [1920] AC 956 at 979-980, HL, per Lord Sumner (liability depends on 'some knowledge and acceptance by one party of the purpose and intention of the other in entering into the contract').

5 *Horne v Midland Rly Co* (1873) LR 8 CP 131; *Wilson v Lancashire and Yorkshire Rly Co* (1861) 9 CBNS 632.

6 *Candy v Midland Rly Co* (1878) 38 LT 226.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/776. Depreciation by delay.

#### **776. Depreciation by delay.**

An ordinary consequence of delay is a diminution in value, and therefore the difference between the value of the goods when they ought to have been delivered and their value at the actual time of delivery may as a rule be recovered<sup>1</sup>. Accordingly, when there is a regular market for the goods, and the price falls in this interval of time, the difference between the market price at the time of actual delivery and the market price at the time when the goods ought to have been delivered is recoverable as damages<sup>2</sup>.

Where damages are claimed for loss of a sale owing to delay, evidence must be given of a contract to sell<sup>3</sup>. Where a machine is delayed in transit damages may be claimed for depreciation during the period of delay<sup>4</sup>. Where the delay would not of itself have caused any loss to the owner of the goods, or any harm to the goods, except for some defect, unknown to the carrier, in the condition or packing of the goods, the carrier is not liable for the consequences of the delay<sup>5</sup>.

1 *Wilson v Lancashire and Yorkshire Rly Co* (1861) 9 CBNS 632; *Schulze v Great Eastern Rly Co* (1887) 19 QBD 30, CA.

2 *Collard v South Eastern Rly Co* (1861) 7 H & N 79; *Simmons v South Eastern Rly Co* (1861) 7 Jur NS 849; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 417, [1967] 3 All ER 686 at 712-713, HL, per Lord Pearce.

3 *Hart v Baxendale* (1867) 16 LT 390.

4 *B Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740, [1940] 2 All ER 97, CA.

5 *Baldwin v London, Chatham and Dover Rly Co* (1882) 9 QBD 582.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/777. Loss of profits through delay.

#### **777. Loss of profits through delay.**

Loss of profits is not an ordinary consequence of delay, and cannot be recovered unless the circumstances are brought to the carrier's knowledge at or before the date of the contract<sup>1</sup>. Where he has proper notice of circumstances which bring to his knowledge the fact that delay will naturally cause loss of profits, those profits are not too remote and may be recovered<sup>2</sup>. Where goods are lost, and in consequence the owner suffers pecuniary loss in respect of profits which he would have made by their use in the time which must elapse before the goods can be replaced, the value of the lost goods can be recovered, but not the profits, in the absence of proper notice<sup>3</sup>. The courts are less ready to allow loss of profit as an item of damage against a carrier than against a vendor, because the nature of the vendor's business is more likely to give him knowledge of the purposes for which the consignee needs the goods, of the terms of sub-contracts, and of other special circumstances which may cause exceptional loss if delivery is delayed<sup>4</sup>.

1 *Hadley v Baxendale* (1854) 9 Exch 341; *Horne v Midland Rly Co* (1873) LR 8 CP 131; *Gee v Lancashire and Yorkshire Rly Co* (1860) 6 H & N 211; *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA, The Pegase* [1981] 1 Lloyd's Rep 175. See also *Wilson v Lancashire and Yorkshire Rly Co* (1861) 9 CBNS 632; *Le Peintur v South Eastern Rly Co* (1860) 2 LT 170; *Great Western Rly Co v Redmayne* (1866) LR 1 CP 329; *Den of Ogil Co Ltd v Caledonian Rly Co* (1902) 5 F 99, Ct of Sess.

2 *Simpson v London and North Western Rly Co* (1876) 1 QBD 274; *Jameson v Midland Rly Co* (1884) 50 LT 426. For quantification of loss caused by the late redelivery of a vessel under a time charterparty see PARA 253 note 10.

3 *British Columbia etc Saw-mill Co Ltd v Nettleship* (1868) LR 3 CP 499.

4 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 536-537, [1949] 1 All ER 997 at 1001, CA, per Asquith LJ; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1049. See also *Koufos v C Zarnikow Ltd* [1969] 1 AC 350, [1967] 3 All ER 686, HL.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/778. Expenses caused by delay.

### 778. Expenses caused by delay.

The reasonable expenses of inquiry and searching for goods which have been delayed are generally recoverable, but not hotel and other such expenses incurred while waiting for the goods to arrive<sup>1</sup>. If the delay results in wasted expenditure on wages or in expenditure on maintenance it will be recoverable<sup>2</sup>, but expenditure which did not form part of the ordinary practice or exigencies of the business will not be recoverable unless there is clear evidence that the circumstances were communicated to the carrier before the contract was made<sup>3</sup>.

1 *Woodger v Great Western Rly Co* (1867) LR 2 CP 318. See also *Candy v Midland Rly Co* (1878) 38 LT 226; *Hales v London and North Western Rly Co* (1863) 4 B & S 66.

2 *B Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740, [1940] 2 All ER 97, CA (delay in transit of special machine for performing contract); in this case damages were also allowed in respect of interest on the money invested in the machinery, which was being wasted during the period of delay.

3 See eg *Romulus Films Ltd v William Dempster Ltd* [1952] 2 Lloyd's Rep 535 at 540.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/779. Loss of market through delay.

### 779. Loss of market through delay.

Loss of market is not of itself an ordinary consequence of delay for which damages may be recovered<sup>1</sup>; nor is loss of regular customers<sup>2</sup>. Where an article is sent to a place in order that it may compete with other similar articles at a show or competition, and the article is delayed on the journey and so excluded from the competition, damages for the loss of its chance of success are, as a rule, too remote<sup>3</sup>.

1 *Hawes & Son v South Eastern Rly Co* (1884) 54 LJQB 174; *Hales v London and North Western Rly Co* (1863) 4 B & S 66. Cf *Robert Shearer Ltd v Road Haulage Executive* [1952] 1 Lloyd's Rep 512.

2 *Mann v General Steam Navigation Co* (1856) 4 WR 254.

3 *Watson v Ambergate, Nottingham and Boston Rly Co* (1851) 15 Jur 448. Cf *Simpson v London and North Western Rly Co* (1876) 1 QBD 274.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/780. Mitigation of damage.

### 780. Mitigation of damage.

In the assessment of damages, the conduct of the owner of the goods must be taken into consideration; and the fact that he has not acted fairly and reasonably so as to avoid any loss due to the carrier's breach of contract is material<sup>1</sup>.

1 *Davis v London and North Western Rly Co* (1858) 4 Jur NS 1303; *Irvine v Midland Great Western Rly (Ireland) Co* (1880) 6 LR Ir 55. As to mitigation of damages see also **DAMAGES** vol 12(1) (Reissue) PARAS 1041-1044.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(i) Carriage of Goods/781. Liability to third party.

### 781. Liability to third party.

Where the consignor or consignee is himself liable to a third party for damages for delay in delivery, and the damages and the costs of the claim are paid by him or are recovered against him, he can recover the damages from the defaulting carrier, if the carrier had actual or imputed knowledge of this additional liability<sup>1</sup>; and he may also recover the costs reasonably incurred<sup>2</sup> if he was justified in defending the claim, but not if he acted unreasonably in doing so<sup>3</sup>.

1 *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1048-1049; and see *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 KB 535.

2 See *Agius v Great Western Colliery Co* [1899] 1 QB 413 at 416, 424, CA, where damages included the amount the plaintiff had had to pay in costs to the plaintiffs in the previous action against him and the amount of his own solicitor's bill.

3 *Baxendale v London, Chatham and Dover Rly Co* (1874) LR 10 Exch 35, discussed and explained in *Hammond & Co v Bussey* (1887) 20 QBD 79, CA, and in *Agius v Great Western Colliery Co* [1899] 1 QB 413, CA. See further **DAMAGES** vol 12(1) (Reissue) PARAS 827-832.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(ii) Carriage of Passengers/782. Special provisions.

## **(ii) Carriage of Passengers**

### **782. Special provisions.**

In the case of carriage by air, the measure of damages for death of or injury to passengers is governed by special statutory provisions<sup>1</sup>.

In the case of carriage by sea, the measure of damages in respect of loss of life or personal injury is limited by statute where the occurrence took place without the shipowner's or charterer's fault or neglect<sup>2</sup>.

In the case of the international carriage of passengers by rail, the measure of damages for death of or injury to passengers is governed by international convention<sup>3</sup>.

Contracts for the carriage of passengers in public service vehicles and generally in other motor vehicles on roads or by rail may not negative or restrict or purport to negative or restrict the liability of the carrier in respect of the death of or bodily injury to passengers<sup>4</sup>.

1 See PARA 150 et seq. As to carriage by air generally see PARA 121 et seq.

2 See PARA 100 et seq. As to carriage by sea generally see PARA 205 et seq.

3 See PARA 724 et seq. As to carriage by road and rail generally see PARA 650 et seq.

4 See PARA 80.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(ii) Carriage of Passengers/783. Personal injuries.

### **783. Personal injuries.**

When a person has a right to recover damages from a carrier in respect of a wrongful act or omission, he is entitled to receive compensation for all the loss he has suffered which is a reasonably foreseeable consequence of the carrier's wrongful act or omission<sup>1</sup>.

Where an injured person is entitled to damages for negligence from a carrier, the fact that the claimant was insured against accidents is irrelevant, and the carrier has no right to require the damages payable to be reduced by the amount insured<sup>2</sup>.

1 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388, [1961] 1 All ER 404, PC, disapproving *Re Polemis and Furness, Withy & Co* [1921] 3 KB 560, CA. The measure of damages for personal injury is fully discussed in **DAMAGES** vol 12(1) (Reissue) PARA 878 et seq. As to the survival of claims for the benefit of the estate of persons killed, and the apportionment of damages in connection with such claims, see the Fatal Accidents Act 1976 s 1; and **DAMAGES** vol 12(1) (Reissue) PARA 932 et seq.

2 *Bradburn v Great Western Rly Co* (1874) LR 10 Exch 1. In assessing damages in any claim under the Fatal Accidents Act 1976, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death must be disregarded: see s 4; and **DAMAGES** vol 12(1) (Reissue) PARA 935.

Halsbury's Laws of England/CARRIAGE AND CARRIERS (VOLUME 7 (2008) 5TH EDITION)/5. REMEDIES/(3) MEASURE OF DAMAGES/(ii) Carriage of Passengers/784. Delay.

#### 784. Delay.

Where a carrier has broken his contract to carry a passenger to the agreed destination within a reasonable time, the passenger is entitled to adopt other means of performing the contract as nearly as possible and to recover as damages from the carrier the reasonable expense to which he is put by the delay<sup>1</sup>. Thus, in proper cases, the expense of hiring other means of transport to reach his home or the expense of staying a night at a hotel may be recovered as the natural result of the breach of contract<sup>2</sup>, although he must not perform the contract in an unreasonable, extravagant or oppressive manner; and a test of what expense is reasonable in the circumstances is whether the passenger would have incurred the expense if he had been delayed through his own fault<sup>3</sup>.

No damages are recoverable for mere vexation and disappointment caused by delay, but damages may be recovered for real inconvenience which is appreciable and capable of being specifically stated<sup>4</sup>.

As a rule, loss through missing business appointments is too remote<sup>5</sup>; but in certain circumstances, where the carrier has notice, at the time the contract was made, of the object of the passenger's journey, such loss may be recovered<sup>6</sup>. When a man loses a day's wages because his train is delayed by negligence, and the railway is not protected from liability by contract, he may recover a day's wages as damages<sup>7</sup>.

Damages which are not the natural and probable result of the delay cannot be recovered<sup>8</sup>.

1 *Le Blanche v London and North Western Rly Co* (1876) 1 CPD 286, CA.

2 *Hamlin v Great Northern Rly Co* (1856) 1 H & N 408; *Hobbs v London and South Western Rly Co* (1875) LR 10 QB 111. See PARA 77.

3 *Le Blanche v London and North Western Rly Co* (1876) 1 CPD 286, CA; *Bright v Peninsular and Oriental Steam Navigation Co* (1897) 2 Com Cas 106; *Buckmaster v Great Eastern Rly Co* (1870) 23 LT 471. See also *Hamlin v Great Northern Rly Co* (1856) 1 H & N 408. In the nineteenth century, the cost of a special train in these circumstances was held to be an unreasonably heavy expense (*Le Blanche v London and North Western Rly Co*; *Bright v Peninsular and Oriental Steam Navigation Co*), but if the circumstances were so urgent as to warrant it, even this cost might have been recovered (*Buckmaster v Great Eastern Rly Co*); similar considerations would be applied to the hire of a motor car or light aircraft.

4 *Hamlin v Great Northern Rly Co* (1856) 1 H & N 408; *Hobbs v London and South Western Rly Co* (1875) LR 10 QB 111. Cf *Bailey v Bullock* [1950] 2 All ER 1167; *Jarvis v Swans Tours Ltd* [1973] QB 233, [1973] 1 All ER 71, CA; *Chande v East African Airways Corp* [1964] EA 78, Kenya SC. As to the recovery of damages for disappointment in the absence of tangible loss see *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732, [2001] 4 All ER 801.

5 *Hamlin v Great Northern Rly Co* (1856) 1 H & N 408.

6 *Buckmaster v Great Eastern Rly Co* (1870) 23 LT 471; *Romulus Films Ltd v William Dempster Ltd* [1952] 2 Lloyd's Rep 535.

7 *Cooke v Midland Rly Co* (1892) 57 JP 388, CA; and see *Duckworth v Lancashire and Yorkshire Rly Co* (1901) 84 LT 774, DC.

8 Where a passenger caught cold from having to walk home at night in rain, it was held that damages for her illness were too remote, and could not be recovered (*Hobbs v London and South Western Rly Co* (1875) LR 10 QB 111), but the correctness of that decision has been doubted (*McMahon v Field* (1881) 7 QBD 591, CA). See also *Jarvis v Swans Tours Ltd* [1973] QB 233, [1973] 1 All ER 71, CA.